

**RE-ORGANISING A FRACTIOUS  
REGULATORY SPACE:  
THE #FEESMUSTFALL PROTESTS AND THE  
REGULATION OF TUITION FEE DECISIONS IN  
SOUTH AFRICA**

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## ABSTRACT

My thesis offers a unique case study of how ongoing crises and continual government interventions can sap the financial and organisational capacities necessary to implement (and contest) regulation. Based on 60 semi-structured interviews and a review of pertinent government policy documents, I analyse how the regulatory space of tuition fee decisions by South African public universities was reconstituted by the 2015 to 2017 Fees Must Fall protests and their attempted settlements.

I modify how regulatory space analysis has traditionally been used: by treating regulatory spaces as dynamic and evolving; by viewing the boundaries of regulatory spaces as porous and overlapping; and by developing how the resources of authority, organisational capacity, and wealth are understood. My application of this re-envisioned regulatory space analysis reveals that tuition fee decisions were regulated by the calibration of the interactions between three main actors, and the four income streams on which universities rely.

Cumulatively, these calibrations shape: what is taught or researched, by who, to or for whom; who could learn what, where, and at what cost; and who paid what portion of that cost. They also prescribe the fora in which tuition fee decisions are made, and who participates in those fora. The protests and their attempted settlements reconstituted this regulatory space. An increasingly fragile link developed between fee determinations and student financial aid. Furthermore, new actors occupied dominant positions, and resources cascaded through this space - into and from cognate spaces.

My analysis highlights the limits of what regulation can achieve. I re-iterate the importance of the place of space, underlining the binding constraint South Africa's macroeconomic deterioration placed on this regulatory space. I also discuss how government failure may undermine the regulatory regime operating in a regulatory space. My thesis reveals the insights which can be garnered from applying a regulatory lense to momentous political upheavals.

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## TABLE OF ABBREVIATIONS

<b>ANC</b>	African National Congress
<b>ANCYL</b>	ANC Youth League
<b>ASGISA</b>	Accelerated and Shared Growth Initiative for South Africa
<b>CESM</b>	Classification of Education Subject Matter
<b>CHE</b>	Council on Higher Education
<b>CUP</b>	Committee of University Principals (precursor to USAf)
<b>DBE</b>	Department of Basic Education (formerly the Department of Education)
<b>DHET</b>	The Department of Higher Education and Training (formerly the Department of Education)
<b>EFC</b>	Expected Family Contribution (of a NSFAS recipient)
<b>EWP 3</b>	Education White Paper 3
<b>Exco</b>	Executive Committee of Council
<b>Finco</b>	Finance Committee of Council
<b>GEAR</b>	Growth, Employment, and Redistribution
<b>HA/WI</b>	Historically advantaged / historically white institution
<b>HD/BI</b>	Historically disadvantaged / historically black institution
<b>HEQC</b>	Higher Education Quality Committee
<b>HET</b>	Higher education and training
<b>MHET</b>	The Minister of Higher Education and Training, formerly the Ministry of Education
<b>NDP</b>	National Development Plan

<b>NIHSS</b>	National Institute for the Humanities and Social Sciences
<b>NQF</b>	National Qualifications' Framework
<b>NSF</b>	National Skills Fund
<b>NSFAS</b>	The National Student Financial Aid Scheme, formerly Tertiary Education Fund South Africa
<b>PSET</b>	Post-school education and training
<b>PYA</b>	Wits Progressive Youth Alliance, comprised of the ANCYL, SASCO, and YCL, amongst others
<b>RDP</b>	The Reconstruction and Development Programme
<b>RMF</b>	Rhodes Must Fall
<b>SAQA</b>	South African Qualifications Authority
<b>SASCO</b>	South African Student Congress
<b>SAUS</b>	South African Union of Students
<b>SRC</b>	Student Representative Council
<b>TUT</b>	Tshwane University of Technology
<b>TVET</b>	Technical and Vocational Education and Training
<b>UCCF</b>	University Council Chairs' Forum
<b>UCT</b>	The University of Cape Town
<b>USAf</b>	Universities South Africa; formerly Higher Education South Africa
<b>UWC</b>	University of the Western Cape
<b>Wits</b>	The University of the Witwatersrand
<b>WSU</b>	Walter Sisulu University
<b>YCL</b>	Young Communists League

## **CHRONOLOGICAL TABLE OF STATUTES AND IMPORTANT PUBLIC POLICY DOCUMENTS**

<b><u>Date</u></b>	<b><u>Public Policy Document / Statute</u></b>
1953	Bantu Education Act
1955	The Freedom Charter
1959	Extension of University Education Act
1994	The Reconstruction and Development Programme
1996	Constitution of the Republic of South Africa
1996	Growth, Employment, and Redistribution
1997	The Higher Education Act
1997	Education White Paper 3: 'A Programme for the Transformation of Higher Education'
1998	Skills Development Act
1999	National Student Financial Aid Scheme Act
2001	The General and Further Education and Training Quality Assurance Act
2001	The National Plan for Higher Education
2003	Funding of Public Higher Education ('the Funding Framework')
2005	Accelerated and Shared Growth Initiative for South Africa
2007	Publication of the Higher Education Qualifications Framework
2007	Polokwane elective conference of the ANC
2008	The National Qualifications Framework Act

- 2008 Report by Higher Education South Africa: ‘Tuition Fees: Higher Education Institutions in South Africa’
- 2010 New Growth Plan
- 2010 Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme
- 2012 Report of the Working Group on Fee Free University Education for the Poor in South Africa
- 2012 Mangaung elective conference of the ANC
- 2013 The National Development Plan
- 2015 Medium Term Budget Policy Statement in Parliament by Minister of Finance Nhlanhla Nene
- 2015 Statement by President Jacob Zuma at the conclusion of consultation with representatives of the university community
- 2016 Statement by the MHET, Dr BE Nzimande, on Government’s 2017 fee support for students from poor, working, and middle class families
- 2016 Presentation by South Africa’s Statistician-General to a meeting of the Portfolio Committee on Higher Education and Training, titled ‘Financial statistics of Higher Education Institutions 2015’
- 2017 Nasrec policy conference of the ANC
- 2017 Report of the Heher Commission of Inquiry
- 2017 Nasrec elective conference of the ANC

## CHAPTER 1

### **Political machinations and regulatory conflagrations**

The momentous 2015 to 2017 Fees Must Fall protests, and the attempts to settle them, appear to signal a turning point for how fee decisions at public universities in South Africa are regulated. Professor Adam Habib, vice chancellor of the University of the Witwatersrand ('Wits'), captured the uniqueness of these protests and their extensive ramifications when he wrote:

*'it was the students with their marches on Parliament and the Union Buildings that shook up the state, changed the systemic parameters and began the process of fundamentally transforming higher education'.<sup>1</sup>*

Student protests about fee decisions, and in response to the exclusions those decisions frequently generated, were not a new phenomenon. During the early 2000s, efforts to restructure South Africa's higher education landscape were met with substantial resistance, including protests by students and academics. Similarly, protests in response to inadequate financial aid provision, and students being barred from entering higher education for financial reasons, arguably became a recurrent theme at several historically disadvantaged / historically black institutions ('HD/BIs') from the mid-2000s.<sup>2</sup>

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<sup>1</sup> Adam Habib, 'Goals and Means: some reflections on the 2015 #FeesMustFall protests' (*Daily Maverick*, 26 January 2016) < [www.dailymaverick.co.za/opinionista/2016-01-26-goals-and-means-some-reflections-on-the-2015-feesmustfall-protests/](http://www.dailymaverick.co.za/opinionista/2016-01-26-goals-and-means-some-reflections-on-the-2015-feesmustfall-protests/) > accessed 12 March 2019.

<sup>2</sup> Rekgotsofetse Chikane, *Breaking a Rainbow, Building a Nation* (Picador Africa, 2018), 123 – 124 and 131 – 134.

Nonetheless, the 2015 to 2017 Fees Must Fall protests, and their settlements, were novel in three ways. First, they witnessed increased involvement by South Africa's president (president Zuma), and the Minister for Higher Education and Training ('the MHET'), in fee decisions. Second, the initial settlement in October 2015 was the agreed imposition of a 0% fee increase for 2016. It was followed by 8% increases for 2017 and 2018. And third, the 0% and 8% fee increases were applied nationally. This level of involvement by president Zuma and the MHET, and fee increase decisions of this nature (0%, then 8%; nationally), were entirely new.

My thesis explores whether these novel interventions re-constituted the regulatory space of tuition fee decisions by public universities in South Africa. I use the notion of 're-constituting' to refer to how the regulatory regime operating in a regulatory space is established, and how it changes. I argue that tuition fee decisions were regulated by the fragile calibration of multiple interactions, prior to the 2015 to 2017 Fees Must Fall protests. The protests and the attempts to settle them substantially frayed these calibrations. They also resulted in new, more rigid constraints being placed on university councils' discretion over tuition fee decisions.

In this chapter, I provide a synopsis of how I develop the main argument I make in my thesis, and of the context for the Fees Must Fall protests. I do so over four sections. First, I discuss the puzzle which confronted me when conducting interviews and reviewing public policy documents: that many of my interviewees saw tuition fee decisions as both unfettered, and subject to numerous constraints. Second, I set out my main lines of argument, including the academic literature I draw on and develop in my

thesis. Third, I provide important context for the Fees Must Fall protests and their attempted settlements. Fourth, I give an overview of the subsequent chapters of my thesis.

## **1. Unfettered, but constrained**

The novel interventions which attempted to settle the 2015 to 2017 Fees Must Fall protests, and the regulatory questions they generate, piqued my interest in this topic. Many (including most of my interviewees) saw fee decisions by public universities as unregulated. University councils had seemingly unfettered discretion when it came to making fee determinations; with no single regulator being tasked with regulating fee decisions. The absence of direct and explicit legal or policy fetters potentially contributed to the substantial fee increases which ignited the protests. Furthermore, this unfettered discretion was not formally or legally altered as attempts were made to settle the protests.

However, my interviewees also referred to multiple constraints on university councils' prerogative to make fee determinations. These constraints included legislation and university statutes prescribing the process through which tuition fee decisions are made, and the actors who participate in these decisions. It extended to policy and political pressures which shaped what factors university councils considered when making fee decisions. These constraints became particularly acute following the interventions triggered by the 2015 to 2017 Fees Must Fall protests.

The immediate spark which ignited the protests in October 2015 was the decision by Wits' university council to increase fees for 2016 by 10.5%. What followed were lower, national (rather than institution-specific) fee increases for 2016 to 2018 as attempts to settle the growing conflagration were implemented. I was curious about two aspects of the attempted settlements. First, did these interventions shift who is authorised to make fee decisions? I was interested here in how the processes which culminate in, and the authority to make, fee decisions might have been altered by the protests and their attempted settlements. Second, and relatedly, was university councils' seemingly unconstrained discretion regarding fee decisions superseded - potentially by a fee-capping regime?

My thesis explores these issues by answering the question:

how did the 2015 to 2017 Fees Must Fall protests, and their settlements, reconstitute the regulatory space of tuition fee decisions by public universities in South Africa?

This question has a before, and after, dimension. It looks at how tuition fee decisions were regulated prior to, and then during and after, the protests. I ask this question in this way to capture the novelty of the events I am analysing; and to trace both continuities and changes which these events triggered.

I split my question into two sets of sub-questions, based on the before and after dimensions. Regarding the before dimension, I ask:

How were public university tuition fee decisions regulated prior to 2015?

Who made the decisions about the level of tuition fee increases at public universities?

Which key interactions shaped how these decisions were made?

For the after dimension, I ask:

Did the disruptions of the Fees Must Fall protests alter how tuition fee decisions were regulated?

Which organisational actors and interactions were affected by these protests?

In what way did these protests impact on these actors and interactions?

Were the protests a regulatory force in their own right?

In answering how this regulatory space was reconstituted, I argue that tuition fee decisions were subject to legal, policy, political, and financial constraints both prior to, during, and after the protests. I show that what emerged was a series of regulatory changes and responses to the protests. Albeit that these were more responses to evolving crises, than the superseding of one regulatory regime by another.

## **2. Main lines of argument**

My interrogation of the constraints on tuition fee decisions answers another question which could arise regarding my project. The vigorous contestation which unfolded during the 2015 to 2017 Fees Must Fall protests was highly political and very

politicised. In what sense were they regulatory, though? I advance two reasons for analysing these events through a regulatory lense.

First, I argue that regulation is inherently political and often politicised. It *'is always a "stake" of industrial or political struggle'*.<sup>3</sup> Furthermore, the formulation and implementation of regulation occurs *'against a background of extensive state involvement'*.<sup>4</sup> Second, and relatedly, I show that the 2015 to 2017 Fees Must Fall protests enhanced the spectre of fee regulation. This happened through a combination (inter alia) of increasing pressure from students to limit fee determinations, and pressure on the national government to contain how much of the national budget was allocated to student financial aid. Applying a regulatory lense to the protests and their attempted settlements can therefore reveal important insights, and help to explain how fee determinations were made.

## 2.1. Delicate calibrations

Overt constraints (e.g. a fee cap) are one type of regulation. I outline a broader account of regulation, though; and on that basis, argue that tuition fee decisions at public universities in South Africa were regulated. My account is grounded in academic literature on regulation and regulatory space analysis. At its most general, this literature treats regulation as *'purposive attempts to influence and control economic and social*

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<sup>3</sup> Leigh Hancher and Michael Moran, 'Organising Regulatory Space' in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Regulation* (Clarendon Press, 1989) 271, 287.

<sup>4</sup> Ibid 272.

*activity*'.<sup>5</sup> Two key conceptual elements of this are that regulation '*entails the constitution, regularisation, and changing of behaviour*'; and that '*the process of regulation incorporates standard setting, monitoring and enforcement, or the employment of rules*'.<sup>6</sup>

I argue that prior to the Fees Must Fall protests, tuition fee decisions were regulated by a delicate calibration of the interactions between three actors and four income streams. The actors were the national government, university managers, and students. The income streams were the government subsidy paid to universities; tuition fees; universities' income from donations, external research funding, and contract work ('third stream' income); and the portion universities received of state-funded student financial aid.

I highlight how these calibrations were informed by law, government policy, and politics; which, together, regulate key inputs into, and determinants of, tuition fee decisions. In particular, they shape: what is taught or researched, by who, to or for whom; who could learn what, where, and at what cost; and who paid what portion of that cost. Moreover, legislation, government policy, and university statutes and rules prescribed the process through which tuition fee decisions were made. An important aspect of the regulations I analyse is that they were implemented

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<sup>5</sup> Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007), 1.

<sup>6</sup> Philip Williams, 'A complex and contested regulatory space: student protests and government's financing of higher education in South Africa' (MPhil thesis, University of Oxford 2017), 9 (citation omitted).

*‘within a framework of...diffuse intervention[s], concerned with a wide range of often unstated and even contradictory objectives’.*<sup>7</sup>

These diffuse interventions by the national government (and, increasingly, other large actors) formed part of the *‘background of extensive state involvement’*.<sup>8</sup>

The protests, and the attempts to settle them, reconstituted this regulatory space along four trajectories. First, universities’ capacity to implement fee decisions, including through sanctioning students with outstanding fee debts (so-called ‘financial exclusions’), was undermined. Second, a proliferation of regulatory fora altered the processes through which fee decisions were made. Third, substantial changes to the flow of funds occurred, including: within universities; from the national government to universities; from the state to the National Student Financial Aid Scheme (‘NSFAS’); and within the national government’s budget. Fourth, new categories of ‘deserving students’ came to the fore.

I utilise the conceptual apparatus of regulatory space analysis to build my argument. I also critique and develop that apparatus. As its moniker suggests, *‘place matters’* in regulatory space analysis. This includes physical spaces, as well as the *‘[p]olitical traditions and legal culture [which] are important to the “place” of organised interests in the policy process’*.<sup>9</sup>

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<sup>7</sup> Hancher and Moran (fn 3) 275.

<sup>8</sup> Ibid 272.

<sup>9</sup> Ibid 279.

In addition, I explore whether new actors came to occupy dominant positions in this regulatory space. To do so, I analyse the role of party politics in the protests and their settlements; together with the impact this had on universities' and the national government's budgeting processes. I also propose an alternative configuration of the main resources in regulatory space analysis, as well as how these resources interact. I argue that the interplay between resources (especially authority, organisational capacity, and wealth) can be as important as looking at the resources in isolation.

## 2.2. Dynamic and porous spaces

I use regulatory space analysis to interrogate how the interactions underpinning tuition fee decisions were calibrated. It is an apt tool for that sort of investigation, because it allows for the interconnecting actors, issues, and resources to be corralled in one 'space'. The ensuing interactions can then be mapped and explored. I find regulatory space analysis to be a particularly useful tool for analysing the 2015 to 2017 Fees Must Fall protests, and their attempted settlements, for two reasons.

First, it incorporates an appreciation of the '*framework of diffuse intervention[s]*' and '*background of extensive state involvement*' in terms of which regulation is formulated, implemented, and contested. I apply it as a '*framing device*', '*to interrogate the experience of regulation*'.<sup>10</sup> Second, regulatory space analysis can

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<sup>10</sup> Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] Public Law 329, 352 – 353

be used to analyse institutional design and reform.<sup>11</sup> This is important, because the enhanced spectre of fee regulation was one outcome of the protests I analyse. However,

*‘the regulatory space metaphor is useful in challenging overstated claims for what is possible through regulatory activity’.*<sup>12</sup>

Regulatory space analysis therefore offers both greater insight into how regulations may currently be operating, and into the limits of what regulatory reform might achieve.

In analysing the 2015 to 2017 Fees Must Fall protests and their attempted settlements, I develop regulatory space analysis by arguing that regulatory spaces can overlap. I also show that they can have porous boundaries. For instance, I explore the impacts on, and interconnection between, university fee decisions and cognate regulatory spaces. These cognate spaces included higher education, basic education, and the *‘other pressing social needs’* (housing, water, etc.) which the post-1994 national government had to meet.<sup>13</sup> I also extend the idea of how regulation can *‘cascade through spaces’* when it is implemented and enforced.<sup>14</sup> I show that actors and issues may similarly be organised into and out of cognate spaces. Likewise, resources (especially wealth, authority, and organisational capacity) may flow into and out from cognate spaces – particularly where there is a zero-sum-game dimension to how those resources are dispersed.

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Education White Paper 3 (August 1997) (‘EWP 3’), paragraph 4.3.

<sup>14</sup> Cf. Fiona Haines, *The Paradox of Regulation* (Edward Elgar, 2011), 228 – 230.

Alongside space, I argue that time is an important dimension to regulation. My thesis unpacks the dynamic transformation of the regulatory space of university fee decisions; before, during, and following the 2015 to 2017 Fees Must Fall protests. I focus especially on how this regulatory space connected to, and was affected by, the transformations of South African society pursued by the Apartheid and post-1994 states. To trace the continuities and divergences which unfolded in these transforming spaces, I consider three different time periods: Apartheid education, the perpetual disequilibrium, and the interregnum.

I use ‘Apartheid education’ to refer to the period c. 1948 to c. 1994. Several important distinctions were entrenched during this period - most notably between historically advantaged or historically white institutions (‘HA/WIs’) and HD/BIs. Distinctions were also made between different types of higher education institutions, and within different groupings of higher education institutions (including different constellations of HA/WIs and HD/BIs).

The perpetual disequilibrium followed Apartheid education, running from c. 1994 to October 2015. It encompassed multiple, ongoing legal and government policy changes; together with significant contestation. This period witnessed ‘*a lot of upheaval*’.<sup>15</sup> One driver of legislation and government policy during this period was the attempt to ameliorate equitably the distinctions which Apartheid education had embedded. Thus 36 higher education institutions which had operated under eight

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<sup>15</sup> Interviewee 8 (Pretoria, 4 April 2018).

responsible government authorities were, by 2015, consolidated into twenty-six public universities operating within a single system presided over by South Africa's national government. Yet even with these shifts, distinctions remained – especially between HA/WIs and HD/BIs. These distinctions had a significant bearing on tuition fee decisions, primarily through shaping key inputs into those decisions (e.g. the financial resources a university had).

An 'interregnum' is how I describe the third period: October 2015 to 2017. This was when the Fees Must Fall protests occurred, and their attempted settlements began. I describe this period as an interregnum, because of the acute and growing uncertainty which characterised the regulatory space. This uncertainty extended to an apparent transition away from how tuition fee decisions were regulated prior to 2015. I argue, though, that what regulatory regime would emerge remained unclear: hence my reference to the enhanced spectre of fee regulation.

Multiple, ongoing changes ran through the perpetual disequilibrium and into the interregnum. Distinctions drawn during Apartheid education (e.g. between HA/WIs and HD/BIs) somewhat endured, but were contested. I apply regulatory space analysis dynamically, to capture these shifts. More generally, I argue that this is a fruitful development of the conceptual lense of regulatory space analysis. Applying it dynamically provides insight into the reflexive formulation, implementation, enforcement, and reform of regulation; rather than providing only a snapshot of a regulatory regime, at a fixed point in time.

### 2.3. A '*ferocious struggle for advantage*'<sup>16</sup>

Another reason for applying regulatory space analysis in this dynamic way derives from a paradox. At the centre of a regulatory space is the '*play of power*':

*'regulatory space may be furiously contested. Its occupants are involved in an often ferocious struggle for advantage'*.<sup>17</sup>

Yet as a framing device, regulatory space analysis is applied by drawing boundaries around this furious contestation. Furthermore, '*regulation almost always happens because some sense of crisis is precipitated*'.<sup>18</sup>

My thesis analyses an especially '*ferocious struggle*' over how tuition fee decisions are made, and by whom. Disruptive student protests and the far-reaching interventions which attempted to settle them overlaid existing tensions (including from law and government policy) in this regulatory space. I argue that this indicates a dynamic interplay between the formulation, implementation, and enforcement of regulation; and '*some sense of crisis*'. I argue further that this interplay could be applied not only to the regulatory space I analyse, but also to regulatory space analysis more generally.

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<sup>16</sup> Hancher and Moran (fn 3) 277.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid 284.

My application of regulatory space analysis to the 2015 to 2017 Fees Must Fall protests, and their attempted settlements, therefore shows the benefits of analysing more overtly political phenomena using a regulatory lense. I show that regulatory space analysis is apt for unpicking the increasingly fragile calibrations which regulated tuition fee decisions, and which were substantially disrupted by the furious contestations of the protests and their attempted settlements.

Through my analysis, I show how tuition fee decisions came to be increasingly linked to state-funded student financial aid. I also explore the conflicting pressures which operated in this regulatory space, including: the pursuit of institutional autonomy, academic freedom, public accountability, and efficiency; and towards standardisation and differentiation of institutional forms and academic offerings. Conflicting pressures extended to how wealth (particularly financial endowments) intersected with access to education and the provision of university education of the requisite quality. These linkages and pressures influenced tuition fee decisions.

### **3. Context: Why should fees fall?**

Before setting out how each chapter of my thesis builds my argument and answers my research question, some context to the 2015 to 2017 Fees Must Fall protests and their attempted settlements is instructive. A primary driver of these protests was students experiencing annual fee increases at public universities as excessive and increasingly

unaffordable. One major factor was a ‘*perverse rationing*’ in higher education, which several interviewees saw as pointing towards a ‘*gathering storm*’.<sup>19</sup>

### 3.1. Impetus behind the protests

Protests began at Wits on 14 October 2015 in response to the university announcing that fees for 2016 would increase by 10.5%.<sup>20</sup> These protests snowballed into the shut-down of the university, and an occupation of central administrative buildings. Two dimensions to the announced increase appear to have been particularly chafing.

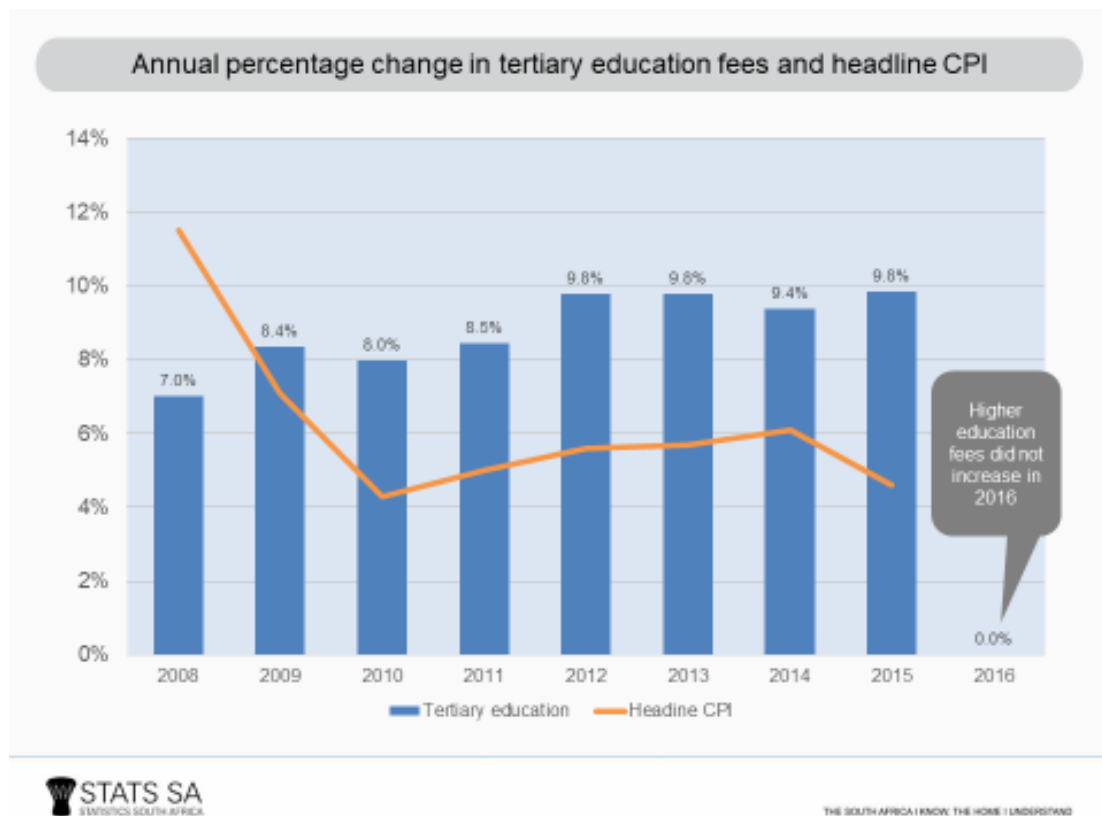
First, it was a double-digit increase. Second, Wits’ fee increase took place against the backdrop of fee increases at all South African public universities, on average, exceeding Consumer Price Inflation by roughly 2% each year since 2009. Figure 1, compiled by South Africa’s Statistician-General for a briefing presented to the Portfolio Committee on Higher Education in November 2016, illustrates this point:<sup>21</sup>

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<sup>19</sup> Williams (fn 6) 3 and 58 – 60.

<sup>20</sup> Susan Booysen, with Kuda Bandama, “Annotated Timeline of the #FeesMustFall Revolt 2015-2016”, in S Booysen (ed.), *Fees Must Fall: Student Revolt, Decolonisation and Governance in South Africa* (Wits University Press, 2016) 316, 320.

<sup>21</sup> Dr Pali Lehohla, ‘Financial statistics of higher education institutions 2015’ (16 November 2016) <<https://pmg.org.za/committee-meeting/23682/>> accessed 14 March 2019, slide 33.



**Figure 1: Fee increases cf. CPI**

To add some perspective, the average fee increases indicated in the above graph equate to an increase of roughly 9.1% per year for the seven-year period 2009 to 2015. At that rate, university fees would have increased on average by roughly 83,98% in 2015, compared to what fees were in 2008. Admittedly, focusing on a seven-year period is potentially arbitrary. Three to four years is the minimum completion time for most degrees offered by public universities.

On one estimate, though, fewer than half of the students entering a degree completed it in that time. Analysing the 2008 cohort of school leavers (particularly the 2009 cohort of first-time university entrants), van Broekhuizen *et al* observe that ‘...the

*four-year completion rate for the cohort was...fairly low at about 37%’.*<sup>22</sup> Moreover, the five-year completion rate was still only 50.3%. The estimated retention rate –

*‘the estimated percentage of students from the 2009 first-time entering cohort who had not yet completed any qualification, but were still enrolled in undergraduate studies in the following year’ –*

was 36.9% after four years (viz. by 2012), and 21.1% after five years (viz. by 2013).<sup>23</sup>

There is therefore a significant possibility that a student would be liable for university fees for up to five years of study.

Added to this was *‘the vicious “revolving door” confronting poor, predominantly black students’.*<sup>24</sup> Prior to the 2015 protests, universities would frequently not allow those with fee debts to proceed through their qualifications or enrol in a new academic year, receive their results, or graduate. This debt was mostly historic: it arose from a student’s previous years of study. It could also arise from a student’s inability to make the minimum initial payments required before they could enrol in a new academic year. The vicious revolving door referred to poor students who initially accessed university education being subsequently ejected from that education on academic (i.e. failing to meet minimum academic criteria) or financial grounds.

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<sup>22</sup> Hendrik van Broekhuizen et al, ‘Higher Education Access and Outcomes for the 2008 National Matric Cohort’ [September 2016] Stellenbosch Economic Working Papers 16/16, 8.

<sup>23</sup> Ibid.

<sup>24</sup> Williams (fn 6) 9 – 10. Citing: Report of the Ministerial Committee on the Review of the National Student Financial Aid Scheme (January 2010) (‘Review of the NSFAS’), paragraphs 2.2.2 of the executive summary and 3.4 of the report.

Students who were ‘revolved back into poverty’ in this way were often worse-off. Their initial access to university education typically required them to incur loans, with even the NSFAS scheme having a significant loan component. When they were ejected from university education, it was unlikely that they would have completed their qualification.

Alongside the completion and retention rates discussed above, van Broekhuizen *et al* identified dropout rates of 23.4% after four years (*viz.* by 2012), and 28.4% after five years (*viz.* by 2013). Furthermore, the completion rate after six years (*viz.* by 2014) was only 58.1%<sup>25</sup>. Students who were ‘revolved’ into, then out of, university education would therefore have incurred tuition (and other) debt; without obtaining a qualification that might improve their employment prospects.

### **3.2. Fees and general discontent**

Protests focused on continually escalating fees are therefore completely understandable. Though the Fees Must Fall protests specifically targeted university fees, it is important to note that ‘fees’ referred to more than just university fees. Fees were a uniting point for those joining the protests, with some describing fees as a metaphor. This metaphor encompassed student welfare more broadly: the material conditions of which included the burden rising fees placed on students, but also extended to the dire conditions poorer students were confronted with (e.g. inadequate access to decent accommodation).

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<sup>25</sup> Van Broekhuizen (fn 22) 8.

In addition, the focus on fees highlighted student's limited power in respect of fee decisions.<sup>26</sup> Moreover, students were not the only actors involved in the protests. Alliances and engagement with workers meant that demands for insourcing previously outsourced workers were also prevalent. More generally, protests which initially centred on freezing student fees (or a 0% fee increase being implemented for 2016); developed into protests in which certain groupings demanded quality, ‘*“free, decoloni[sed education]”*’.<sup>27</sup> Thus while university fees were a key point of contention, broader debates around what kind of institution public universities should be, and how they should operate, also came to the fore.

That such expansive demands were expressed through disruptive protests is perhaps not surprising. Dissatisfaction with how university education was operating, and who was perceived as benefiting from it, contributed to the emergence of the Fees Must Fall protests. More broadly, South Africans were living through disgruntled and frustrating times. General dissatisfaction with elected representatives had grown substantially between 2000 and 2015, primarily as a result of:

‘*“[a] number of key government officials [being] embroiled in corruption scandals”, including around upgrades to President Zuma’s residence in Nkandla; and...the government [being] “plagued by mediocre news on the economic and unemployment fronts”*’.<sup>28</sup>

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<sup>26</sup> Chikane (fn 2) 32 and 147 – 148. See also Williams (fn 6) 61.

<sup>27</sup> Williams (fn 6) 94 – 95.

<sup>28</sup> Ibid 2. Citing: Afrobarometer Dispatch No. 65 (24 November 2015), ‘South Africans Increasingly dissatisfied with their elected leaders’ performance’

### 3.3. Transformation concerns

At universities, particular ire was focused on the slow pace of transformation.<sup>29</sup> Superficially, the lack of transformation was evident in the low number of black South Africans to be found in the higher levels of teaching and university administration; even as the student demographics at HA/WIs had shifted more in line with South Africa's overall demographics. The support staff who were demanding to be insourced were black South Africans, while a significant portion of senior managers and academics (particularly at HA/WIs) were white.

It was in this milieu that the Rhodes Must Fall ('RMF') protests began in early 2015. Similar to Fees Must Fall, the RMF protests were about more than protestors' demand that the statue of Cecil John Rhodes at the University of Cape Town ('UCT') be taken down. Rather, several people who participated in or followed RMF argue that it was a response to a discriminatory culture experienced by black South Africans at HA/WIs; as well as challenging the curricula taught in universities, and universities' role in society.<sup>30</sup>

Some of these themes and organisational modes carried over to Fees Must Fall. Most immediately, the notion of that which is protested against needing to 'fall', as

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<sup>29</sup> Report of the Commission of Enquiry into Higher Education and Training to the President of the Republic of South Africa (August 2017) ('Heher Commission Report'), paragraph 2.

<sup>30</sup> Chikane (fn 2) 105 - 106; Williams (fn 6) 94.

captured in both RMF's and Fees Must Fall's hashtags.<sup>31</sup> Furthermore, the discontent and organisational networks which had played a role in driving RMF were partly evident in Fees Must Fall. To some extent, this included how authority was constructed and utilised to mobilise other actors.

One further link between RMF and Fees Must Fall is that both signalled the emergence of sustained disruptive protests at HA/WIs. While institutions such as Wits had experienced disruptive student protests previously (e.g. in 2007), the 2015 protests were of a different order of magnitude in both scale and longevity. For Fees Must Fall in particular:

*'[w]hat distinguished the 2015 protests from those experienced periodically over the decade before, was the hub of those protests was at the historically-white universities. The majority of protests experienced since 2000 were focused at the [HD/BIs]'*.<sup>32</sup>

### **3.4. Access and success**

The Fees Must Fall protests therefore brought to the fore major systemic discrepancies in South Africa's public higher education landscape. For contextual purposes, it is important to note the related points of who goes to, and who succeeds at, university. Only a small minority of South Africans make it to university. 60% of the learners who started formal schooling roughly 12 years prior to 2008, actually wrote the 2008 school-leaving exam.

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<sup>31</sup> See, *inter alia*, Williams (fn 6) 61 and 75 – 78.

<sup>32</sup> Heher Commission Report (fn 29) paragraph 1.

Put differently, 40% of the learners in that total cohort didn't even write the school-leaving exam.<sup>33</sup> Of those who did, roughly 62% passed it. That equates to only 37% of the entire age cohort who initially started school together.<sup>34</sup> Furthermore:

*'Roughly 20% of the [2008 national school-leaving] cohort accessed university at some stage during the first six years following the 2008 [school-leaving] exams...[And it seems likely] that less than 22% of the cohort will ultimately have enrolled in university'.<sup>35</sup>*

The 20% access rate for the 2008 school-leaving cohort equates to just 12% of the entire age cohort that started school together. So: 88% of those who started school in the same year as the 2008 school-leaving cohort, did not access university between 2009 and 2014. Two further figures highlight the extent to which university education is accessed by a distinct minority. Fewer than '9% of [South African] youth have [a] tertiary education'; only 4% have degrees'.<sup>36</sup> For all South Africans aged 5 – 24 who were attending an educational institution in 2016, only 5% were attending a university or university of technology. Of the remainder, 93% were in school.<sup>37</sup>

The drip-feed of school-leavers to universities is additionally skewed very heavily in favour of schools in wealthier communities. For the 2008 school-leaving cohort,

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<sup>33</sup> Hendrik van Broekhuizen et al, 'From Matric into and through University: University access and success for the 2008 National Matric cohort' [31 October 2017] Presentation, slide 11 of 34.

<sup>34</sup> Ibid; thus 63% of that cohort did not pass the school-leaving exam in 2008.

<sup>35</sup> Van Broekhuizen et al (fn 22) 6.

<sup>36</sup> Van Broekhuizen et al (fn 33) slide 3 of 34.

<sup>37</sup> Lehohla (fn 21) slide 42.

45,2% of those who passed the school-leaving exam and attended a quintile five school accessed university education. By contrast, only 9,2% of those attending a quintile one school accessed university.<sup>38</sup> Put more starkly:

*‘grade 8 students attending fee-charging schools (quintile 5) are two to four times more likely to qualify for university than those attending no-fee schools (quintiles 1-4)’.*<sup>39</sup>

Another way this skew has been captured is that

*‘there are more students attending university from the richest 10% of the income distribution (Decile 10) than from the poorest 80% of the income distribution (Deciles 1 – 8 combined)’.*<sup>40</sup>

This suggests another perverse rationing. While Fees Must Fall protestors were highlighting the inequities which resulted from ever-increasing university fees, the minority of school-leavers who accessed university education were disproportionately more likely to do so if they attended fee-charging schools. This speaks to a more general silence that pervaded the protests and their settlements. As South Africa’s Statistician-General noted:

*‘when the students had cried that #FeesMustFall...no politician had spoken about schooling...What politicians had prioritised were the other factors that drove poverty, such as housing, energy and water, which were no longer the strong drivers of poverty. This was understandable, because if civil society was interviewed regarding which social need they had wanted first delivered, housing would be the immediate answer...Since it was impractical to expect households to*

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<sup>38</sup> Van Broekhuizen et al (fn 33) slide 29 of 34.

<sup>39</sup>‘How #FeesMustFall Relates to SA Schooling – My Sunday Times Article’ (Nic Spaul, 9 November 2015) <<https://nicspaul.com/2015/11/09/how-feesmustfall-relates-to-sa-schooling-my-sunday-times-article/>> accessed 27 November 2020.

<sup>40</sup> ‘Important Research Inputs on #FeesMustFall’ (Nic Spaul, 29 September 2016) <<https://nicspaul.com/2016/09/29/important-research-inputs-on-feesmustfall/>> accessed 27 November 2020. Citing Servaas van der Berg, ‘Distributional Implications of Student Fees’ [12 January 2015] Presentation, slide 38 of 39.

*prioritise tertiary qualification attainment if basic schooling was neglected, schooling should be at the centre of the government's resource allocation'.<sup>41</sup>*

The importance of better schooling runs alongside an urgent need for South Africa to provide opportunities outside university education:<sup>42</sup>

<b>Year:</b>	<b>2010</b>	<b>2014</b>
<b>University Students</b>	<b>986 559</b>	<b>1 037 088</b>
<b>College Students</b>	<b>404 849</b>	<b>781 378</b>
<b>Adult Education &amp; Training Students</b>	<b>297 491</b>	<b>270 181</b>
<b>18-24-year-olds not in education, employment, or training ('NEET')</b>	<b>2 781 185</b>	<b>3 001 000</b>

**Figure 2: South Africa's post-school system**

As Figure 2 indicates, in 2010 and 2014 South Africa had roughly three NEETs for each university student. Moreover, enrolment in adult education and training had decreased; while university enrolment had expanded.

In quantitative terms, the Statistician-General identified a lack of educational attainment as being '[t]he main contributor to the poverty situation of the youth';

<sup>41</sup> '2017 Readiness of Universities and TVET Colleges; Financial Statistics on Higher Education Institutions in 2015: Stats SA | PMG' <<https://pmg.org.za/committee-meeting/23682/>> accessed 14 March 2019.

<sup>42</sup> Heher Commission Report (fn 29) paragraph 3.9 (citation omitted).

standing at 35,5%. ‘*Dwelling Type*’ was only a 2,9% contributor.<sup>43</sup> Furthermore, the most significant ‘*Poverty Driver*’ in 2016 was unemployment (at 52). ‘*Years of Schooling*’ was the next highest driver (at 11); while ‘*Type of Dwelling*’ came in considerably lower (at 5).<sup>44</sup> The Statistician-General commented that

*‘the [second] biggest driver of poverty...[,] years of schooling...was [also] the precursor to acquir[ing] skills to become employable’.*<sup>45</sup>

Not only was there silence regarding the state of the schooling sector in South Africa; but there were also three inherent tensions. Where Fees Must Fall protestors and the Statistician General emphasised educational attainment as the main route to social mobility and out of poverty, swathes of ‘*civil society*’ wanted ‘*housing [to be the] social need [which was] first delivered*’. Furthermore, the Statistician General emphasised schooling, while the Fees Must Fall protests had focused mostly on university education. In addition, for every student at university, there were roughly three 18 to 24-year-olds who were NEETs.

Of those who access university education, who succeeds is also important. Mirroring the lack of transformation that RMF raised, the Statistician-General was struck by the decrease in the number of Black South Africans ‘*completing Bachelor’s degrees after completing grade 12*’, as shown in Figure 3:<sup>46</sup>

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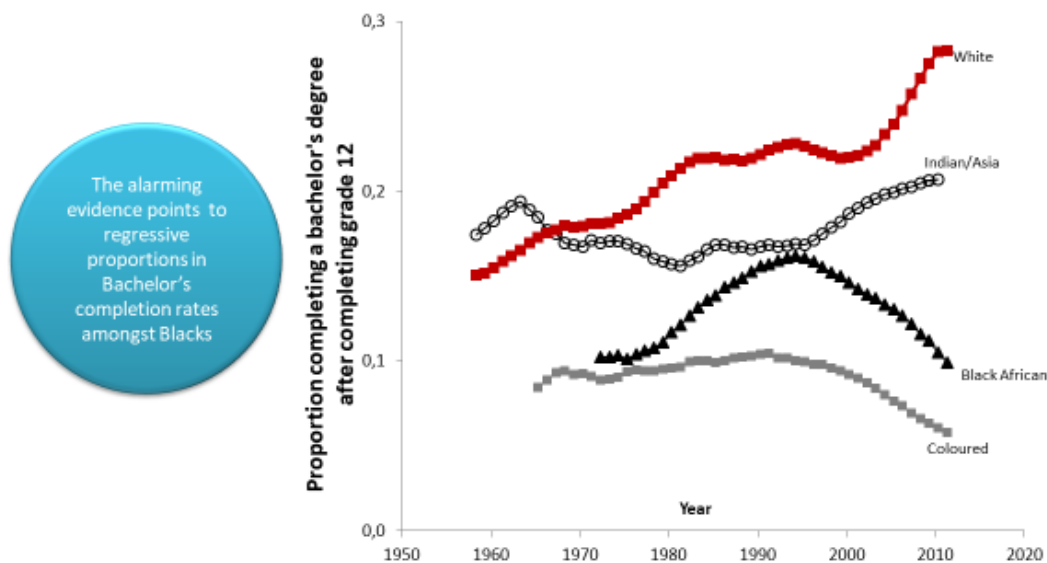
<sup>43</sup> Lehohla (fn 21) slide 7.

<sup>44</sup> Ibid slide 6.

<sup>45</sup> See fn 41.

<sup>46</sup> Lehohla (fn 21) slide 16.

### Proportion completing bachelor's degree after completing grade 12



**Figure 3: Bachelor's degree completion rates**

In a similar vein, the frustration with the slow pace of transformation is unsurprising given that, at least with respect to the 2008 school-leaving cohort:

*'Race remains perhaps the single most prominent demographic correlate of university access and success in South Africa'.<sup>47</sup>*

Diverging achievement by the 2008 cohort goes back as far as their school-leaving exam. Figure 4 summarises key aspects of van Broekhuizen *et al's* findings on this score:<sup>48</sup>

<sup>47</sup> Van Broekhuizen (fn 22) 39 - 40.

<sup>48</sup> Ibid.

<b>Race</b>	<b>2008 cohort</b>	<b>Pass school-leaving exam</b>	<b>Achieve a Bachelor Pass</b>
Asian	2.9%	89.5%	54%
Black	82.5%	56.6%	13.6%
Coloured	6.8%	80%	23.8%
White	7.7%	99%	70.2%

**Figure 4: School-leaving exam success**

Van Broekhuizen *et al* note that:

*‘It is to be expected that the large racial differences in matric performance among the 2008...cohort would have subsequently translated into large differences in post-matric outcomes’.*<sup>49</sup>

Figure 5 summarises some of these differences, with figures indicating the percentage of the relevant sub-group of the 2008 cohort achieving the outcome indicated in the header row:<sup>50</sup>

<b>Race</b>	<b>Undergraduate Enrolment</b>		<b>Undergraduate Completion</b>		<b>Drop-out before 2014</b>
	<b>Studies</b>	<b>Degree</b>	<b>Qualification</b>	<b>Degree</b>	
Asian	43.3%	36.3%	24.3%	21.1%	10.9%
Black	16.6%	8.8%	7.5%	4.3%	5.5%
Coloured	19.8%	14.2%	9.4%	7%	6.9%
White	47.4%	42.5%	30.3%	27.9%	9.8%

**Figure 5: University success**

<sup>49</sup> Ibid 41.

<sup>50</sup> Ibid 45.

Although there is a noticeable difference in timing of entering university across these race-groups, van Broekhuizen *et al*'s analysis of a sample restricted to those entering university in 2009 also reveals '*observed racial differences in terms of university completion and dropout rates*'. This suggests that the noticeable difference does not derive solely from timing of university entrance.<sup>51</sup> One especially striking disparity in these figures that speaks to the Statistician-General's point is that:

'[b]y the end of 2014, a greater percentage of black learners had dropped out of university without completing any undergraduate qualification [5.5%] than had completed undergraduate degrees [4.3%]'.<sup>52</sup>

Although more black learners completed undergraduate qualifications (7.5%) than dropped out (5.5%), the figures are still '*alarming*'.

Comparing '*only learners who performed similarly in matric...[viz.] those...who achieved Bachelor passes in [the school-leaving exam]*' provides one means of '*untangl[ing] the causes of these racial differences in university outcomes*'. When focusing on such a sample, it is important to remember the stark discrepancies - set out in Figure 4 - about who achieved such results. That said, limiting the analysis to this particular sub-group leads to an interesting shift in the figures.<sup>53</sup>

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<sup>51</sup> Ibid 44.

<sup>52</sup> Ibid 44 – 45.

<sup>53</sup> Ibid 47.

<b>Race</b>	<b>Share of Bachelor Passes</b>	<b>6-year access rate</b>	<b>6-year completion rate</b>	<b>5-year dropout rate</b>
Asian	8%	72.8%	64.6%	20.25%
Black	56.4%	71.2%	58.9%	25.2%
Coloured	8.2%	63.1%	58.7%	28.2%
White	27.4%	63.4%	73.1%	16.6%

**Figure 6: Bachelor pass success**

There are three ‘*encouraging signs*’ the figures for this specific sample present. First, the 6-year access rate for black learners with bachelor passes (71.2%) is higher than that for coloured learners (63.1%) and white learners (63.4%). Moreover, it is just over four times higher than the overall 6-year access rate for all black learners in the 2008 cohort (16.6%). Second, the 6-year completion rate for black learners with Bachelor passes is higher (58.9%) than when considering the whole cohort (53.5%). Third, the five-year dropout rate for black learners with Bachelor passes is lower (25.2%) than when considering the whole cohort (32%).<sup>54</sup>

Even so, stark inequalities remain evident in these figures. The Fees Must Fall protests were a response to this context, as well as the broader transformation and affordability concerns already discussed. The disruptions which these protests and the

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<sup>54</sup> Ibid 44 and 46.

attempts to settle them triggered significantly reconfigured the regulatory space of tuition fee decisions.

#### **4. Chapter overview**

Chapters two and three of my thesis critically review and develop academic literature on regulation and regulatory space analysis. In chapters four to nine, I apply a revised version of regulatory space analysis to unpack the calibrations regulating tuition fee decisions; as well as how these calibrations were affected by the 2015 to 2017 Fees Must Fall protests and their settlements. Chapter ten concludes my thesis, highlighting my main conclusions on how the regulatory space of tuition fee decisions was reconstituted. My methodology appendix then sets out my research design – including how I conducted my fieldwork and analysed the data which I had compiled.

More specifically, chapter two of my thesis begins addressing the puzzle that tuition fee decisions are both unfettered, but also subject to multiple constraints. It begins answering the conceptual element of the questions: how were tuition fee decisions regulated pre-2015, and how did this regulation change? I argue that tuition fee decisions were regulated by the calibration of the interactions between three actors and four income streams. I show that this regulation was a palimpsest of the state's more general regulation of higher education, and processes within individual higher education institutions. What emerged was negotiated self-regulation, with law and government policy placing access and financial restrictions on university education. I highlight the role protests and crises can play in regulation, and how the demand for regulation in this regulatory space outstripped supply. I also introduce paradigms –

normative programmes which shape how actors view the world, and how they behave in it - as a means of exploring how organisational actors interact and how resources are dispersed.

Chapter three rounds out the conceptual element of my answer to the questions: how were tuition fee decisions regulated pre-2015, and how did this regulation change? I use a modified version of regulatory space analysis to analyse the calibrations which regulated tuition fee decisions. I apply regulatory space analysis dynamically to capture the evolution of this space, as well as its shifting boundaries and its changing occupants. In particular, I use regulatory space analysis to discern which actors are involved in, and which issues form part of, tuition fee decisions. I emphasise the importance of assessing regulatory regimes holistically. I apply and critically develop academic accounts of four aspects of regulatory space analysis, which form the focus of chapters four to nine: the boundaries of that space; the dramatis personae in it; how resources are dispersed in a regulatory space; and the place of space.

Chapter four discusses the shifting place of space of the regulation of tuition fee decisions in South Africa, focusing on how the Apartheid and post-1994 states sought to transform South African society. This chapter starts empirically answering the questions: who made tuition fee decisions, and which interactions shaped those decisions? I analyse this regulatory space in terms of the transformative paradigms pursued by the Apartheid and post-1994 states. In particular, I tease out a central tension which emerged during the perpetual disequilibrium: that social activism may cannibalise responsible budgeting. I explain how a deteriorating stalemate can ensue

from this cannibalisation. I also elaborate how paradigms can influence the dispersal of resources in a regulatory space, together with how key interactions unfold. A key point I highlight is the ongoing role of interventionist states in this regulatory space: from Apartheid education, and into the perpetual disequilibrium.

In chapter five, I dig deeper into who made tuition fee decisions pre-2015, and which interactions shaped those decisions. I analyse how the triad of planning, funding, and quality control fed into the calibrations which regulated tuition fee decisions. I also explore how institutional autonomy became a battleground as a result of legal and policy tensions, together with internal institutional debates. In particular, I tease out the pressures which arose from emphasising the potentially competing values of academic freedom, institutional autonomy, public accountability, and efficiency.

Chapter six fleshes out the analysis of chapter five by interrogating how tuition fee decisions were made pre-2015 (and to a small extent, during 2015 to 2017) at the four universities I focus on in my fieldwork. I analyse the deceptively complex question: what are fees? I then turn to two factors which influenced tuition fee decisions at the universities I focused on: legislation and government policy; and how universities build their budgets, including their consideration of the impact of a fee decision on students and on the university.

In chapter seven, I start pivoting my attention from who made tuition fee decisions pre-2015, to exploring how the calibrations regulating these decisions frayed in the build up to the 2015 Fees Must Fall protests. I highlight the increasingly fragile

link which emerged between tuition fee decisions and the financial aid available for students. In addition, I analyse the role of students protests in this regulatory space. This begins to answer the question of which organisational actors and interactions were affected by the protests. I also discuss how protests can be a regulatory force in their own right. Referring to the stalemate I noted in chapter four, I show how South Africa more generally, and this regulatory space in particular, became subject to biting resource constraints. These constraints were coupled with increasing policy changes. Taken together, these changes and constraints dispersed the resources of wealth, authority, and organisational capacity: resources which are central to the formulation and implementation of regulation.

Chapter eight details one set of changes which followed the 2015 to 2017 Fees Must Fall protests. I investigate how acute uncertainty and increasing contestation reshaped this regulatory space. Linked to that investigation, I explore the interplay between the resources of authority and organisational capacity. This interplay brought new organisational actors to the fore – including through the splintering of authority and organisational capacity. In addition, I interrogate the increasingly dominant position occupied by certain actors in this space.

Chapter nine complements chapter eight by looking at the disruptive interplay between the resources of wealth, organisational capacity, and authority. I track how redistributions of financial resources followed the ad hoc announcements which were being made in this space. This led to wealth cascading into this regulatory space from cognate spaces. I also delve into how the calibrations regulating tuition fee decisions

were substantially destabilised by these changes. One outcome was the enhanced spectre of fee regulation. Another outcome I argue is likely, is further instability in this regulatory space.

Chapter ten concludes my thesis. I summarise how the 2015 to 2017 Fees Must Fall protests reconstituted the regulatory space of tuition fee decisions at public universities in South Africa. I interrogate whether this regulation became more intrusive and top-down. I also note how the broader implications of these protests and their settlements rippled out quite far; including into the national government's budgeting process, and government policy. More wealth cascaded into the regulatory space of tuition fee decisions from several spaces (including the cognate space of basic education, and the more distant space of housing). At the same time, party-politics (and politics more generally) came to play a larger role in the contestation around how tuition fee decisions were regulated. Finally, I set out the limits of my research; and try to suggest fruitful future research.

My methodology appendix sets out which data I gathered for my thesis, and how I gathered and analysed it. As a starting point, I drew on the MPhil I completed in 2017. My MPhil utilised qualitative empirical data from 15 interviews and one email exchange, and a review of relevant public policy documents. I expanded this dataset for my DPhil by conducting a further 44 interviews and reviewing additional public policy documents. My interviews focused on four public universities. My interviews were transcribed and then coded in NVivo, along with several public policy documents. I drew on quantitative data prepared by others to enrich my analysis.

Cumulatively, I used the data I compiled and analysed to trace how the 2015 to 2017 Fees Must Fall protests reconstituted the regulatory space I focus on in my thesis. I did this by investigating the key interactions which feed into fee determinations, and analysing how these interactions were altered by the protests and their attempted settlements.

## CHAPTER 2

### Regulation and regulatory constraints

*‘to be corrupted by totalitarianism one does not have to live in a totalitarian country. The mere prevalence of certain ideas can spread a...poison that makes one subject after another impossible for literary purposes’.*<sup>55</sup>

The central conceptual puzzle I confronted when speaking to my interviewees was that tuition fee decisions appear to be ‘*unfettered*’ by law or policy.<sup>56</sup> And, therefore, unregulated. As pressure grew to expand access to university education, the spectre of fee regulation emerged – especially during the perpetual disequilibrium (1994 to October 2015). By 2013, this spectre was acknowledged in preliminary policy documents:

*‘all universities...charge student fees, which are essential to institutional survival in the current funding environment...Rising student fees continue to pose a major barrier to access for many students. The government will consider ways of controlling fee increases’.*<sup>57</sup>

Evaluating ‘*ways of controlling fee increases*’ suggests that the regulation of tuition fee decisions, though under consideration, was still some time away. One reading of the 2015 to 2017 Fees Must Fall protests is that they accelerated the impetus towards regulating tuition fee decisions. This reading implies that tuition fee decisions remained unregulated, even at the end of 2017. If so, my thesis appears puzzling; since I

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<sup>55</sup> George Orwell, ‘The Prevention of Literature’ in *George Orwell: Essays* (Penguin Books, 1994) 328, 336.

<sup>56</sup> Interviewee 17 (Cape Town, 19 April 2018).

<sup>57</sup> White Paper for Post-School Education and Training (November 2013), 37.

interrogate whether the 2015 to 2017 Fees Must Fall protests, and their settlements, affected how tuition fee decisions by South African public universities are regulated.

I argue that tuition fee decisions were regulated before, during, and after the Fees Must Fall protests. Further, I argue that these protests both disrupted and amplified the regulatory constraints imposed on tuition fee decisions. The contrast between my argument, and my interviewees' views, centres on how 'regulation' is understood. In this chapter and chapter three, I draw on academic literature to build a conceptual basis for analysing the rich array of regulatory constraints affecting tuition fee decisions. In this chapter I analyse which constraints on behaviour should be considered regulatory constraints. In chapter three, I critique and develop regulatory space analysis – the conceptual framework I apply in the remainder of my thesis which enables me to look beyond conventional definitions of 'regulation' and map the regulatory constraints to which tuition fee decisions were subject.

I split my interrogation of regulatory constraints in this chapter across three sections. First, I outline differing views on what constitutes 'regulation'. I discuss my interviewees' narrower interpretations of when regulation occurs, and contrast these interpretations with understandings of 'regulation' drawn from academic literature. I then flesh out the concept of 'regulation' which I will use in the rest of my thesis.

I build on this conceptual foundation in the second section, teasing out broad categories of regulatory constraints which impacted on tuition fee decisions. I analyse how state law and policy imposed access and financial restrictions which curtailed

university councils' seemingly unfettered discretion over tuition fee decisions. I also unpack how protests can operate as a regulatory force, and how '*some sense of crisis*' is intimately intertwined with regulation.<sup>58</sup>

In the third section, I discuss how interventionist states drive and implement regulation. Politics and politicisation are central to these interventions. I introduce the concept of 'paradigms', which I use to analyse how actors pursue normative programmes. I focus particularly on the transformative programmes pursued by the Apartheid and post-1994 states in South Africa. I outline two paradigms (responsible budgeting and social activism) that inform regulatory programmes which are central to the rest of my thesis. I also highlight the fundamental tension which emerged between these paradigms during the perpetual disequilibrium (c. 1994 to October 2015). Finally, I discuss higher education institutions' contested role in implementing competing paradigms, and how these paradigms mediated the transformation pursued by the Apartheid and post-1994 states in South Africa.

## **1. What is 'regulation'?**

The 2015 to 2017 Fees Must Fall protests saw heightened political contestation over, and politicisation of, tuition fee decisions. Less clear is how these disruptions and their attempted settlements implicate the regulation of tuition fee decisions. Even after the protests, no single regulatory agency oversees tuition fee decisions.

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<sup>58</sup> Hancher and Moran (fn 3) 284.

University councils in South Africa appear to have untrammelled discretion over tuition fee decisions.<sup>59</sup> Looked at another way, though, this untrammelled discretion could be seen as a form of self-regulation: part of a broader ‘*negotiated self-regulation*’.<sup>60</sup> Analysing how tuition fee decisions are regulated requires an appreciation of the complex array of actors and issues combined by, and involved in, this ‘*negotiated self-regulation*’.

Most immediately, tuition fee decisions raise questions of: who provides what education; to whom; at what cost; paid by whom. Answering these questions touches on interconnecting regulatory functions that were, during the perpetual disequilibrium, split across several actors and processes. I argue that this amounted to the regulation of tuition fee decisions by a series of delicate calibrations. These calibrations constrain what tuition fee decisions were made, and how. I use ‘calibrations’ to explore how the interconnected but contesting parties participating in tuition fee decisions engaged with each other; and especially, how these engagements placed constraints on, and therefore regulated, tuition fee decisions.

### **1.1. Direct and explicit fettering**

For my interviewees,

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<sup>59</sup> Interviewee 17.

<sup>60</sup> Yunus Ballim et al, ‘Regulation’ in Council on Higher Education, *South African Higher Education Reviewed: Two Decades of Democracy* (Council on Higher Education, 2016), 63, 79 – 80.

*‘South African universities...have enjoyed [a surprising level] of administrative autonomy...[including] the unfettered right to set [their] own fees...unfettered at law [and] unfettered at policy’.*<sup>61</sup>

Legal or policy fetters are clear examples of regulation. The absence of such fetters could suggest that tuition fee decisions are unregulated. And, therefore, subject only to the discretion of the university council making them.

But how wide is this discretion? My interviewees are correct that there were no direct or explicit legal or policy constraints on what tuition fee decisions a university council could make. The sparse statutory provisions dealing with tuition fees merely record *‘money payable by students for higher education programmes provided by the institution’* as one constituent of the *‘funds of public higher education institutions’*.<sup>62</sup> This could be read as imposing no constraints on what tuition fees public universities decide to charge. Yet South African higher education law and policy delineated in substantial detail how tuition fee decisions were to be made, and by whom. At the least, this suggests that the process for making a tuition fee decision was regulated.

Perhaps one reason this regulation of procedure was not seen as a constraint on the substance of a tuition fee decision is that university councils retained *‘surprising autonomy’*.<sup>63</sup> Whereas a ministerially imposed fee cap (or one imposed by a regulatory agency), however determined, would directly and explicitly constrain what fees were charged; procedural regulations left universities free to exercise a broad discretion. Yet

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<sup>61</sup> Interviewee 17.

<sup>62</sup> Higher Education Act 1997, section 40(1)(g).

<sup>63</sup> Cf. interviewee 17.

the regulation of the process through which a tuition fee decision is made can quite easily constrain what fee decision is ultimately taken. Similarly, prevailing social and political factors could acutely limit what fee decisions were available to a university council.

During the interregnum, for instance, it became politically and socially '*not feasible*' to depart from what was announced by South Africa's president in October 2015; and MHET in September 2016.<sup>64</sup> This suggests that university councils were subjected to heightened social and political constraints on what tuition fee decisions they could make. Put differently, key actors (e.g. university council members) calibrated their conduct in line with prevailing social and political constraints. I argue that that this kind of calibration regulated tuition fee decisions.

## 1.2. Calibrations and constraints on behaviour

Academic literature makes a case for adopting a broad understanding of 'regulation'. Morgan and Yeung define regulation as '*purposive attempts to influence and control economic and social activities*'.<sup>65</sup> Lange and Haines employ a

*'wide definition of regulation that seeks to capture both legal and non-legal processes for changing the behaviour of economic actors according to specific standards, backed up by institutions and mechanisms of enforcement'*.<sup>66</sup>

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<sup>64</sup> Cf. e.g. interviewee 47 (email exchange, April 2017).

<sup>65</sup> Morgan and Yeung (fn 5) 1.

<sup>66</sup> B Lange and F Haines, 'Regulatory Transformations: An Introduction' in B Lange, F Haines and D Thomas (eds), *Regulatory Transformations: Rethinking Economy and Society Interactions* (Hart Publishing, 2015) 1, 7.

These and other accounts reveal four pillars of ‘regulation’:

*‘[(1)] the constitution, regularisation, and changing of behaviour...[(2)] in a social environment...[(3)] the process of regulation incorporates standard setting, monitoring and enforcement, or the employment of rules...[and (4)] these rules and standards are generally institutionalised’.*<sup>67</sup>

Cumulatively, these four pillars extend the scope of ‘regulation’ significantly beyond direct and explicit legal and policy fetters. As Hancher and Moran helpfully summarise, regulation entails designing rules and creating institutions to clarify and enforce them.<sup>68</sup> Moreover,

*‘there is much to be gained from exploring these common features of regulation, and from comparing the experience of rule-making and implementation in different settings’.*<sup>69</sup>

Equally important is that

*‘[the regulatory] making of rules and the enforcement of standards...occurs within a framework of...diffuse intervention[s], concerned with a wide range of often unstated and even contradictory objectives’.*<sup>70</sup>

This ‘*framework of diffuse interventions*’ points to several aspects of regulation.

One aspect is that even where there is a central regulatory agency or authority, the

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<sup>67</sup> Williams (fn 6) 9. Citing: Morgan and Yeung (fn 5) 3; Lange and Haines (fn 66) 7; Jacint Jordana and David Levi-Faur, ‘The Politics of Regulation in the age of governance’ in J Jordana and D Levi-Faur (eds), *The politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004) 3; and Hancher and Moran (fn 3) 271.

<sup>68</sup> Hancher and Moran (fn 3) 271.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid 275.

*‘integration [of large corporate firms] into the implementation of regulation is very often a precondition of its success’.*<sup>71</sup>

Similarly,

*‘in regulation, much of the most important activity consists in the routinised application of general principles, which may be devised by the regulatory authority or alternatively may be little more than the company’s standard operating procedures, officially endorsed as general principles’.*<sup>72</sup>

I expand this insight in my thesis by extending it from large commercial firms to public universities specifically; and more generally, public higher education institutions. The 2015 to 2017 Fees Must Fall protests are a fruitful context for this, because one of the objections which they raised was against the

*‘ “commercialization of higher education, which...advocates for the management and governing of institutions of higher learning in ways identical to the manner in which business corporations are managed ” ’.*<sup>73</sup>

Public universities’ internal governance and regulation – especially their institutional statutes and rule books – are key potential sources of ‘regulation’. These sources could be heavily impacted by more general principles set out in state laws, policies, and regulations. Institutional statutes and rule books may also carve out novel applications of the general principles promulgated in state laws, policies, and regulations – potentially triggering reflexive reform of those more general principles.

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Report of the Heher Commission (fn 29) para 20.

Furthermore, implementation of the general principles by the state or within a particular university might

*'not only dictate...how things are to be done; they also impose beliefs about what can be done'*.<sup>74</sup>

This is particularly likely where established processes are run in a sufficiently regularised manner so as to be standard operating procedures. In turn, these standard operating procedures could come to regulate particular matters; even though they amounted to little more than one institution's established way of doing things. The regulation of tuition fee decisions fits this model. It is a palimpsest of the more general regulation of higher education by the South African state, and the processes within particular universities – including student protests, and the responses to such protests.

This layering of the state's more general regulation of higher education and individual universities' specific processes reinforces the utility of adopting a broad definition of 'regulation'. Part of understanding the prevailing regulatory regime will require analysing these overlapping - though potentially disconnected - regulatory sources (e.g. state and university statutes) and mechanisms (such as ministerial intervention, or university managers enforcing the university's internal rules). This analysis is necessary, because it can reveal regulatory mechanisms which operate across seemingly disconnected spheres: for instance, that the more general regulation of the governance of higher education impacts on university councils' discretion over tuition fee decisions.

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<sup>74</sup> Hancher and Moran (fn 3) 288.

Equally,

*‘it is important to view regulatory regimes holistically, rather than focusing on individual facets...an expansive array of factors influence how (and whether) a regulatory regime operates’.*<sup>75</sup>

The ‘*expansive array of factors*’ includes

*‘institutional frameworks; policy and governmental settings; sets of procedures; enforcement, monitoring and information-using strategies and approaches; clusters of ideas and assumptions about how things are to be done;...levels of resourcing; and groups of persons with their backgrounds, preferences, cultures, disciplines, ideas, incentives and explanations’.*<sup>76</sup>

This holistic view is essential because

*‘in economic regulation, the most important parties are bound together in relations of exchange and interdependence...the essence of regulatory politics is the pursuit of institutional advantage...Regulation – and the rules and distribution of power through which it operates – is always a “stake” of industrial or political struggle’.*<sup>77</sup>

How this interdependence and contestation is navigated has a fundamental bearing on what regulatory regime is imposed, and how. For my thesis, a holistic understanding of ‘regulation’ reveals that university councils’ seemingly unfettered discretion over tuition fee decisions nested within a plethora of overarching and comprehensive (but potentially inconsistent) state laws and policies; together with university statutes and rule-books.

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<sup>75</sup> Williams (fn 6), 10; citing Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2012), 507.

<sup>76</sup> Baldwin, Cave, and Lodge (fn 75) 507.

<sup>77</sup> Hancher and Moran (fn 58) 287.

An important facet of this nesting of university councils' discretion within multiple laws, policies, statutes and rule-books is that traditional regulatory functions were split across multiple functionaries. Standard setting, monitoring and enforcement, and rule employment were not the sole prerogative of a single institution. Instead, the Apartheid and then the post-1994 states sought particular outcomes through shaping higher education and higher education institutions in specific ways. While both states did not fetter public universities' fee decisions, they did shape key determinants of, and inputs into, those decisions. Public universities exercised self-determination over how tuition fee decisions were made, and by whom. This self-determination could be contested, though: by the state, and by students.

The 2015 to 2017 Fees Must Fall protests are a vivid case study of how this self-determination was contested, particularly by students. They provide important empirical information both on how the regulation of tuition fee decisions was developed and implemented; and on how it was undermined and potentially incomplete. I use the concept of 'calibrations' to explore this regulatory regime and how it was affected by these protests. Calibrations offer a means of exploring how the interconnected but contesting parties participating in tuition fee decisions engaged with each other. I focus on how these engagements placed constraints on, and therefore regulated, tuition fee decisions. 'Calibrations' cover how these multiple interactions could limit and shift the actions of, and options available to, participants in tuition fee decisions.

I also analyse how these engagements were substantially disrupted by the 2015 to 2017 Fees Must Fall protests. These protests witnessed a metastasising array of demands: from fees ‘falling’, to ‘*free decolonised education*’<sup>78</sup> being advocated for with increasingly disruptive force. One outcome of these protests was the enhanced impetus given to the spectre of fee regulation. Adopting a broad and holistic understanding of ‘regulation’; including through analysing the regulatory constraints imposed by calibrating engagements; reveals insights into how the regulation of tuition fee decisions was affected by these protests - beyond only the direct and explicit fettering of these decisions.

## **2. Legal and policy constraints**

I focus on a set of calibrations in my thesis. These calibrations are between three actors, and between universities’ four income streams. The actors are the national government, university managers, and students. Universities’ four income streams are: the subsidy from the national government; income from donations and for contracting work; tuition fees; and student financial aid, including through government funded programmes. Tuition fee decisions were not fettered by any explicit and direct legal or policy constraints. At the same time, they were still regulated by the calibration of these three actors and four income streams.

Legal and policy constraints could constrain these actors and income streams; as well as how these actors and income streams interacted. In so doing, law and policy

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<sup>78</sup> Cf. interviewee 48 (Johannesburg, 22 March 2017).

fed into the regulation of tuition fee decisions. This resolves the conceptual puzzle of whether tuition fee decisions were regulated. The ‘*surprising administrative autonomy*’ universities exercised, including over tuition fees, remained subject to broader (and therefore less direct or explicit) legal and policy constraints. I argue that the presence of this broader regulation is unsurprising; partly because

‘[f]ormal regulation, deriving from legislation, is a manifestation of the intended relationship between a state and its social institutions...regulatory measures are a reflection of priorities identified by the state, together with the resources that it has chosen to allocate in pursuit of those priorities to deliver on the promises made to its society’.<sup>79</sup>

For both the Apartheid and post-1994 states, higher education and public universities had a key role to play in the society each state envisaged. This role encompassed a specific ‘*intended relationship*’ with and to the state. It extended to universities’ role in ‘*deliver[ing] on the promises made [by the state] to...society*’. In this section, I outline two sets of legal and policy constraints which fed into the regulation of tuition fee decisions: access restrictions, and financial restrictions. The calibrations regulating tuition fee decisions nested within, and were shaped by, these overarching constraints. I then turn to the role protests and crisis play in regulation – especially the regulation of tuition fee decisions.

## 2.1. Access restrictions

Under education Apartheid (c. 1948 to 1994), the perpetual disequilibrium (1994 to October 2015), and the interregnum (October 2015 to December 2017), state law and

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<sup>79</sup> Ballim et al (fn 60) 63.

policy remained a key factor shaping what is taught or researched, by who, to or for whom. Moreover, state law and policy affected which institutions could provide what kind of education, and to whom. These constraints are important, because fee decisions are taken by and at individual public universities. Three significant implications flow from this.

First, only public universities could exercise the prerogative to make seemingly unfettered tuition fee decisions. But only particular institutions could be public universities, because state law and policy regulated what education could be provided, and how. The capacity to make a tuition fee decision was therefore premised on compliance with state law and policy regarding which institutions could offer what education, to whom, and how.

Second, I argued previously that state law and policy placed public universities in the contradictory position of being required to compete and to collaborate:

*‘Professor Everatt commented...(regarding developments prior to, and after, October 2015) that... “[u]niversities are set up to compete, and yet we’re told to collaborate...we’re set up that we compete for funding,...for the best students,...for grants,...for everything. And then told: you must work together to find a single solution to your problems” ’.*<sup>80</sup>

A further contradictory pressure was that public universities were subjected to the same set of overarching pressures, but impacted by these pressures in different ways.

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<sup>80</sup> Williams (fn 6) 71.

For example, the socio-economic status of a university's prospective students has a direct bearing on what fees prospective students could afford, and would be likely, to pay. All South African public universities had to grapple with this. During the perpetual disequilibrium in particular, the state-driven expansion of access to higher education meant that the overall composition of the student body was deliberately altered. This included bringing increasing numbers of poorer South Africans into higher education. However, different public universities still had different student bodies. Important differences included different proportions of students coming from especially deprived backgrounds.

These contradictions could trigger reflexive iterations. A particular university might make a tuition fee decision, in light of broader state laws and policies (*inter alia*). In turn, the state's laws and policies could be affected by how individual universities made and implemented their tuition fee decisions. In addition, students could challenge (especially through disruptive protests) how universities made tuition fee decisions and how the state responded to those decisions.

Third, state law and policy imposed quantity restrictions or quotas by constraining who could learn what, where. The education Apartheid pursued by the Apartheid state placed ethnic and racial constraints on who could attend which public universities. In response to the legacy issues arising from these constraints, the post-1994 state sought to steer public universities so that access to university education could become more equitable and efficient; as well as better co-ordinated with South Africa's economic development needs. To achieve this, the post-1994 state established

detailed planning, funding, and quality control mechanisms. These mechanisms combined increasing steering by the national government, with ongoing negotiation and discussion between the national government and individual public universities - hence public universities' '*negotiated self-regulation*'.<sup>81</sup>

Planning extended to requiring each public university to agree an enrolment plan with the national government. These enrolment plans constrain how many students each university can admit, and in which fields:

*'there are more students that could study, than there are places. And more students than there is funding...access is managed first and foremost through the enrolment plan'*.<sup>82</sup>

State law and policy therefore drove expanded access to university education, and rationed (through enrolment planning) who received what access to university education. The significance of this is that it is only students accessing public universities who pay tuition fees.

## **2.2. Financial restrictions**

Tuition fees are charged to students who register at public universities, for the courses those students take. This raises two issues about who is expected to pay those fees. First, what role do those expected to pay fees play in the fee decision? This question covers the time building up to a fee decision, including the process through which the decision is taken. It also extends to what follows a fee decision, especially the

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<sup>81</sup> Cf. fn 60.

<sup>82</sup> Interviewee 18 (Cape Town, 20 April 2018).

prospective fee payer's payment or non-payment of the fee. Second, the issue of payment of fees raises the question: what role do those financing tuition fees play in the tuition fee decision? These financiers are the prospective students, as well as the state-sponsored and private sources of funding which students draw on to fund their tuition.

More generally, demanding that students pay a council-determined fee raises two interconnected questions. What are fees? And what is the cost of the education provided by a public university? The question of costs extends beyond fees to the other sources of income on which public universities rely. It could be complemented by a further question: what should these costs be? Answering all of these questions – about the role of those who pay for, and those who finance the payment of, fees; and about the costs of university education - goes to the heart of how the calibration of actors and income streams regulated tuition fee decisions.

I explore these questions empirically in chapters five to seven of my thesis. One underlying theme for those chapters is that tuition fees, especially as the perpetual disequilibrium moved closer to the interregnum, became an increasingly important component of how public universities attempted to ensure their overall incomes were sufficient. The main challenge facing public universities (and higher education more generally) was that the post-1994 state embarked on a deliberate and concerted push, through law and policy, to expand access to higher education. This challenge was made acutely difficult by the pervasive funding shortages facing universities. State funding of public universities was increased during the perpetual disequilibrium, but

incommensurate to the rate at which state policy expanded university enrolments. The ensuing and growing funding shortfall applied both to money public universities received directly from the state, and to the financial aid the state provided to prospective students.

I argue in my thesis that these factors combined to regulate the seemingly unfettered tuition fee decisions university councils were authorised to make. The marrying of a state-driven push to expand access with inadequate funding being provided for that expansion generated a series of contradictory pressures; in practice, and in law and policy. These included: pressures to achieve greater equity to transform South Africa's university sector, while also trying to pursue financially sustainable development of the sector; and preserving and enhancing the areas of teaching and research excellence within the sector, while reconfiguring the higher education sector.

### **2.3. Protests and crises**

The 2015 to 2017 Fees Must Fall protests emerged in the context of these contradictory pressures. They built on historic discontent with the financial restrictions students experienced when attempting to access public universities. They were also a departure from previous protests:

*‘What distinguished the 2015 protests from those experienced periodically over the decade before, was that the hub of these protests was at the historically-white universities. The majority of protests experienced since 2000 were focused at the historically black universities, where issues including fees,*

*access to the National Student Financial Aid Scheme [the ‘NSFAS’]...and other related issues were the cause of frequent, but uncoordinated protest’.*<sup>83</sup>

This departure from previous protests spoke to a core set of unresolved issues around how public universities and tuition fees were financed, partly carried over from ‘*the majority of protests experienced since 2000*’. Added to these issues were the metastasising demands which emerged during the Fees Must Fall protests.

Two dominant and related responses to the question of financing emerged during the 2015 to 2017 Fees Must Fall protests. One response was a denial that the issues facing students and public universities should be viewed in financial terms:

*‘Mr Chikane...explained that too often, the solution [to the issue of the financial exclusion of academically deserving students] is sought “within the realm of economics rather than of sociology or politics...He asked that rather than consider the best economic solution, “look for a solution that makes the most humane sense for our country”...He concluded that while he was not going to try and answer the question of feasibility, he was of the view that “Free Higher Education, in the context of South Africa’s socio-economic positioning, is a must...”’.*<sup>84</sup>

This response emphasises the prioritising of the social over, if not to the exclusion of, the financial or the financially feasible.

Another, related response was that the suffering of students and prospective students (which tracked these financial restrictions) could and did trigger protests. These protests had varying results. Student protests were a fairly regular feature in the higher education sector, including at several public universities. This suggests two

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<sup>83</sup> Report of the Heher Commission (fn 29) para 1.

<sup>84</sup> Ibid para 271.

ways in which student protests acted as a regulatory force with which the government and universities had to contend. First, successful protests could overturn or alter specific decisions: as happened in 2015, when fee increases previously announced by university councils were rescinded. Second, the possibility of protests could become a factor during the proceedings through which tuition fee decisions were made.

More generally, the perennial possibility of student protests contributed to the sense of instability and uncertainty in higher education and at certain universities. Hence one of my interviewee's observations that

*'at the systemic level but also at the institution level...we've been in a state of perpetual disequilibrium for the greater part of [the period]...going back to...the turn of democracy in 1994'.<sup>85</sup>*

This could also be described as a continuous sense of crisis, with multiple individual crises compounding this general sentiment.

From a regulatory perspective, crises are important in several respects. On one reading,

*'regulation is largely a matter of organisational routine, of institutional procedures, punctuated by occasional crises...Such crises serve the function of inducing change, or at least initiating a search for alternative institutional arrangements...Regulation almost always happens because some sense of crisis is precipitated'.<sup>86</sup>*

My thesis questions and develops this point. While the crisis triggered by the 2015 to 2017 Fees Must Fall protests did enhance the spectre of fee regulation, I argue that

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<sup>85</sup> Interviewee 8 (Pretoria, 4 April 2018).

<sup>86</sup> Hancher and Moran (fn 3) 284.

tuition fee decisions were already regulated prior to this most recent crisis. Moreover, the perpetual disequilibrium was subject to a continual sense of crisis – even before the Fees Must Fall protests tipped public universities and higher education into the interregnum. Instead of ‘*regulation almost always happen[ing] because some sense of crisis is precipitated*’, I argue for a dynamic interplay between the emergence and implementation of regulation and crises.

For South African public universities during the perpetual disequilibrium, ‘*some sense of crisis*’ was arguably a constant. I argue that the interregnum emerged largely because the demand for regulation outstripped any single actor’s or constellation of actors’ financial and organisational capacity to regulate. What ensued was a dynamic interplay between: incomplete attempts to regulate to achieve specific (and potentially competing) objectives; a crisis or crises occurring in response to perceived failings, including regulatory failure; and subsequent attempts to regulate further – again, potentially in pursuit of competing objectives.

I explore several empirical instances of this in chapters seven to nine of my thesis. A holistic snapshot of this dynamic is that

*‘the first twenty years of post-apartheid higher education [in South Africa] may well be characterised as having been in a state of dynamic flux, with different segments, separately but sometimes aligned, working hard to correct non-equilibrium conditions while at the same time trying to ensure that students received an education of the requisite quality. Such corrections were not always possible or successful and the latter decade saw a number of [higher education] institutions being placed under curatorship or “administration” for a range of*

*failures*'.<sup>87</sup>

One specific example of these institutional challenges was the contestation from around 2007 onwards over 'free education'. This contestation had policy and organisational ramifications for the NSFAS - the state-funded provider of financial aid to prospective students.

The dynamic interplay between regulation and '*some sense of crisis*' ultimately drove a paradox. The sense of crisis often precipitated further regulatory interventions, while sapping the financial and organisational capacity needed to implement both existing regulation and the new regulations being demanded. This sapping of capacity increased the likelihood that new shortcomings might emerge or be perceived; triggering further crises and demands for regulation. I use the notion of calibrations to unpick these dynamics.

Calibrations are an apt means for analysing how tuition fee decisions were regulated because of the uncertainty and instability around the rules or standards being developed, monitored, and enforced. The uncertainty and instability stemmed from the dynamic interplay between a continual sense of crisis and the repeated demands for further interventions (including regulatory interventions). It also arose from the absence of a central regulatory agency or authority through which these contestations could be resolved; or, at least, channelled. Moreover, calibrations provide a means of interrogating one central facet of the concept 'regulation':

*'the analyst of contemporary regulation is confronted with the task of*

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<sup>87</sup> Ballim et al (fn 60) 64.

*understanding the networks of interdependence in the arenas of negotiation and compromise – in a phrase the patterns of power brokerage’.*<sup>88</sup>

### **3. Interventionist states and the centrality of politics**

One reason that I was puzzled by my interviewees’ observation that tuition fee decisions were not regulated was the substantial legal and policy intervention by the Apartheid and post-1994 states in higher education. This continual intervention is significant from a regulatory perspective, because

*‘economic regulation is an integral part of the activities of the modern interventionist state...Economic rule-based regulation is not a distinct activity; it is woven into a larger fabric of intervention’.*<sup>89</sup>

I argue that the *‘larger fabric of intervention’* highlights in my empirical case the centrality of politics, and politicisation, to regulation.

#### **3.1. The politicisation of regulation**

Ongoing state intervention in higher education in South Africa is a good example of both the centrality of politics to, and the politicisation of, regulation. It is pertinent to analysing tuition fee decisions at public universities:

*‘across the [higher education] sector, there was no shortage of political supporters or pressure groups, both within institutions and from interested components of their communities that were concerned with the immediate interests of particular institutions. External interests, organised along political, ethnic, language or even local community lines, exerted pressure through influence on governance structures such as the university council or the student representative council, as well as through operational structures such as the university residence*

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<sup>88</sup> Hancher and Moran (fn 3) 297.

<sup>89</sup> Ibid 275.

*management. This aspect of the distortion of governance processes at universities led to various amendments to the Higher Education Act...’.*<sup>90</sup>

This politicisation could also set off reflexive interactions similar to those I discussed in sections 1.2 and 2.1 of this chapter. Prevailing regulations could trigger specific responses by ‘*political supporters or pressure groups*’; in turn, setting off regulatory changes (including amendments to legislation).

It also shows the wide array of seemingly unrelated actors and issues which may be set in motion by the implementation of, and responses to, regulation. This reinforces the benefits obtained by adopting a wide understanding of what constitutes ‘regulation’. Individual interventions and regulations may initially be narrowly focused. But the polycentricity of their implementation can render these interventions and regulations increasingly open-ended. This expanding scope can be helpfully captured in spatial terms:

*‘regulation initiated in one site (e.g. a legislature) to deal with a specific issue (terrorism; an industrial disaster; a financial collapse) proceeds to “cascade through spaces” through its implementation and enforcement. This extends to the continuing, iterative process of regulatory reform’.*<sup>91</sup>

Politics is enmeshed throughout, since regulation can be a means by which the state

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<sup>90</sup> Ballim et al (fn 60) 69 – 70.

<sup>91</sup> Williams (fn 6) 14. Citing: Haines (fn 14) 228 – 230.

*‘use[s] or deploy[s] authority...This could take the form of the state relying on established authority or standards; or the deployment of authority to achieve public policy objectives’.*<sup>92</sup>

The state’s deployment of authority in this way, and the concomitant politicisation of regulation, is inevitable insofar as regulation is ‘*“the control of private behaviour by public agencies” to protect the public interest*’.<sup>93</sup> Moreover,

*‘law may...be central to regulation, especially insofar as law can be an instrument of social control’.*<sup>94</sup>

However, law is not the only medium through which regulation might take place; particularly given the broad understanding of ‘regulation’ which I employ in my thesis.

Heightened political activity could, therefore, be an indication of greater regulatory activity. Or at least, attempted regulatory activity. This is another important point about the 2015 to 2017 Fees Must Fall protests. These protests vividly displayed intense political engagement and contestation. I analyse these events using concepts from academic literature on regulation partly

*‘because politics will often be at the core of regulation. Morgan and Yeung highlight [how] the politics of regulation is influenced by issues of citizenship, inclusion, and market/state views. Moreover, inherent in all regulatory schemes are questions of legitimacy and accountability’.*<sup>95</sup>

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<sup>92</sup> Ibid 11. Citing: Jordana and Levi-Faur (fn 67) 8; and Scott (fn 10) 331.

<sup>93</sup> Ibid 12. Citing: Nupur Chowdhury and Ramses Wessel, ‘Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?’ [2012] *European Law Journal* 335, 344 – 346.

<sup>94</sup> Ibid. Citing: Morgan and Yeung (fn 5) 1.

<sup>95</sup> Ibid 16. Citing: Morgan and Yeung (fn 5) 2 and 11.

All of these issues are evident in how public universities are regulated, and in the 2015 to 2017 Fees Must Fall protests. The gate-keeping function partially performed by tuition fee decisions was seen as raising fundamental questions about which South Africans could access what education; and, therefore, what future career prospects. How fee decisions were being made was subjected to visceral critique, especially concerning their legitimacy (given South Africa's socio-economic environment). Key actors – university managers, and even certain government officials – were seen as unacceptably unaccountable for the decisions they made.

I therefore re-iterate my previous conclusion that

*‘the “political dimension” of regulation “will not disappear”. Furthermore, seeking its disappearance would be undesirable, because regulation is “at once a technical, political, and social project”<sup>96</sup>’.*

My reading of the 2015 to 2017 Fees Must Fall protests is that they disrupted the prevailing regulation of tuition fee decisions and subjected these decisions to even more binding constraints, rather than merely enhancing the spectre of regulation of fee decisions which, up to that point, were unfettered.

I argue that analysing the protests and their attempted settlements through a regulatory lens reinforces

*‘the role interest groups can play in lobbying for legislative and regulatory action, and the manner in which “constellations of interests” can drive regulatory models’.<sup>97</sup>*

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<sup>96</sup> Ibid 17. Citing: Baldwin, Cave, and Lodge (fn 75) 507; and Haines (fn 14) 2.

<sup>97</sup> Ibid 16 – 17. Citing: Lange and Haines (fn 66) 13 – 14.

Such lobbying by ‘constellations of interests’ also fed into the dynamic interplay I discussed in section 2.3: between regulation (or demands for regulation), and ‘*some sense of crisis*’. In particular, the financial and organisational capacity underpinning this lobbying could be deployed in ways which ultimately undermined the financial and organisational capacity required to ‘*drive [the] regulatory model*’ being advocated.

The likelihood of politicised state intervention, including through regulation, is significantly increased when a specific conception of the state is at play. In the context of Britain and Europe since 2011, this could mean ‘*living in the age of the “regulatory state”*’.<sup>98</sup> Higher education in South Africa fits within this conception. During the perpetual disequilibrium, it was characterised by ‘*a strongly directive state approach*’.<sup>99</sup> For instance,

‘*South Africa’s 2001 National Plan for Higher Education...is strongly interventionist and centrally-driven*’.<sup>100</sup>

These centrally driven interventions formed part of a broader social project. Both the Apartheid and post-1994 states pursued large-scale transformations of South African society. These transformational projects extended to institutional design (and reconfiguration). Law, and regulation through law and other means, played a central role in the post-1994 state’s transformational project, including through

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<sup>98</sup> Baldwin, Cave, and Lodge (fn 75) 2. Williams (fn 6) 17.

<sup>99</sup> Roger King, ‘Analysing the Higher Education Regulatory State’ (2006) 1, 7. Discussion Paper no. 38, The Centre for Analysis of Risk and Regulation, London.

<sup>100</sup> Ibid 8.

*‘operat[ing] as...instrument[s] of social control: through facilitating instrumental problem solving; and through imposing institutional...parameters on social behaviour’.*<sup>101</sup>

These *‘institutional parameters’* included mandating the establishment of the internal governance structures at public universities through which tuition fee decisions would be made.

The 2015 to 2017 Fees Must Fall protests, and other student protests, highlight another dimension to how these transformational projects were pursued. Attempts to achieve the desired transformation of society require the enforcement of the laws and regulations being used to drive this transformation. Yet enforcement can be a contested process. This has a bearing on regulation, because

*‘it is through the enforcement process that a set of legal standards designed to influence human and institutional behaviour is translated into social reality’.*<sup>102</sup>

This *‘translation into social reality’* applies to both the *‘legal standards designed to influence human and institutional behaviour’*, and to the broader normative programmes which may underpin those standards. I use *‘paradigms’* to analyse how actors attempt to steer others in accordance with, and are themselves steered by, these broader normative programmes.

### **3.2. Paradigms**

I define the concept of a *‘paradigm’* as a normative programme which shapes both how an actor views the world, and how they behave in that world. Paradigms are adopted

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<sup>101</sup> Williams (fn 6) 18. Citing: Morgan and Yeung (fn 5) 1 and 5 – 6.

<sup>102</sup> Ibid 19. Citing Morgan and Yeung (fn 5) 10.

by actors, and can influence both their current behaviour and their expectations about future conduct – including the conduct of other actors. They are intimately connected to actors’ beliefs. In my thesis, I focus especially on how paradigms are expressed in political rhetoric. This extends to their being expressed in legal and public policy documents, including those documents which feed into regulatory interventions.

This includes the regulation of tuition fee decisions, with paradigms shaping what is taught or researched, by who, to or for whom, and at which institutions. In chapter four, I analyse the paradigm of separation which underpinned the transformation of South African society sought by the Apartheid state. I also discuss in chapters four the paradigm of society as unity, egalitarian and democratic which drove the post-1994 state’s transformation of South African society.

Just as ‘*a wide range of often unstated and even contradictory objectives*’ inform the ‘*framework of...diffuse intervention[s]*’ within which regulation occurs, one paradigm may subsume several different and competing paradigms.<sup>103</sup> My thesis focuses on two paradigms subsumed within the paradigm of society as unitary, egalitarian, and democratic: the paradigm of responsible budgeting, and the paradigm of social activism.

Responsible budgeting focuses on the long-term (financial) viability and sustainability of an institution or organisation (e.g. the state, a university). It entails

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<sup>103</sup> Hancher and Moran (fn 3) 275.

planning and budgeting to navigate and account for adverse, unintended, or perverse outcomes. The paradigm of social activism prioritises advancing and achieving equality-focused outcomes. A notable aspect of this prioritisation is that financial concerns are often seen as illegitimate constraints on the fulfilment of equity goals. I have argued previously that there was unnecessary and unfortunate tension between the paradigms of responsible budgeting and social activism.<sup>104</sup> I expand that argument in this thesis, developing the theme of social activism cannibalising responsible budgeting.

Two examples illustrate this tension and cannibalisation. First, I outlined in section 2.3 of this chapter that one tenet of the 2015 to 2017 Fees Must Fall protests was an attack on the idea that financial analysis should drive which policies were pursued. This was a vocal assertion of social activism against responsible budgeting:

*‘Mr Chikane...explained that too often, the solution [to the issue of the financial exclusions of academically deserving students] is sought “within the realm of economics rather than of sociology or politics...He asked that rather than consider the best economic solution, “look for a solution that makes the most humane sense for our country” ’.*<sup>105</sup>

Crucially, Mr Chikane *‘concluded that...he was not going to try and answer [the] question of [the] feasibility’* of free higher education.<sup>106</sup>

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<sup>104</sup> Williams (fn 3) 64 – 66.

<sup>105</sup> Report of the Heher Commission (fn 29) para 271

<sup>106</sup> Ibid.

The refusal to answer questions of feasibility speaks to the cannibalisation of responsible budgeting by social activism. I say this because severe financial constraints had been highlighted in several public policy documents, and discussions of those documents, prior to the 2015 to 2017 Fees Must Fall protests. Furthermore, these discussions and documents had also emphasised the deleterious consequences (including, if not especially, for students) which would arise from not operating within those constraints.

For instance:

*‘While it is possible to achieve rapid enrolment growth without extra expenditure, the penalties for doing so are harsh’.*<sup>107</sup>

Similarly:

*‘ “the growth of funds [provided to the NSFAS] has not kept pace with the ever-increasing demand. Even a fivefold increase in 10 years leaves NSFAS with a massive funding shortfall. It would probably need to triple its budget to meet even current demand’.*<sup>108</sup>

And regarding the more general expansion and reconfiguration of the post-school education and training (‘PSET’) sector proposed in the *White Paper for Post-School Education and Training* (2013), a September 2016 report on the costing and financing of the proposed expansion found that:

*‘the rapid expansion of the PSET system will result in expenditure exceeding the funding available, if tax revenues grow in line with the National Treasury’s long-term fiscal projections...Under the full policy scenario [i.e. ‘enrolments increase...rapidly and the quality of education and training programs is*

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<sup>107</sup> EWP 3 (fn 13) paragraph 4.4

<sup>108</sup> Report of the Heher Commission (fn 29) para 321. Citing the Review of the NSFAS (fn 24).

*improved substantially’] a nominal shortfall of R370 billion in 2030 is expected. This represents about 2.46% of GDP in 2030...there is an urgent need to determine whether the enrolment and policy targets set out in the White Paper can be reasonably accomplished’.*<sup>109</sup>

These issues of feasibility – particularly the constrained financial and organisational capacity which they implied – were therefore important in any discussion of higher education. Social activism’s cannibalisation of responsible budgeting, though, meant that they were increasingly pushed into the background. This increased the instability and uncertainty of the higher education sector and the institutions in it. Concomitantly, it raised the likelihood and sense of crisis, together with further demands for state intervention.

Second, the rejection of financial analysis or seeking solutions ‘*within the realm of economics rather than sociology or politics*’ occurred alongside vocal calls for political action because of South Africa’s socio-economic context:

*‘it was by taking the notion of “economic freedom in our lifetime” [a rallying cry of the African National Congress’ Youth League (ANCYL) prior to March 2013] that my generation turned a spotlight on the status quo and defined it as our enemy. But more importantly, that notion provided us with the discourse necessary to mobilise against it’.*<sup>110</sup>

One expression of this discourses was ‘fallism’, which became more prominent during the 2015 Rhodes Must Fall and the Fees Must Fall protests.

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<sup>109</sup> Ibid, para 278.

<sup>110</sup> Chikane (fn 2) 44.

The rallying cry of ‘*economic freedom in our lifetime*’ jars with the avoidance of questions of feasibility and the criticism of seeking solutions in ‘*economics rather than sociology or politics*’. Furthermore, analysing it reveals a contradiction; or, at least, a double movement. One reading of this rallying cry is that political freedom, even if it has been achieved, is insufficient. ‘True’ freedom is socio-economic. Yet the political remains doubly relevant.

First, appeals to the economic status quo are specifically designed to facilitate mobilisation and organisation by those railing against it. Second, and relatedly, this mobilisation is geared towards driving political action which has as its express goal economic changes – including distributing economic benefits towards those rallying behind this cry. Which, in turn, implies that mobilising and exercising political power is an important freedom to have; and a freedom which those making this cry possess, at least in some sense.

Moreover, this freedom could drive significant legal, policy, and financial changes, especially if protests were the mode in which it was expressed. One instance of this is the increasing funding provided to the NSFAS:

*‘in 1991 (as [the Tertiary Education Fund of South Africa]) [NSFAS] supported 7 220 students with an average loan of R2 977 and a total budget of R21 million...In 2014, 414 802 students were funded (at both universities and [other higher education institutions]) with R8.96 billion in funding [and t]he average loan was R21 906...allocations to NSFAS have...increased substantially over the years, as has the number of students funded each year. Despite this...the funding need still outweighs the available funding. As a result of the students’ protests, NSFAS allocations increased considerably...in 2016*

[the NSFAS] *would fund more than 405 000 students with a grant budget of R14.6 bn*'.<sup>111</sup>

I discuss these and other financial redistributions which occurred during the interregnum in chapter nine of my thesis.

Another dimension to this kind of social activism - including during the 2015 to 2017 Fees Must Fall protests and attempted settlements - was that it was partly driven by actors connected to major political parties, especially the African National Congress ('ANC'). These connections encompassed senior ANC leaders (such as president Jacob Zuma, from 2007 onwards) and ANC-affiliated student movements (the South African Student Congress, the ANCYL). Yet these '*patterns of power brokerage*' were dynamic rather than static; multifaceted rather than neat or monolithic.<sup>112</sup> I explore these complex interconnection in chapter eight of my thesis. This complexity reinforces the value of using calibrations to unpick how these and other interactions regulated tuition fee decisions. It also bolsters the utility of using paradigms to analyse key components of the regulation of tuition fee decisions; including the interactions which calibrated those decisions.

Both the Apartheid and post-1994 states pursued far-reaching transformations of South African society. These transformations entailed ongoing state intervention, including in higher education. They embroiled several large actors. Public universities were enrolled, and contested their role, in the post-1994 state's attempts to transform

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<sup>111</sup> Report of the Heher Commission (fn 29) para 327.

<sup>112</sup> Cf. Hancher and Moran (fn 3), 297.

South African society. This extended to engaging with law and policy determining who could learn what, where, and at what cost; and who paid what portion of that cost. All of which affected what tuition fee decisions university councils could make. Paradigms provide a way of exploring how higher education institutions' contested role in transforming South African society impacted on the regulation of tuition fee decisions.

## **Conclusion**

I use academic literature to build my argument that 'regulation' extends beyond direct and explicit legal and policy fetters. Calibrations are a fruitful means of exploring the broad array of constraints on behaviour which can and should be considered regulatory. This is partly because state law and policy – and not just direct and explicit regulation - often feed into the standards which are monitored and enforced, and the rules which are employed, in a regulatory regime. Access and financial restrictions are a prime example of this, and of how broader state law and policy regulated tuition fee decisions made by public universities in South Africa. Similarly, student protests and a continual sense of crisis were important factors shaping what regulation emerged and how it was implemented.

Cumulatively, state law and policy, student protests, and a sense of crisis speak to the centrality of politics to, and the politicisation of, regulation. This is especially true for the comprehensive transformations of society pursued by the Apartheid and post-1994 states in South Africa. I argue that paradigms are a useful tool for identifying specific political rhetoric that informed these interventions. Treating tuition fee decisions as regulated by a series of delicate calibrations therefore resolves the puzzle

that these decisions appeared to combine university councils' unfettered discretion with a panoply of constraints derived from several sources (including state law and public policy). My interviewees referred to the plethora of factors which fed into what I discuss using the notion of calibrations. This raises the question: what is the appropriate conceptual tool for analysing these delicate calibrations?

## CHAPTER 3

### Re-envisioning regulatory space analysis

*‘Try again. Fail again. Fail better.’<sup>113</sup>*

My interviewees observed both that tuition fee decisions appeared unfettered, and that they were subject to a complex and interwoven set of constraints. I argue that calibrations are a fruitful means of exploring these constraints. In this chapter, I show that regulatory space analysis is the apt conceptual tool for analysing these calibrations. This is partly because it adopts a broad view of what constitutes ‘regulation’. This broad view extends to how regulation is implemented and enforced.

Pertinent to my thesis is both how regulatory space analysis frames, and how it critiques, regulation. For the regulation of tuition fee decisions, this framing and critiquing is doubly relevant. It facilitates an enhanced understanding of what regulatory constraints apply, and how, and renders these visible. Furthermore, employing a wider understanding of which constraints are regulatory can feed into a critique of the regulatory regime being implemented.

As I discussed in chapter two, the main puzzle I confront in my thesis is the perception that tuition fee decisions were unregulated; even though they were made within an abundance of overlapping and contradictory regulatory constraints. Regulatory space analysis is an apt tool for resolving this puzzle. I apply it to reveal

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<sup>113</sup> Samuel Beckett, ‘Worstward Ho’.

and interrogate the abundance of constraints to which tuition fee decisions were subject. I also use it to highlight the regulatory nature of some of these constraints.

In this chapter, I build the conceptual framework I use for the rest of my thesis: a re-envisioned regulatory space analysis. My re-envisioning builds on and advances academic accounts of regulatory space analysis. I develop it in this chapter in two parts. First, I draw on academic literature to outline what regulatory space analysis is and how it can be used. I highlight how apt it is for answering the question my thesis focuses on: how did the 2015 to 2017 Fees Must Fall protests, and their settlements, re-constitute the regulatory space of tuition fee decisions by public universities in South Africa? Second, I delve into the four aspects of regulatory space analysis which my empirical analysis of tuition fee decisions focuses on: how the boundaries of a regulatory space are drawn; who the dramatis personae are; how important resources in a regulatory space are dispersed; and the ‘place of space’.<sup>114</sup>

## 1. Regulatory space analysis

A ‘regulatory space’ is an ‘*analytical device*’.<sup>115</sup> Similar to the concept of a ‘public space’, it is an ‘*analytical construct*’

*‘whose dimensions and occupants can be understood by examining regulation in any particular national setting, and by analysing that setting in terms of specific political, legal, and cultural attributes’.*<sup>116</sup>

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<sup>114</sup> Hancher and Moran (fn 3) 279.

<sup>115</sup> Ibid 271.

<sup>116</sup> Ibid 277.

It can be used to interrogate what '*place...organised interests*' are given in regulatory – including legal and public policy – processes.<sup>117</sup>

I use this analytical construct to interrogate which actors and issues feed into the processes through which tuition fee decisions are regulated. A variety of large actors – including '*different institutions*' – '*inhabit [and operate within] a common regulatory space*'.<sup>118</sup> Put differently, I use the concept of a regulatory space to corral the calibrations which I argue regulated tuition fee decisions. The notion of a common regulatory space in which these calibrations unfold is fruitful. A variety of actors and issues can be placed in this space, and how their interactions feed into tuition fee decisions can be explored.

Viewing these calibrations as operating in a common regulatory space therefore provides a more comprehensive picture of how the regulation of tuition fee decisions operates. It allows for a far-reaching exploration of which rules and standards are debated and implemented; and how these rules and standards are monitored and enforced in practice. Appreciating these intricacies is a precursor to analysing and critiquing the regulatory regime of which they form part.

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<sup>117</sup> Ibid 276.

<sup>118</sup> Ibid.

### 1.1. Framing ‘regulation’

In chapter two, I stressed the importance of ‘*view[ing] regulatory regimes holistically*’.<sup>119</sup> Put differently: a ‘*regulatory regime must be assessed as a whole*’, rather than

‘*concentrat[ing] on the regulators, the regulatory agencies, and regulatory policies as if they were the whole story*’.<sup>120</sup>

Specific aspects of the regulatory regime can provide only an incomplete picture of how that regime operates. This is particularly true for tuition fee decisions, given the diverse legal and policy mechanisms which have a bearing on how they are made. Regulatory space analysis is triply apt for conducting such a holistic assessment of how tuition fee decisions are regulated.

First, regulatory space analysis can be applied as a ‘*framing device*’, ‘*to interrogate the experience of regulation*’; as well as assessing institutional design and reform.<sup>121</sup> This ‘framing’ can capture the entire system of regulation, bringing to light important interactions which affect regulatory implementation, enforcement, and reform. For tuition fee decisions, utilising regulatory space analysis enables me to tease out how the direct and explicit regulation of who learns what, where, from whom,<sup>122</sup> at

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<sup>119</sup> See fn 75.

<sup>120</sup> Stephen Wilks, ‘Utility Regulation, Corporate Governance, and the Amoral Corporation’ in Bruce Doern and Stephen Wilks (eds), *Regulatory Institutions in North America* (University of Toronto Press, 1998) 133, 133 and 157.

<sup>121</sup> Scott (fn 10) 352 – 353.

<sup>122</sup> Claudio Radaelli, ‘Who learns what? Policy learning and the open method of coordination’ (2004). Paper prepared for the ESRC seminar series: Implementing the Lisbon Strategy ‘Policy Learning Inside and Outside the Open Method’, 26 November 2004, European Research Institute, University of Birmingham,

what cost, and paid by whom; constrained university councils' seemingly unfettered discretion regarding tuition fee decisions.

Second,

*'the regulatory space metaphor is useful in challenging overstated claims for what is possible through regulatory activity'*.<sup>123</sup>

Because of its focus on capturing all of the interactions which shape a regulatory regime, regulatory space analysis facilitates a better understanding of whether and how that regime is being implemented, enforced, and reformed. In turn, this holistic understanding can enhance how regulatory successes and failings are assessed – and relatedly, provide an understanding of what can and can't be achieved through regulation.

One response to the 2015 to 2017 Fees Must Fall protests could be the assessment that tuition fee decisions were unregulated. A solution might be to regulate them. I argue that both this assessment and the proposed solution are mistaken: tuition fee decisions were already regulated, but the regulatory regime suffered from several shortcomings. The shortcomings included the regulatory regime being expected to fulfil multiple, frequently competing objectives; and insufficient attention being paid to existing capacity constraints, or how further legal and policy interventions might sap capacity further. Seeing the solution in further regulations ignores that any further

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<https://ore.exeter.ac.uk/repository/bitstream/handle/10036/23652/RadaelliPolicyLearning.pdf?sequence=1&isAllowed=y>.

<sup>123</sup> Scott (fn 10) 352.

regulation would itself face similar limits. Moreover, it would place further demands on actors and institutions which were already unable to meet the expectations arising from the prevailing regulatory regime.

Third, the framing device of regulatory space analysis is ideally suited to tracing and interrogating the dispersal of power and authority evident in the regulation of tuition fee decisions. Power, law, authority, accountability, and legitimacy all have a bearing on how tuition fee decisions are regulated, yet were dispersed and evolving. Crucially:

*‘the “regulatory space” metaphor draws attention to the fact that regulatory authority and responsibility are frequently dispersed between a number of organisations...and that authority is not the only source of power within a regulated domain’.*<sup>124</sup>

It is therefore necessary to look at all sides of, and participants in, the regulatory regime. Especially insofar as that regime includes bargaining, negotiation, and potentially co-regulation.<sup>125</sup> Bargaining and negotiation suggest that responsibility and accountability for the regulatory regime is shared by various actors.<sup>126</sup> Furthermore,

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<sup>124</sup> Ibid 331.

<sup>125</sup> Cf. Wilks (fn 120) 133, 136, and 157. See also Lis Lange and Thierry Luescher-Mamashela, ‘Governance’ in Council on Higher Education, *South African Higher Education Reviewed: Two Decades of Democracy* (Council on Higher Education, 2016), 105: ‘the 2004 CHE analysis [argued that] policy implementation turned out to be non-linear and much more complex in terms of outcomes and impacts than the conceptualisation of policy development and implementation held at the time had allowed for...the CHE [concluded, inter alia,] that the outcomes of policy were going to be “co-produced” by government, the higher education sector, individual institutions and other social actors’.

<sup>126</sup> Wilks (fn 120) 140.

they suggest that the regulator (assuming there is a single regulator) engages with regulatory ‘partners’ rather than ‘targets’.<sup>127</sup>

In addition, any assessment of a regulatory regime needs to identify accurately what ‘*provide[s] the structure of pressures and incentives*’ which affects those expected to implement and comply with that regime.<sup>128</sup> Regulatory space analysis facilitates this type of assessment. It allows for a wide array of constraints to be viewed as regulatory. Furthermore, it provides a mechanism through which these constraints can be brought together and explored holistically.

Regulatory space analysis can also

*‘encourag[e] us to consider...the limits and (implicitly) the potential for law as one instrument of governance’.*<sup>129</sup>

I argue that this can be extended to public policy, too. Both law and public policy play a prominent role in regulating South African higher education. This more general regulation affects how tuition fee decisions are regulated. For both general and specific regulation, I show that the ‘*relations*’ I focus on

*‘can be characterised as complex, dynamic and horizontal, involving negotiated interdependence’.*<sup>130</sup>

As a ‘framing device’ and an ‘analytical construct’, regulatory space analysis is well suited to corralling the multiple and dispersed factors which affect what rules or

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<sup>127</sup> Ibid 143.

<sup>128</sup> Ibid.

<sup>129</sup> Scott (fn 10) 330.

<sup>130</sup> Ibid.

standards are envisioned, how they are implemented and monitored, and what enforcement or reform occurs.

## 1.2. Dynamic rather than static

To be used effectively, though, several questions arise regarding how regulatory space analysis can be applied. The extensive variety of factors to be considered both in constructing and analysing a regulatory space suggest that delineating a single space might be difficult. My application of regulatory space analysis to tuition fee decisions focuses on the various factors which ‘*influence the shape of th[is] regulatory space and the allocation of power within*’ it.<sup>131</sup>

Several key features of regulatory space analysis are worth noting in this regard:

*‘precisely because it is a space, it is available for occupation [and] it can be unevenly divided between actors...just as we can identify a general concept of regulatory space in operation in a particular community we can also speak of specific concepts of regulatory space at work in individual sectors...The boundaries which demarcate [a] regulatory space are defined...by a range of issues, so it is sensible to speak of regulatory space as encompassing a range of regulatory issues in a community’.*<sup>132</sup>

The 2015 to 2017 Fees Must Fall protests are a vivid example of physical and online spaces being occupied and unevenly distributed. These occupations and uneven distributions had legal and policy – and, I argue, regulatory – ramifications.

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<sup>131</sup> Hancher and Moran (fn 3) 271.

<sup>132</sup> Ibid 277.

Central to my application of regulatory space analysis to tuition fee decisions is that

*‘regulatory space may be furiously contested. Its occupants are involved in an often ferocious struggle for advantage’.*<sup>133</sup>

Put differently, *‘the play of power is at the centre’* of regulatory space analysis.<sup>134</sup> My thesis examines a particularly fractious period, during which furious contestation and ferocious struggles for advantage were readily apparent. This heightened and explicit conflict affected the stability (and the regularisation) of regulation, though.

More generally, the presence of furious contestation and ferocious struggles for advantage at the centre of a regulatory space calls into question the stability of that space, as well as its prospects for enduring. I use regulatory space analysis as the conceptual framework for my thesis precisely because it is built around this dilemma: that a contentious play of power can both drive and undermine regulation. I show that a contentious play of power is prominent in the regulation of tuition fee decisions. This is especially true during the perpetual disequilibrium and the interregnum, when a continual sense of crisis pervaded the regulatory space of tuition fee decisions.

Furious contestation and ferocious struggle also suggest that regulatory spaces should be treated as dynamic and evolving. This is partly because the contestations and struggles are ongoing, and partly because they are multifaceted. Three important corollaries flow from this. First, I argue that regulatory space analysis should capture

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<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

this dynamic evolution, rather than seeking to establish a static snapshot of a regulatory regime. This is particularly true for the reflexive and iterative implementation, monitoring and enforcement, and reform of regulation.

Second, regulatory spaces will have shifting boundaries. I argue that the boundaries of the regulatory space of tuition fee decisions were both permeable and variable. In particular, I argue that the regulatory space of tuition fee decisions overlapped with other, related spaces. Third, and relatedly, the occupants of a regulatory space; the positions of those occupants; and how those occupants interact; will all be subject to ongoing change. This ongoing change is inherent in, and an outcome of, the '*play of power*' at the centre of a regulatory space.

Where do these corollaries leave regulatory space analysis? I argue that it remains a very useful framing device, precisely because it provides a mechanism for mapping these dynamic interactions. But I also argue that any application of regulatory space analysis needs to include that regulatory spaces are continually subject to various multidirectional changes.

## **2. Four main features of the regulatory space**

Regulatory space analysis is therefore the optimal conceptual lens for answering the question: how did the 2015 to 2017 Fees Must Fall protests, and their settlements, re-constitute the regulatory space of tuition fee decisions by public universities in South Africa? I bolster this conclusion by turning to the four main features of regulatory space

analysis which I focus on in my thesis. First, I analyse how the boundaries of a regulatory space are drawn. This is important, because boundary delineation determines what falls inside or outside of a regulatory space. I argue that the regulatory space of tuition fee decisions overlapped with cognate regulatory, governance, and policy spaces.

Second, I look at who the *dramatis personae* in a regulatory space are. This links to who draws the boundaries of a regulatory space, and how; as well as to who participates in the '*play of power*' at the centre of a regulatory space. Third, I interrogate how the resources of wealth, organisational capacity, and authority are dispersed. Each of these are resources which occupants of a regulatory space utilise in their furious struggle for advantage. Fourth, I discuss the 'place of space': where organised interests are located in key processes. This speaks to the culture and history of a regulatory space. It also highlights the importance of physical and geographic features of a regulatory space.

## 2.1. Boundaries

The boundaries of a regulatory space are determined '*by the range of regulatory issues subject to public decision*'.<sup>135</sup> These boundaries are therefore discursively drawn, and socially constructed. Because they are discursively drawn, these boundaries are likely to be fluid. Or at least, always open to challenge. This has implications for the stability and certainty of the regulatory regime being implemented.

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<sup>135</sup> Ibid.

A spatial framing device, such as regulatory space analysis, accurately captures this fluidity. One benefit of regulatory space analysis, and the broader understanding of regulation I advocate in chapter two of my thesis, is that mechanisms and processes outside of the purely legal can have a significant bearing on a regulatory regime. Regulatory space analysis' focus on '*the range of regulatory issues subject to public decision*' allows for this wider array of factors to be included in any analysis of a regulatory regime.

This is not to say that law has no bearing. Rather,

*'law...becomes involved in the construction of spaces through which norms and a range of disciplinary practices can act'*.<sup>136</sup>

I show in chapters four to nine that the ongoing intervention by the Apartheid and then post-Apartheid states subjected higher education and tuition fee decisions to an ongoing barrage of law and policy. This barrage shaped what higher education looked like, and the processes through which decisions (including tuition fee decisions) are taken.

A spatial framing device is apt for analysing this, because

*'images of space are a valuable means of understanding the reach and thus the boundaries of legal regulation'*.<sup>137</sup>

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<sup>136</sup> Bettina Lange, 'Regulatory Spaces and Interactions: An Introduction' [2003] *Social and Legal Studies* 411, 414.

<sup>137</sup> *Ibid* 420.

I extend this to the wider conception of regulation I argued for in chapter two of my thesis. The importance of understanding this reach and these boundaries is evident from how far the Apartheid and post-1994 states shaped – and failed to shape – higher education in South Africa. I argue that the regulation of tuition fee decisions should be understood as occurring in a space subjected to continual pressures to transform.

South Africa's law and policy on higher education encapsulate the uneven fluidity which ensued. I have divided my empirical analysis into three time periods: Apartheid education (c. 1948 to 1994); the perpetual disequilibrium (1994 to October 2015); and the interregnum (October 2015 to December 2017). A further distinction could be made between the Apartheid (c. 1948 to 1994) and post-Apartheid (1994 to 2017) states. Each of these two states sought to transform South African society in fundamentally different ways.

Additional complexity arises from the fact that changes to the government's funding framework for higher education run across the time periods I divide my thesis into, and the shift from the Apartheid to the post-1994 state. From 1983 to 2003, one funding framework was implemented. This was replaced by a substantially different funding framework from 2004 and 2005 onwards.<sup>138</sup> In 2009, the South African government altered the boundaries of the regulatory space of tuition fee decisions further by splitting the Department of Education into the Department of Basic Education, and the Department of Higher Education and Training ('DHET'). Partly

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<sup>138</sup> Cf. Report of the Heher Commission (fn 29) paragraph 468.

stemming from this split, the DHET released a green paper in 2012 and a white paper in 2014. These policy documents suggest the DHET's focus shifted from higher education and training, to broader post-school education and training.

These shifts suggest continuities and potentially radical departures regarding both which regulatory issues are subject to public decision, and who is included in the 'public' making that decision. They also highlight the ongoing and important – though not exclusive – influence of law over how the boundaries of the regulatory space of tuition fee decisions were being drawn.

In determining the boundaries of the regulatory space of tuition fee decisions, I also highlight how these shifts support the conclusion that this regulatory space overlapped with connected spaces. This overlap implies that the boundaries between spaces are not just porous. Rather, they are non-exclusive: with some spaces extending into, or being subsumed within, others. An example of this is how the location of the regulatory space of tuition fee decisions evolved during the perpetual disequilibrium.

Tuition fee decisions fit within the broader space of university education. In turn, university education co-existed alongside all of the other forms of education which fell under the remit of South Africa's national Department of Education. When that Department was split in 2009, university education was shifted to the newly formed DHET; albeit as only one area overseen by the DHET. Even with this shift, university education remained connected to basic education: prospective university students first had to complete their schooling, and prospective teachers study at universities.

More generally, the regulatory space of tuition fee decisions competed with other spaces in various zero-sum-games. University education formed one of the many areas funded by the national government. In drawing up its budget, the government had to decide how much to allocate to each of the various priorities and programmes it was pursuing. Thus university education competed with funding for early childhood development (which fell under the Department of Basic Education); and with funding for Technical and Vocational Training, and Continuing Education and Training (both falling within the DHET's remit, but separate from university education). These interconnections and overlaps reinforced how the implementation and effects of regulation could '*cascade through spaces*'.<sup>139</sup>

There is the related question of whether a regulatory space is single or multi-level. Tuition fee decisions remained the prerogative of individual university councils. This could suggest that there were multiple regulatory spaces, rather than a single regulatory space; with each university council constituting a regulatory space. I argue instead for an overarching but multifaceted regulatory space. National law and policy created a single framework of overarching constraints on university councils. But how individual councils were affected by, and responded to, these constraints varied.

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<sup>139</sup> Haines (fn 14) 228 – 230.

## 2.2. Dramatis Personae

If the boundaries of a regulatory space are determined ‘*by the range of regulatory issues subject to public decision*’, who can raise what issues when those public decisions about the boundaries of a regulatory space are taken? One distinct feature of (‘*economic*’) regulation is that

*‘it is dominated by relations between large, sophisticated, and administratively complex organisations performing wide-ranging economic and social tasks. Such bodies...encompass organised interest groups [inter alia]...Understanding economic regulation...means understanding a process of intermediation and bargaining between large and powerful organisations spanning what are conventionally termed the public and private domains of decision-making’.*<sup>140</sup>

I extend this analysis from its original focus on economic regulation and ‘*the large firm*’.<sup>141</sup> I add coalitions of politically affiliated students and the internal factions of political parties to the repertoire of ‘*organised interest groups*’ which can play a significant role in a regulatory space. In addition, I analyse public universities as ‘*large, sophisticated, and administratively complex organisations performing wide-ranging economic and social tasks*’ – similar to the large, private firms which have been the focus of regulatory space analysis.

In extending regulatory space analysis from how it was originally conceived, I am both enhancing and critiquing how it might be applied. There is substantial merit in the claim that

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<sup>140</sup> Hancher and Moran (fn 3) 272.

<sup>141</sup> Ibid 274.

*‘large firms cannot be described as private “takers” of regulation...They have acquired the status of “governing institutions”’.*<sup>142</sup>

I argue that powerful organised interest groups – including coalitions of politically affiliated students – might also be ill-conceived as ‘regulation takers’. I also argue, though, that not all large organisational actors could be conceived as ‘governing institutions’, even if they exercised significant sway in a regulatory space.

Coalitions of politically affiliated students significantly altered the shape of, and dynamics within, the regulatory space of tuition fee decisions. However, they lacked the capacity (including the necessary institutionalisation) to govern this regulatory space. Similarly, university councils found their seemingly unfettered discretion over tuition fee decisions subjected to governance and regulatory constraints - especially during the interregnum.

One main challenge of analysing a regulatory regime is that

*‘organisational alliances are constantly forming and reforming...Parties bargain, co-operate, threaten, or act according to semi-articulated customary assumptions. The allocation of rules between rule makers, enforcers, and bearers of sectional interests constantly shifts’.*<sup>143</sup>

I show that these features are prevalent in the regulatory space of tuition fee decisions. Students, university managers, and the national government regularly interacted; at times, in seemingly customary manners. The process through which a university council made a fee decision could appear fairly regular and stable. Student protests

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<sup>142</sup> Ibid 275 (citation omitted).

<sup>143</sup> Ibid 276.

could even form part of this seemingly regular and stable process. Yet the continual sense of crisis during the perpetual disequilibrium, and the ingrained uncertainty during the interregnum, indicate that this seeming regularity and stability rested on a shaky foundation.

Important questions to answer when applying regulatory space analysis are ‘*who participates in and benefits from regulation*’.<sup>144</sup> While this is different from establishing whether some form of regulatory capture has occurred, it acknowledges that specific organised interests may be central to (and the largest beneficiaries of) regulation. Particularly since regulatory spaces are ‘*available for occupation [and] can be unevenly divided between actors*’.<sup>145</sup> Hence the ‘*critical question[s]*’ for regulatory space analysis to interrogate are

*‘the rules of admission [to a shared space], the relations between occupants, and the variations introduced by differences in markets and issue arenas’.*<sup>146</sup>

My thesis focuses particularly on how actors (or ‘*groups*’) and issues are organised into and out of the regulatory space of tuition fee decisions during the perpetual disequilibrium and the interregnum.<sup>147</sup>

For students, there was a perceived ‘*systematic*’ exclusion from exercising any real power over tuition fee decisions.<sup>148</sup> This exclusion could be expressed through

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<sup>144</sup> Ibid.

<sup>145</sup> Ibid 277.

<sup>146</sup> Ibid 276.

<sup>147</sup> Cf. ibid 278.

<sup>148</sup> Cf. ibid.

student representatives being repeatedly outvoted by other council members when tuition fee decisions were made. More generally, students facing exclusion from university education on financial grounds (including their inability to pay tuition fees) could experience the regulatory space of tuition fee decisions as structured in terms of a rigid hierarchy. This hierarchy placed university managers and the national government above students and their concerns – particularly in light of the inadequate funding of higher education in South Africa.

While experiencing this hierarchy and exclusion, though, students retained several means of influencing fee decisions. These included: student protests, which could target universities and the national government; and, for politically affiliated students, lobbying their parent political body (which could prove particularly effective if that parent body was the ruling party – the ANC). In addition, this contestation and lobbying could extend far beyond tuition fee decisions, even when a specific fee decision provided a coalition of students with their initial organisational impetus. This expansion of which actors and issues occupied a regulatory space (and contested that space's boundaries) is evident in the metastasising demands which came to the fore during the 2015 to 2017 Fees Must Fall protests.

Just as regulatory space analysis critiques the rigid divide between a public and private sphere which debates about regulatory capture rely on, I highlight the malleable distinction between inclusion and exclusion. In the regulatory space of tuition fee decisions, highlighting one's exclusion could be a potent mobilising force. Furthermore, inclusion and exclusion could overlap: as with students facing exclusion

from university study on financial grounds, who also affiliated with youth wings of the ruling party. Those youth wings lobbied fairly successfully for free education, and in so doing, substantially altered the nature and shape of the regulatory space of tuition fee decisions. A central argument in that lobbying was that free education would remove the threat of financial exclusion which many students and prospective students faced.

This lobbying and contestation impacted on the cognate spaces with which the regulatory space of tuition fee decisions overlapped. I show in chapter nine that the benefits which accrued to students as a result of this lobbying, came at the expense of actors and issues in cognate spaces. Moreover, both university managers and the national government responded to this lobbying; despite their seeming hierarchical power over, and ability to exclude, students from the regulatory space of tuition fee decisions.

University managers were particularly vulnerable to student protests. They had to manage those protests, while also navigating (and contesting) the government policies affecting their institutions. The national government, in turn, sought to cajole universities to fulfil the central role envisaged for them in public policy. The national government therefore sought to steer the higher education sector. However, any attempts to steer higher education were hampered by the inadequate finances provided by the national government to this sector. One reason for this financial inadequacy was that the national government had to balance steering and funding higher education with

ensuring that it responded adequately to ‘*other pressing social needs*’ (housing, water, etc.).<sup>149</sup>

### **2.2.1. Interconnections and disconnections**

The complexity of these interactions highlights the importance of tracing the interconnections and disconnections between actors and issues in a regulatory space. These interconnections and disconnections are enablers of, and detractors from, the capacity to mobilise. Mobilisation – ‘organisation’, and the resource of ‘organisational capacity’ – is central to exerting influence in a regulatory space. It is organised interests which are best able to insert themselves into key policy and regulatory processes.

This is reinforced by the necessity of organisational membership, or having some sort of ‘*organisational role*’, if one is to access a regulatory space.<sup>150</sup> Although the interactions regulatory space analysis draws attention to include those between individual people, those people are involved in those interactions primarily because of, and through, their membership of large organisations which operate in the regulatory space in question. For the regulatory space of tuition fee decisions, this is most evident in how participation was limited to those having some sort of university affiliation: as students, university managers, or individuals working for the DHET.

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<sup>149</sup> EWP 3 (fn 13) paragraph 4.3.

<sup>150</sup> Hancher and Moran (fn 3) 286.

Hence the bite of students' or prospective students' impecunity. Those unable to make the payments required, including tuition fees, could cease to be students. And, therefore, actors within this regulatory space:

*'once you're removed from the system, [for example by being forced to return home because you've been financially excluded] you really have no chance...the university's responsibility, and the government's responsibility, is not there. Because there's no students on the university premises. If there's a protest, those students will have to not be present'.<sup>151</sup>*

Organisational membership was crucial. It was also complicated. As the above quote highlights, it is only registered students who are on campus who can most forcefully contest a tuition fee decision. Yet being a registered student requires being admitted to a university: i.e. membership of the very institution whose decision is being contested. Moreover,

*'the organisations typically dominant in a regulatory space...are usually big...and are marked by the elaborate internal division of administrative labour and extended administrative hierarchies. These features impose both co-operative and conflictual elements on the practice of regulation'.<sup>152</sup>*

I show that this observation could be applied even to professedly non-hierarchical bodies such as student formations participating in the Rhodes Must Fall and Fees Must Fall protests:

*'horizontal leadership...was a tactic that was used...You have this horizontal leadership, but you always have people in the background that are pulling the strings...whenever they get shown up, they [went] back into hiding'.<sup>153</sup>*

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<sup>151</sup> Interviewee 5 (Johannesburg, 28 March 2018).

<sup>152</sup> Hancher and Moran (fn 3) 286 – 287. See also Lange and Luescher-Mamashela (fn 125) 105.

<sup>153</sup> Interviewee 60 (Oxford, 3 May 2017).

Co-operation and conflict apply both between and within the main actors in a regulatory space, with

*‘the most important parties [being] bound together in relations of exchange and interdependence. But the co-operation enforced by the division of administrative labour should not conceal the way the organisations who inhabit regulatory space are riven by competition and conflict’.*<sup>154</sup>

Factionalisation is also inherent in the large organisations which can dominate a regulatory space, and therefore find themselves *‘bound together in relations of exchange and interdependence’*. The ascendance of a faction, or attempts to achieve such ascendance, can disrupt and reconfigure a regulatory space – including by breaking some connections between actors and issues, and building others.

Another way of analysing this factionalisation is as *‘stakeholderisation’*:

*‘[while] some...[university] council members are drawn from constituencies that have...some interest in the institution [such as labour representatives, or members drawn from the Senate]...they are [in council] as individuals. They are not there on a mandate. They are not there to report back to their constituency’.*<sup>155</sup>

Stakeholderisation was a contentious feature of the regulatory space of tuition fee decisions:

*‘across the [higher education] sector, there was no shortage of political supporters or pressure groups, both within institutions and from interested components of their communities that were concerned with the immediate interests of particular institutions. External interests, organised along political, ethnic, language or even local community lines, exerted pressure through influence on governance structures’.*<sup>156</sup>

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<sup>154</sup> Hancher and Moran (fn 3) 287.

<sup>155</sup> Interviewee 12 (East London, 12 April 2018).

<sup>156</sup> Ballim (fn 60) 69 – 70.

This destabilisation of the governance of universities, including through increasing stakeholderisation inside and outside university councils, impacted on the regulatory space of tuition fee decisions. It made the play of power at the centre of this space even more virulent, with an expansive array of actors furiously contesting the nature and shape of this regulatory space.

At an extreme, the regulatory space could be subjugated to a particular faction's pursuit of advantage and empowerment. I argue in chapters eight and nine that cognate spaces were adversely affected by, but disregarded in, the lobbying for free education. There was an interplay between a coalition of politically affiliated students lobbying for free education; and President Zuma's rise to power, and subsequent announcements on and statements about free education. Lobbying by this coalition of politically affiliated students at electoral conferences held by the ANC was an essential ingredient in Jacob Zuma becoming president of the ANC; and, through that presidency, president of South Africa.

The lobbying was premised on President Zuma implementing policy to realise students' demands for free education.<sup>157</sup> President Zuma's December 2017 announcement of some form of free education was then made at another ANC electoral conference. Thus a coalition of politically affiliated students played a role in a South African president's rise to power. That president's subsequent pronouncements

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<sup>157</sup> Williams (fn 6) 73.

fundamentally reconfigured the regulatory space of tuition fee decisions, and the cognate spaces with which it overlapped.

### 2.2.2. Government failure?

Actors and issues being organised into and out of a regulatory space raises the questions of how governance of, and within, that regulatory space operates. For the regulatory space of tuition fee decisions, the absence of a single, central regulatory agency meant that governance was dispersed across several actors. The governance of this regulatory space was also shaped by the ongoing legal and policy interventions made by the Apartheid and post-1994 states in their attempts to transform South African society.

This ongoing intervention fits with how the analytical construct of a ‘regulatory space’ was originally discussed in academic literature:

*‘economic regulation under advanced capitalism – its formation as much as its implementation – invariably involves interdependence and bargaining between powerful and sophisticated actors against a background of extensive state involvement’.*<sup>158</sup>

My thesis extends this framing to socio-economic regulation, since issues around access to higher education were an inherent feature of the regulatory space of tuition fee decisions. Significant ‘*interdependence and bargaining*’ occurred between a variety of actors operating in this space: primarily, university managers, students, and the national government.

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<sup>158</sup> Hancher and Moran (fn 3) 272.

The '*background of extensive state involvement*' highlights the key role for government and governance in regulatory space analysis. One intriguing question this raises is: how should the risk of '*government failure*' feature in decisions of whether, and how, to regulate?<sup>159</sup> Some approaches to de-regulation emphasise reliance on markets to achieve regulatory objectives. One common feature of those approaches is that a prerequisite for justifying regulation is the presence or occurrence of a market failure of some kind.<sup>160</sup> This could be bolstered by a requirement that '*government failure...be disproved as well as market failure proved*'.<sup>161</sup>

This contentious requirement draws attention to the shortcomings of governments' capacity to deliver certain outcomes. It also suggests that demands for regulation need to contend with the possibility that a government's limitations and mistakes militate against that same government seeking to achieve particular outcomes through legislation or regulation. This is because government failure could make the harm to be remedied worse, not better; or could create further harms.

Although this line of reasoning has been critiqued in academic literature, the possibility of government failure bears some scrutiny. I say this because government failure was foundational to the issues which ignited the 2015 to 2017 Fees Must Fall protests. This may seem surprising, given that many protestors railed against the

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<sup>159</sup> Lange (fn 136) 417.

<sup>160</sup> Cf. Brownen Morgan, 'The Economization of politics: meta-regulation as a form of non-judicial legality' [2003] *Social and Legal Studies* 489, 505.

<sup>161</sup> *Ibid.*

commodification of higher education in South Africa – especially the notion that the market could or should regulate access to higher education. Tuition fee decisions were, on this reading, seen as one of several market mechanisms operating in higher education.

I show, though, that the perpetual disequilibrium was characterised by a persistent disconnect between the national government's attempted steering and planning of higher education, and the adequacy of the resources the national government provided to higher education to achieve the outcomes sought. More generally, I argue that the uncertainty, instability, and continual sense of crisis of the perpetual disequilibrium arose from repeated, far-reaching policy changes: changes which, towards the end of the perpetual disequilibrium, increasingly took place following protest-driven social activism by students. Ongoing failures of state planning were therefore an important reason for the crisis and instability of this regulatory space.

The disconnect between what the national government demanded through its legal and policy interventions, and the concomitant incapacitation of the institutions central to meeting these demands, is striking for two reasons. First, one dimension of the 2015 to 2017 Fees Must Fall protests was a call for further state intervention in higher education. This included providing more funding. And, pertinent to my thesis, it encompassed increased state intervention in tuition fee decisions (and institutional autonomy, more generally). Some of those making this call demonised markets,

capitalism, and neoliberalism.<sup>162</sup> Yet government failure had also been a key ingredient in the deleterious circumstances students railed against.

Second, public policy documents published by the national government explicitly acknowledged the ‘*harsh penalties*’ which would follow ‘*rapid enrolment growth without extra expenditure*’.<sup>163</sup> Such penalties would fall especially on poorer students. The (forewarned) failure of a specific actor, the national government, therefore influenced the nature and shape of the regulatory space of tuition fee decisions.

### **2.3. Dispersal of resources**

In addition to the actors and issues being organised into and out of a regulatory space, that space’s shape is influenced by the resources available to those actors; especially how those resources are accessed and utilised. Thus

*‘any investigation of the concept [‘regulatory space’] involves examining the outcomes of competitive struggles, the resources used in those struggles, and the distribution of those resources between the different involved institutions’.*<sup>164</sup>

My thesis extends this investigation to large actors, including coalitions or networks of actors, even though these groupings may lack formal institutional status.

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<sup>162</sup> See e.g. fns 793 - 795.

<sup>163</sup> EWP 3 (fn 13) paragraph 4.4.

<sup>164</sup> Hancher and Moran (fn 3) 277.

Another reason for interrogating the distribution of resources in a regulatory space is that

*‘regulation as an activity...has to be organised. Without appropriate institutional arrangements implementation simply does not take place. The act of organisation in turn demands resources: the knowledge to create or to copy regulatory institutions; the money and people to run those institutions; the expertise to devise rules, and to monitor and police their enforcement’.*<sup>165</sup>

Certain resources and capacities are therefore central to the implementation (and contestation) of a regulatory regime.

Regulatory space analysis typically focuses on four resources:

*‘the chief idea of the regulatory space metaphor is that resources relevant to [the] holding of regulatory power and exercising of capacities are dispersed or fragmented. These resources are not restricted to formal, state authority derived from legislation or contracts, but also include information, wealth, and organisational capacities’.*<sup>166</sup>

Organising, and ‘*organisational capacities*’, are especially important, since

*‘organisational status is...the most important condition governing access to regulatory space. Private individuals who do not perform organisational roles, or who are not bearers of organisational interests, enjoy limited and usually temporary success in any attempt to intervene’.*<sup>167</sup>

I critique and build on how the resources of wealth, organisational capacity, and authority are understood. Information – including monitoring and reporting – was an

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<sup>165</sup> Ibid 284.

<sup>166</sup> Scott (fn 10) 330.

<sup>167</sup> Hancher and Moran (fn 3) 286.

important resource in the regulatory space of tuition fee decisions, too. Access to it was uneven and contentious:

*‘these processes could’ve have happened a lot earlier, had we had that information and were the university transparent. I often think that Fees Must Fall was in many ways a creation of; not just student frustration; but the fact that the university refused to deal with the [Student Representative Council (‘SRC’)] respectfully. And treated us in a very paternalistic way’.*<sup>168</sup>

Most pertinent to my thesis, though, are the resources of wealth, organisational capacity, and authority. Information tended to be connected to these resources, as is borne out by the further observation that

*‘it’s true: in real terms, the contribution of the government has not been sufficient. In terms of how little they’ve...been increasing the money that they give to universities. It’s actually been decreasing, in real terms...we understood all those arguments. But what we wanted from them was that they stand with us and demand that the government deal with this issue on a national level’.*<sup>169</sup>

Below I set out how I build on and critique how wealth, organisational capacity, and authority are understood in regulatory space analysis.

### 2.3.1. Wealth

The resource of wealth includes ‘*the money*’ and the ‘*“treasure”*’ needed to implement and contest regulation.<sup>170</sup> I build on this understanding of wealth in two ways. First, I argue that financial means are an important component of the resource of wealth. Second, I highlight the intimate links which can be drawn between wealth and

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<sup>168</sup> Interviewee 5.

<sup>169</sup> Ibid.

<sup>170</sup> Hancher and Moran (fn 3) 284; Scott (fn 10) 334.

budgeting. Together, my additions to how the resource of wealth should be understood in regulatory space analysis bring to the fore the tension between the paradigms of social activism and responsible budgeting.

Including financial means as part of the resource of wealth extends the scope of wealth from money or treasure currently on hand, to possible funding and financing arrangements. The latter encompass an actor's access to funds in the future, and their ability to borrow funds currently. In addition, financial means refers to access to a fungible resource. One implication of this fungibility is that the resource of wealth can flow into and out of connected spaces. Following president Zuma's announcements in October 2015 and December 2017; and the MHET's announcement in September 2016; wealth flowed into the regulatory space of tuition fee decisions (and to the benefit of particular actors within that space), from cognate spaces.

Compiling and implementing a budget is one way of prioritising and tracking these flows of funds. Budget-like considerations can be criticised for similar reasons to those offered against embedding pro-competition considerations in regulatory decision making.<sup>171</sup> This would include objecting to a technocratic understanding of financial means unduly constraining which social policies or objectives are deemed feasible. However, budgeting can also be a mechanism by which difficult trade-offs are made explicit (and perhaps ideally, made explicitly). The necessity of transparently and explicitly navigating these trade-offs arises partly from the fact that '*economic*

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<sup>171</sup> Cf. Morgan (fn 160).

*conditions*' (as well as '*other external factors*') might '*impinge on [a] regulatory space*'.<sup>172</sup>

More technocratic considerations can, then, be a counterpoint to the vociferous advocacy engaged in by specific organised interests in a regulatory space. Put differently, it can be just as dangerous for the political or social to override and silence the technical; as it can be for the technical to silence or displace the political or social. For the latter, some values and ideals (*'need, vulnerability, harm'*) cannot be fully or readily translated into more technocratic (and pro-market) language (*'market failure', 'government failure'*).<sup>173</sup> My analysis of social activism cannibalising responsible budgeting highlights the similar danger of important *'trade-offs'* not featuring in the *'moral logic'* presented by certain organised interest groups in the regulatory space of tuition fee decisions.<sup>174</sup> Implementing policy and regulation to meet the demands made by these organised interests necessarily meant prioritising one side of the ensuing trade-offs over another; thereby organising actors, issues, and wealth out of cognate spaces, and into the regulatory space of tuition fee decisions.

### **2.3.2. Organisational Capacity**

The resource of organisational capacity has typically been understood as encapsulating the unique role large organisations play in the implementation and contestation of

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<sup>172</sup> Scott (fn 10) 339.

<sup>173</sup> Morgan (fn 160) 505 and 509.

<sup>174</sup> Interviewee 27 (Cape Town, 10 May 2018).

regulation. It is through their role in, or membership of, large organisations that individuals access a regulatory space.<sup>175</sup> Furthermore,

*‘economic regulation...is dominated by relations between large, sophisticated and administratively complex organisations performing wide-ranging economic and social tasks’.*<sup>176</sup>

The centrality of ‘*organisational status*’ to regulatory space analysis stems partly from ‘*an elementary characteristic of regulation as an activity: it has to be organised*’.<sup>177</sup>

Moreover,

*‘economic regulation...is largely transacted through big organisations...control of the means of organisation [- including potentially ‘self-sustaining’ or ‘institutionalised’ ‘patterns of organisation’ -] is itself a major resource’.*<sup>178</sup>

Large organisations therefore have an enhanced capacity to shape what regulation is implemented, and how. This can include the elevated role large organisations’ standard operating procedures may come to play in a regulatory space - potentially stretching as far as ‘*delimiting beliefs about what is thinkable or possible*’.<sup>179</sup>

I have previously critiqued and built on this account of the resource of organisational capacity. Regulatory space analysis focuses on how the nature and shape of a regulatory space is affected by the shifting ‘*patterns of power brokerage*’ within

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<sup>175</sup> Hancher and Moran (fn 3) 284.

<sup>176</sup> Ibid 272.

<sup>177</sup> Ibid 284 and 286.

<sup>178</sup> Ibid 290.

<sup>179</sup> Scott (fn 10) 333.

it.<sup>180</sup> Although organisational status and organisational capacity may be key components of regulatory space analysis, treating them as a resource is problematic. This is because control and possession of resources ‘give [actors] *some degree of power*’.<sup>181</sup> Moreover, ‘*organisational resources*’ extend to

*‘marketing, lobbying and professional advice [, the possession of which] may permit actors to dominate rule-formation, rule-enforcement, or processes by which sanctions are applied’.*<sup>182</sup>

Resources could also be interconnected, with possession of some resources facilitating access to others.<sup>183</sup> I have previously argued that relationships between actors should be considered as resource, partly because of the importance of these interconnections. Rather than being ‘*contingent on...control of resources*’, fostering relationships can play a significant role in how the nature and shape of a regulatory space evolves; given ‘*how affinity, and network and community membership, structure regulatory spaces*’.<sup>184</sup>

The importance and utility of relationships is reinforced by the dispersal of (other) resources, and of regulatory functions, within a regulatory space. Standard-setting, interpretation and monitoring; and enforcement in cases of non-compliance; are

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<sup>180</sup> Hancher and Moran (fn 3) 297.

<sup>181</sup> Scott (fn 10) 334.

<sup>182</sup> Ibid 337.

<sup>183</sup> Ibid.

<sup>184</sup> Chowdhury and Wessel (fn 93) 335, 348; Williams (fn 6) 30.

*‘more likely to form the subject-matter of an interpretive community more widely dispersed within the regulatory space’*

than to be driven by a single actor.<sup>185</sup> By expanding an actor’s organisational roles and memberships, relationships can potentially increase an actor’s access to, and status in, a regulatory space. Similarly,

*‘norm production may be dispersed across several fora.<sup>186</sup> This does not belie unity within a regulatory space. Such unity could emerge from an overarching, dominant discourse: as social justice discourses predominate South African public policy discussions. Unity of purpose may also emerge from the cross-cutting affiliations of a variety of actors’.*<sup>187</sup>

Alongside looking at relationships between actors, relationships within organisations should also be analysed. Intra-organisational bargaining and negotiation can be just as important – and furiously contested – as inter-organisational interactions:

*‘the internal political character of individual firms, though little investigated, is...a crucial variable’.*<sup>188</sup>

Another reason the internal dynamics of large organisational actors is significant is that

*‘regulators often make use of the resources of those they regulate to secure compliance. Formal mechanisms include the creation of mandatory compliance teams within firms’.*<sup>189</sup>

For example, the *‘negotiated self-regulation’* of universities during the perpetual disequilibrium included ongoing reporting by universities to government; as well as

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<sup>185</sup> Chowdhury and Wessel (fn 93) 341.

<sup>186</sup> Ibid 349 – 350.

<sup>187</sup> Williams (fn 6) 30.

<sup>188</sup> Hancher and Moran (fn 3) 289.

<sup>189</sup> Scott (fn 10) 345.

legislative requirements that universities establish specific internal governance structures.<sup>190</sup>

Cumulatively, relationships and the interdependencies which they necessitate suggest that the scope of large organisation's standard operating procedures could be both far-reaching and fragile. Even large organisations in a regulatory space have to navigate negotiated interdependence, and are subject to multiple (potentially competing) legal and policy demands. These constraints are overlaid with the jockeying between organised interests: in the regulatory space, and within large organisations.

The 2015 to 2017 Fees Must Fall protests provide valuable insights into how large organisations may be significantly constrained by having to navigate these internal and external milieus. University managers faced rapidly increasing administrative complexity as their institutions were disrupted by protests and the attempts to settle those protests. These disruptions had numerous ramifications, particularly for an institution's standard operating procedures.

This was aptly captured by two interviewees:

*'there was a code that applied in the past. That code has...been fundamentally shaken...because [it] was based on a set of circumstances...that are very different to the circumstances...prevail[ing] now';<sup>191</sup>*

and

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<sup>190</sup> Ballim et al (fn 60) 79 – 80.

<sup>191</sup> Interviewee 19 (Cape Town, 23 April 2018).

*‘there’s been a lot more concessions to our rules than what used to be [the case] say five, ten years ago...lots of that at a very basic level...it has meant an enormous administrative load on our administrative staff. Because a lot of the information, a lot of the processes have had to be manual work-arounds’.*<sup>192</sup>

Some of these changes affected tuition fee decisions and the processes associated with such decisions. Others, though, could be far-reaching and dispersed – especially given the metastasising demands which came to the fore during the protests.

### **2.3.3. Authority**

The resource of authority is central to both rule or standard formulation and monitoring, and to enforcement and compliance. Narrowly, it could be defined as the entitlement both to perform certain conduct, and to require certain conduct of others. This narrow definition links the resource of authority to the shifting *‘patterns of power brokerage’* within a regulatory space.<sup>193</sup> More broadly, authority extends to legitimacy, accountability, and transparency. Acting legitimately, accountably, and transparently might frequently be prerequisites for exercising authority. Furthermore, having or lacking (or being perceived to have or lack) authority might affect whether an actor’s conduct is seen as legitimate. Similarly, authority can be tied to the audience(s) to whom an actor is accountable, and who might expect or demand transparency from an actor.

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<sup>192</sup> Interviewee 1 (Johannesburg, 12 March 2018).

<sup>193</sup> Hancher and Moran (fn 3) 297.

The 2015 to 2017 Fees Must Fall protests arose partly in response to tuition fee decisions being seen as being imposed without adequate regard for their effect on students. This included different views on what was possible or achievable:

*‘Mr Chikane elucidated in an interview: “...the feasibility proposed by vice chancellors and the university, isn’t the same as the most feasible option available”’*.<sup>194</sup>

Yet as I show in chapters eight and nine, the attempted settlements to these protests contained their own inadequacies regarding legitimacy, accountability, and transparency.

The resource of authority in a regulatory space is dispersed, and it is only one of several important resources. It is *‘not restricted to formal, state authority derived from legislation or contracts’*.<sup>195</sup> Furthermore, it is *‘multiple rather than bilateral’*.<sup>196</sup> This has several implications for how the resource of authority is dispersed and utilised. First, the dispersal of this resource necessitates negotiated interdependence between actors in a regulatory space.<sup>197</sup> Second, and relatedly, such dispersal renders regulation through direct command and control impossible; while also undermining the credibility of threats to escalate sanctions for non-compliance.<sup>198</sup>

One reading is that

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<sup>194</sup> Williams (fn 6) 67.

<sup>195</sup> See fn 166.

<sup>196</sup> Scott (fn 10) 335.

<sup>197</sup> Ibid 337.

<sup>198</sup> Ibid 337 and 346.

*‘the concept of regulatory space “decentres the state as a source of regulation and points to the role that can be played by a whole host of regulatory schemes” ’.*<sup>199</sup>

My analysis of the 2015 to 2017 Fees Must Fall protests, though, shows that different organised interests may lobby for the state to be brought closer to the centre of a regulatory space: through, for example, providing free (or fee-free) university education. Similarly, the shifting targets of these protests – from managers at particular universities, to the MHET and South Africa’s parliament – suggest competing challenges being made of different authority figures.

Moreover, those challenged might have limited capacity to meet the demands being made on them. For example, the demand for free, decolonised, quality education was made to university managers; to the MHET; to president Zuma; and to candidates contesting senior leadership roles within the ANC at its electoral conferences. The shifting demands made to an array of authority figures; and the contestation of these figures’ authority; reinforces the conclusion that *‘regulatory concerns are likely to be diluted by other objectives’* when actors deploy their resources – even if those actors are located within the state.<sup>200</sup>

I build on this breadth and dispersal of resources, including authority, by showing in chapter eight that significant changes in who has what authority can take place without any formal changes being made to prevailing laws and policies. The most notable instance of this realignment of authority is president Zuma’s October 2015

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<sup>199</sup> Ibid 347.

<sup>200</sup> Ibid 335 – 336.

overruling of tuition fee decisions made earlier that year by university councils. Similarly, the MHET's September 2016 announcement, and Universities South Africa's ('USAF's') engagement with the MHET in 2017, appeared to result in tuition fee decisions being taken outside of university councils. Yet throughout, university councils' prerogative to make tuition fee decisions remained formally unfettered by law or policy.

My thesis also explores how the growing authority and organisational capacity of protesting students could alter law in practice, without any formal change in the law occurring. There were two significant levels to this. First, protesting students were fairly successful in elevating access to higher education and training generally, and to university education specifically, to the status of a constitutionally enshrined right. This was despite the fact that *'the expression "higher education and training" [does] not [appear] in [South Africa's] Constitution'*.<sup>201</sup>

Second, I analyse in chapters eight and nine how the realignments and redistributions initiated by the attempted settlements of the Fees Must Fall protests prioritised this new 'right' to higher education and training over the established (and fundamental and universal) right to basic education, including adult basic education. Again, this prioritisation occurred without any formal change in law; and without South Africa's constitution being amended.

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<sup>201</sup> Report of the Heher Commission (fn 29) paragraph 42.

## 2.4. The ‘place of space’

Lastly, analysing a regulatory space requires paying careful attention to the location of organised interests in the regulatory and policy process:

*‘questions about who participates in and benefits from regulation are certainly important: explaining the complex and shifting relationships between and within organisations at the heart of economic regulation is the key to understanding the nature of the activity’.*<sup>202</sup>

This is reinforced by how participating in and benefiting from regulation can be institutionalised; particularly since regulatory spaces are accessed through actors’ memberships of and roles in large organisations.

The institutionalisation of participation and benefit can be fruitfully explored in spatial terms. Systematic exclusions can arise from the ‘*routinised character*’ of ‘*organisational life*’. Thus

*‘understanding who is in, and who is out, is...particularly vital, and depends crucially on analysing the customary patterns of organisational relationships in any particular regulatory space’.*<sup>203</sup>

Different national settings will mean different political, legal, and cultural attributes and traditions shaping which organised interests are found where in a regulatory space.<sup>204</sup>

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<sup>202</sup> Hancher and Moran (fn 3) 276.

<sup>203</sup> Ibid 277.

<sup>204</sup> Ibid 277 and 279 to 280.

Culture, in particular, can impact on the shape and occupants of a regulatory space. Furthermore, it can change over time:<sup>205</sup>

*‘different national traditions...allow access to regulatory space to different constellations of actors. The differences are summed up in the importance given to concepts of legal and political culture [which] are at the very least important in mediating the influence of historical experiences’.*<sup>206</sup>

I analyse how the past can enliven a regulatory space’s present. One way this occurs is through actors in the present invoking particular histories: for instance, how

*‘the track record of [public university’s] funding [post-1994] is littered with deficiencies and resistance and struggle’.*<sup>207</sup>

One central aspect of the *‘resistance and struggle’* was resort to disruptive protests, particularly by students facing exclusion from university education. Another way the past can enliven the present is through appeals by certain actors to key historical documents (e.g. the 1955 Freedom Charter).

In addition, *‘culturally formed assumptions about the purpose and role of law are particularly significant’.*<sup>208</sup> The link between culture and law is important, because of the role law can play in constructing spaces. Because regulatory spaces are socially constructed, they will often be underpinned by cultural assumptions.<sup>209</sup> Moreover,

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<sup>205</sup> Ibid 283.

<sup>206</sup> Ibid 280.

<sup>207</sup> Interviewee 33 (Johannesburg, 18 May 2018).

<sup>208</sup> Hancher and Moran (fn 3) 280.

<sup>209</sup> Lange (fn 136) 414 – 415.

regulatory spaces may be multi-scalar and multi-sited – especially where the implementation of regulation cascades through spaces.<sup>210</sup>

I explore the place of organised interest in key policy processes as part of my emphasis on the dynamic nature of regulatory spaces. Rather than providing a static snapshot of a regulatory regime, I argue that regulatory space analysis can be used to interrogate how the formulation, monitoring, and enforcement of rules and standards evolves. One way I capture this evolution is through tracing the continuities and disconnections in the regulatory space of tuition fee decisions from Apartheid education, to the perpetual disequilibrium, and into the interregnum.

A further reason for applying regulatory space analysis dynamically is that spaces can be stretched by and through time. Put differently, time and space can be subjected to both ‘*distantiation*’ and compression:

*‘in time-space distantiation social relations are stretched over time and space. They are...abstracted...and disembedded from local definitions of time and place...This can increase opportunities for the control of social relations over longer time spans and across a broader range of localities...Time-space compression is the intensification of specific events in real time. It...involves a quicker flow of events over distances’.*<sup>211</sup>

My thesis applies this to regulatory space analysis by developing an understanding of how the regulatory space of tuition fee decisions overlapped with

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<sup>210</sup> Ibid. See also fn 139.

<sup>211</sup> Lange (fn 136) 415.

cognate spaces. I analyse how a continual sense of crisis – especially during the perpetual disequilibrium – affected the nature and shape of this regulatory space; including through an ‘*intensification of specific events in real time*’. The 2015 to 2017 Fees Must Fall protests, and attempts to settle them, provide several examples of regulations and regulatory effects cascading through multiple sites. One manifestation of this was

*‘the “expansion of time and space” resulting from “something happening at the same time with agreed demands [being presented] in completely different places’.*<sup>212</sup>

Analysing the place of space also means paying attention to physical and geographic features of a regulatory space. This extends beyond investigating which organised interests play what role, where, in key interactions. I argue that it means considering the sites in which events and processes unfold. One aspect of how the regulatory space of tuition fee decisions overlapped with other spaces was the way in which historical features continued to manifest physically in, and shape, the current regulatory space.

These manifestations generated unequally distributed constraints which different universities had to navigate when making tuition fee decisions. For instance:

*‘many universities in large rural areas drew students from the immediate surrounds and had significant proportions of students who struggled to pay fees, with serious impacts on budgets. This was compounded by the apartheid legacy as many of these rural institutions were also historically disadvantaged. This...led to the circular problem of constrained budgets not allowing for the developments necessary for improved quality of teaching, learning and research,*

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<sup>212</sup> Williams (fn 6) 69.

*thus compromising universities' ability to attract the most academically prepared students in their regions'.<sup>213</sup>*

The profile of a universities' students affected whether, and what level of, tuition fees could and would be paid. Similarly, students' academic preparedness had a bearing on how far they were likely to progress with their studies; especially whether they would ultimately graduate.

Attempts to address these ongoing manifestations of historical features of this regulatory space could prove contentious. They further fragmented the dispersal of resources by increasing the range of interventions over which these limited resources were to be deployed. For instance,

*'as an important deviation from international higher education quality assessment practice, the [Council on Higher Education] included staff and student transformation as part of the quality assessment criteria and institutions were required to assess themselves against this aspect of institutional development'.<sup>214</sup>*

Universities were required to report regularly on their efforts on this score as part of the quality assurances procedures they were expected to comply with. However, the Council on Higher Education was not the only body overseeing the drive to transform universities' staff and students.

Complying with these transformational programmes sapped resources and capacity away from actors who were already having difficulty in meeting narrower objectives. University managers, for example, had limited capacity and resources to

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<sup>213</sup> Ballim et al (fn 60) 69.

<sup>214</sup> Ibid 94.

meet the demands placed on their institutions. Adding to the list of demands they were expected to meet meant spreading these capacities and resources more thinly. The net result could be a degenerating cycle fuelling a continual sense of crisis. When some demands were not met, partly because of capacity and resource constraints, disruptive protests could ensue; potentially alongside calls for further interventions (from e.g. the national government). These protests and interventions would then increase the demands being placed on an institution, and on the government attempting to intervene.

Several forms of government and governance failure could emerge from this, further destabilising the regulatory space of tuition fee decisions. Two examples are that

*‘the amendments to the Higher Education Act (2012) were written in such a way that they appeared to give the [MHET] the power to intervene in institutions that are considered to be dysfunctional on grounds that appeared to be too open-ended. The appointment of a Ministerial Transformation Oversight Committee in response to the apparently slow transformation of higher education institutions elicited similar concerns from the higher education sector. Such developments suggest an over-reliance by the government on regulation which applies across the board as the main vehicle for dealing with particular challenges in higher education in South Africa’.*<sup>215</sup>

Another way of describing the contestation around these interventions is as a clash between different legal and political traditions and cultures. I use paradigms – especially the cannibalisation of responsible budgeting by social activism - to analyse this clash.

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<sup>215</sup> Ibid 97.

A further indication of the importance of the place of space is the shifting targets and locations of disruptive protests, and the sites in which attempts were made to resolve the issues driving these protests. The 2015 to 2017 Fees Must Fall protests saw a notable shift in the locale of disruptive student protests:

*‘what distinguished the 2015 protests from those experienced periodically over the decade before, was that the hub of these protests was at the historically-white universities. The majority of the protests experienced since 2000 were focused at the historically-black universities’.*<sup>216</sup>

This highlights the uneven distribution of power, capacity, and resources in the regulatory space of tuition fee decisions: particularly regarding which student protests garnered what level of profile and attention, and what kind of response (e.g. highly local versus national).

Furthermore, the protests cascaded through various sites as they progressed, with an increasing range of actors and issues being organised into and out of spaces. These spaces varied: from university campuses, including the central administrative buildings which typically housed senior university managers; to the Johannesburg headquarters of the ANC; to South Africa’s national parliament, and the Union Buildings.

The final implication of the place of space relevant to my thesis is that it limits the generalisability of my analysis and findings. I argue that the regulatory space of tuition fee decisions was a single, multifaceted space. Tuition fee decisions were made

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<sup>216</sup> Report of the Heher Commission (fn 29) paragraph 1.

by individual university councils exercising a seemingly unfettered discretion. I argue, though, that all universities were brought into a single, common space by overarching higher education law and policy. Albeit that different university councils experienced these overarching constraints (and other fetters) differently. Similarly, university managers, students, and the national government occupied a common (if sprawling) arena. They were also differently affected, though, by the challenges and opportunities available in this arena. Especially as the play of power at its centre became increasingly virulent, and an expanding array of actors and issues were organised into and out of this regulatory space.

## **Conclusion**

In this chapter, I argued that a re-envisioned version of regulatory space analysis is an apt mechanism for unpicking the delicate calibrations which regulate tuition fee decisions. I advanced two primary reasons to support my argument. First, regulatory space analysis incorporates a broad understanding of what constitutes ‘regulation’, in line with what I argued in chapter two of my thesis. Second, it facilitates holistic mapping and critiquing of regulatory regimes. Regulatory space analysis achieves this partly through focusing on the multiple interactions between various actors which are central to the formulation and monitoring of rules and standards, and to enforcing compliance.

My re-envisioning of regulatory space analysis builds on and critiques how this analytical framing device has been developed in academic literature. I emphasise the necessity of applying regulatory space analysis dynamically rather than statically. My

account refines how the boundaries of regulatory spaces are drawn. I argue that the regulatory space of tuition fee decisions had porous boundaries, and that it overlapped with cognate spaces. In addition, I enhance traditional accounts of the dramatis personae occupying, and resources available in, a regulatory space: by expanding the range of actors who should be considered as occupants of a regulatory space; by highlighting the value of looking at interactions within large organisations, as well as between them; and by critically analysing what constitute ‘resources’ in a regulatory space. My account closes with an emphasis on the importance of the place of space – the need to investigate which organised interests are located where in key interactions, and the physical and geographic features of a regulatory space.

Having completed the outline of the key concepts and framework pertinent to my thesis, I turn in the remainder of my thesis to applying my re-envisioned regulatory space analysis to my empirical data. In chapter four, I flesh out the regulatory space of tuition fee decisions during education Apartheid. This is followed by a similar interrogation in chapters five to seven of that regulatory space during the perpetual disequilibrium. Chapters eight and nine round out my empirical analysis by exploring the reconfiguration of this regulatory space during the interregnum.

## CHAPTER 4

### **The evolving space in which South African university councils' exercised their prerogative over tuition fees**

*'History, Stephen said, is a nightmare from which I am trying to awake.'*<sup>217</sup>

Chapter two reviewed different understandings of regulation, while chapter three argued for conceptual modifications to how regulatory space analysis has been applied. The modified version of regulatory space analysis will be applied to answer my research question: how did the 2015 to 2017 Fees Must Fall protests, and their settlements, re-constitute the regulatory space of tuition fee decisions by public universities in South Africa? I divide this question into three time periods. I analyse the period c. 1948 to c. 2015 in this chapter. For chapters five to seven, I focus on the fragile calibrations which emerged between c. 1994 to 2015. In chapters eight and nine, I discuss the *interregnum* which followed the disruption of these calibrations between October 2015 and December 2017.

More specifically, this chapter and chapters five to seven will focus on a set of sub-questions which help to unpick the calibrations regulating how tuition fee decisions were made at public universities in South Africa prior to 2015. These sub-questions are: who made decisions about tuition fees at public universities in South Africa prior to 2015; and which key interactions between individuals and organisations shaped how those decisions were made? Answering these sub-questions will enable me to solve a

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<sup>217</sup> James Joyce, *Ulysses*.

puzzle. While a rich tapestry of law and policy regulates (and has regulated) higher education in South Africa,

*‘South African universities...have enjoyed administrative autonomy at a level that European universities find surprising’.*<sup>218</sup>

This autonomy extends to South African universities’ *‘unfettered right to set [their] own fees’* – a right which appears to be *‘unfettered at law, unfettered at policy’*.<sup>219</sup> This is puzzling because of the strictures universities faced under education Apartheid, and the substantial policy changes to which higher education in South Africa has been subjected.

I argue that despite the absence of direct or explicit legal or policy fetters, tuition fee decisions were regulated prior to, during, and after the 2015 to 2017 Fees Must Fall protests. As part of this argument, this chapter will explore the general regulatory constraints on tuition fee decisions which arose from changes in the dispersal of the resources of authority, organisational capacity, and wealth. Information resources were mostly subsidiary to the resources of organisational capacity, wealth, and authority; with greater reliance placed on, and more to be gained from, possession of the latter three resources.

South African university councils are vested with the authority to make university fee decisions. A primary driver of the regulatory constraints that university councils faced was an interventionist state: first under Apartheid, and then post-1994.

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<sup>218</sup> Interviewee 17 (Cape Town, 19 April 2018).

<sup>219</sup> Ibid.

Both states sought to transform South African society, with varying support or opposition from different higher education institutions. A key feature of these transformations was that they were spatial. Fundamental to the Apartheid and post-1994 states' aspirations for South African society were geographic contours determining who could access which goods and services, where. The interventionist states pursuing these transformations also brought to the fore a series of political and economic constraints on tuition fee decisions. These attempted transformations organised actors and issues into and out of the regulatory space of tuition fee decisions, altering its dramatis personae. Moreover, the transformations changed the boundaries of this regulatory space, particularly by shifting which spaces it overlapped with.

This chapter will focus on how university councils' prerogative over tuition fee decisions evolved through these societal transformations, and how it was affected by the shifting economic and political constraints with which universities were confronted. Together with chapters five to seven, this chapter will tease out general and then more specific facets of the *'play of power'* at the centre of the regulatory space of tuition fee decisions.<sup>220</sup> The move from more general observations in this chapter, to specific analysis in subsequent chapters, is partly inspired by regulatory space analysis' emphasis that

*'place matters': '[p]olitical traditions and legal culture are important to the "place" of organised interests in the policy process'.*<sup>221</sup>

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<sup>220</sup> Hancher and Moran (fn 3) 277 – 278.

<sup>221</sup> Williams (fn 6) 33; citing Hancher and Moran (fn 3) 279.

The societal transformations pursued by the Apartheid and then the post-1994 state highlight the need to treat ‘space’ and the ‘place of space’ in regulatory space analysis as changing over time. This is because these transformations sought to alter fundamentally all facets of the ‘space’ South Africa was in; especially South Africa’s ‘*political traditions and legal culture*’. This encompassed, and had specific effects within, the regulatory space of tuition fee decisions.

This chapter will provide historical context to the regulatory space of tuition fee decisions at public universities in South Africa. I focus on how ongoing state involvement shaped what higher education was; how funding for it was disbursed; and which organisations could provide education, and to whom. Two core claims will be developed: that the societal transformation pursued by the Apartheid and post-1994 states entailed multiple, potentially ongoing policy changes; and that they manifested in the evolution of distinct paradigms.

In the first section of this chapter, I use the concept of ‘paradigms’ to unpack the societal transformation pursued by the Apartheid and post-1994 states. I explore the central paradigms adopted by the Apartheid and post-1994 states, and discuss tensions inherent in these central paradigms. These paradigms matter, because they have an impact on the dispersal of resources in a regulatory space and on how actors interact in that space.

The second section will set out how an interventionist state drove substantial policy changes, both under Apartheid and post-1994. These changes reconfigured the

regulatory space of tuition fee decisions. I address the special role the post-1994 state assigned to higher education, and how institutions were reconfigured. In addition, I interrogate the role paradigms played in this regulatory space. This included universities being enrolled by the state as exemplars and proponents of the state's central paradigm.

## **1. Transformative Paradigms**

State-driven transformation of society seeks to supplant old regulatory and governance spaces with new ones, over time, by progressing towards an aspirational future. The main tenets of this future might be set out in key legal and policy documents. Although the vision is of a trajectory through time towards distinct regulatory and governance spaces, both the process of transitioning and the end result are heterogenous. This is because societal transformation entails multiple policy changes and trajectories. It is also because newer spaces might not fully supersede older ones; with historical reference points, or modes of engagement reminiscent of prior interactions, persisting. I argue that rather than indicating path dependence, these are instances where the past enlivens and shapes the present - albeit in varied and contingent, rather than linear and deterministic, ways.

Paradigms are a central feature of the societal transformation pursued by the Apartheid and post-1994 states, and a useful tool for exploring transformative policy visions. I argue that paradigms are created and adopted by specific actors. This section will outline the central paradigms adopted by the Apartheid and post-1994 states, as evidenced by key legal and policy documents. Next, I discuss tensions inherent in the

paradigm adopted by the post-1994 state. This section will conclude with an analysis of the impact paradigms can have on the dispersal of resources in a regulatory space.

## **1.1. Central Paradigms**

The South African state was an originator and advocate of specific paradigms. The Apartheid state sought to implement a paradigm of separateness; while the post-1994 state adopted a paradigm of society as unitary, egalitarian, and democratic.

### **1.1.1. Separateness**

The Apartheid state's paradigm entailed separating society along racial and ethnic lines – a separation which had a spatial and an organisational component. Crudely, different races and ethnicities were to be kept apart as far as possible; with strict, legally-mandated racial segregation in common spaces. Apartheid, and later the government policy of Separate Development, also sought to impose different governance structures on different races and ethnicities.

The transformational goal was to split society up. Ten ethnically delineated homelands (also referred to as Bantustans) were established for black South Africans. Four of those homelands were proclaimed independent states by the Apartheid government: Transkei (1976), Bophuthatswana (1977), Venda (1979), and Ciskei

(1981).<sup>222</sup> This sought to turn the landmass of South Africa into 11 entities, comprised of five ‘states’ (the Republic of South Africa and the four independent homelands).

By fiat, black South Africans were denied citizenship outside of their homelands. Under the 1984 tricameral constitution, Indian and coloured (mixed-race) South Africans were given representation in separate houses of parliament (the Houses of Delegates and Representatives respectively) within the Republic of South Africa; while white South Africans were represented in the House of Assembly.<sup>223</sup>

For higher education, the net effect was that the 36 public higher education institutions fell under eight different government authorities.<sup>224</sup> These distinctions are summarised in Figure 7. While all public higher education institutions may have had the same surprisingly unfettered institutional autonomy, particularly regarding the prerogative to determine tuition fees, they operated against this rigidly constraining backdrop of state-driven separation on the basis of race and ethnicity.

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<sup>222</sup> sahoboss, ‘The Homelands’ (*South African History Online*, 17 April 2011) <<https://www.sahistory.org.za/article/homelands>> accessed 3 July 2019.

<sup>223</sup> Ian Bunting, ‘The Higher Education Landscape under Apartheid’, in Nico Cloete *et al* (eds), *Transformation in Higher Education: Global Pressures and Local Realities in South Africa* (Kluwer Academic Publishes, 2004) 35, 35 – 36.

<sup>224</sup> *Ibid*, Table 1, p 39.

<b>Race group (Apartheid Classification)</b>	<b>Responsible Authority</b>	<b>No. of institutions<sup>225</sup></b>
Black South Africans	1) Dept. of Education and Training (for Africans)	6
	2) Republic of Bophuthatswana	2
	3) Republic of Ciskei	2
	4) Republic of Transkei	2
	5) Republic of Venda	1
Coloured South Africans	6) House of Representatives	2
Indian South Africans	7) House of Delegates	2
White South Africans	8) House of Assembly	19

**Figure 7: Public Higher Education Institutions by 1994**

### **1.1.2. Society as unitary, egalitarian, and democratic**

In 1994, the ANC replaced the National Party as the main political entity governing South Africa. A transformational programme of a fundamentally different kind was inaugurated. The new paradigm, encapsulated in several legal and policy documents, was of society as unitary, egalitarian, and democratic. All three of these tenets were in direct opposition to what the Apartheid government had stood for.

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<sup>225</sup> Both public universities and Technikons – see section 2.2.1 of this chapter.

The departure point for the new government, and for South Africa's 1996 constitution, was the recognition that the country had a justice deficit. Repairing this lesion would be a priority, with the constitution's preamble stating that:

*'We, the people of South Africa, Recognise the injustices of our past...We therefore adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past...'*

This constitution responded to Apartheid's emphasis of separateness by affirming that the new South Africa would be a singular society. It declared that:

*'The Republic of South Africa is one, sovereign, democratic state';*<sup>226</sup>

*'We, the people of South Africa...Believe that South Africa belongs to all who live in it, united in our diversity...We therefore...adopt this Constitution...to...Build a united and democratic South Africa';*<sup>227</sup> and

*'There is a common South African citizenship'.<sup>228</sup>*

What had been a racially and ethnically fragmented system of governance privileging some South Africans to the detriment of most others, was to be transformed into a single, democratic, and egalitarian system for all South Africans.

This vision of South African democracy post-1994 incorporated a foundational set of values. These included:

*'...establish[ing] a society based on democratic values, social justice and fundamental human rights;...Improv[ing] the quality of life of all citizens and free[ing] the potential of each person';*<sup>229</sup> and

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<sup>226</sup> Section 1, Constitution of the Republic of South Africa (1996).

<sup>227</sup> Ibid, preamble.

<sup>228</sup> Ibid, s 3(1).

<sup>229</sup> Preamble, Constitution of the Republic of South Africa (1996).

*‘Human dignity, the achievement of equality and the advancement of human rights and freedoms’.*<sup>230</sup>

A reconfigured state was to play a key role in achieving this vision.<sup>231</sup> There would be one government, and one law, for all South Africans. As part of this, there would be one education system, and one higher education system. The constitution bolstered this focus on a single, national higher education system by listing *‘tertiary education [as] an exclusive national competence’*.<sup>232</sup> This made the new responsible authority for higher education the national (rather than the provincial or local) government.

Although the national government was vested with substantial authority, including over tertiary education, South Africa’s post-1994 democracy was to be imbued with co-operative governance. The constitution delineated this principle with respect to the three spheres of government: national, provincial, and local.<sup>233</sup> The constitution both established co-operative government as a foundational tenet of South Africa’s post-1994 democracy, and prescribed its content.<sup>234</sup> This fleshed out the ‘democratic’ aspect of the paradigm of society as unitary, egalitarian, and democratic. The emphasis on co-operation can be read as a direct counterpoint to the antagonistic separation pursued under Apartheid.

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<sup>230</sup> Ibid, s 1(a).

<sup>231</sup> Ibid, s 7(2): *‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights’*.

<sup>232</sup> Ibid, Schedule 4, Part A.

<sup>233</sup> Ibid, s 40(1).

<sup>234</sup> See e.g. *ibid*, ss 41(e) – (h).

## 1.2. Inherent tension

The paradigm of society as unitary, egalitarian, and democratic incorporated a fundamental tension: between the paradigm of responsible budgeting and the paradigm of social activism. I have argued previously that this tension is unnecessary and unfortunate.<sup>235</sup> An early example of this tension can be found in the macro-economic policy initially adopted by the post-1994 state.

In 1994, the ANC moved from being a mobiliser of opposition to Apartheid, to being South Africa's ruling party. This shift reinforced the ANC's historical vision of society as unitary, egalitarian, and democratic. It also added an active, participatory dimension to the 'democratic' leg of that paradigmatic view. An important component of the ANC's election manifesto in 1994, and initially its '*primary socio-economic programme*', was the Reconstruction and Development Programme ('RDP').<sup>236</sup> It cited several times the Freedom Charter which had been adopted by the '*Congress of the People*' in June 1955, and which set out

*'a...statement on the future of South Africa...the common programme enshrining the hopes and aspirations of [South Africans resisting Apartheid]'*.<sup>237</sup>

Both the Freedom Charter and the RDP were presented as emanating from broad, consultative processes which '*actively involv[ed] the people and their organisations in*

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<sup>235</sup> Williams (fn 6) 64 – 66.

<sup>236</sup> Abongile, 'South Africa's Key Economic Policies Changes (1994 - 2013)' (*South African History Online*, 6 May 2014) <<https://www.sahistory.org.za/article/south-africa%E2%80%99s-key-economic-policies-changes-1994-2013>> accessed 24 June 2019.

<sup>237</sup> 'Congress of the People and the Freedom Charter | South African History Online' <<https://www.sahistory.org.za/article/congress-people-and-freedom-charter>> accessed 29 August 2019.

*articulating their needs and aspirations*'.<sup>238</sup> These documents therefore espouse a specific vision for how society (and organisations within it) will be governed.

Importantly, though, the RDP marked a shift from collating aspirational values which would ideally underpin South African society in the future; to articulating the policy the new government would implement. This shift brought to the fore a tension at the heart of the paradigm of society as unitary, egalitarian, and democratic. That tension was between the paradigms of responsible budgeting (which emphasises long-term financial viability) and of social activism (which prioritises equality-focused outcomes). It would have a substantial bearing on government policy generally, as well as on the regulatory space of tuition fee decisions.

Part of the tension potentially resulted from the ANC's move from being an oppositional force, to becoming the ruling party. The difficulties this presented were explicitly captured in the RDP:

*'...in 1994 we are about to assume the responsibilities of government and must go beyond the [Freedom] Charter to an actual programme of government'*,<sup>239</sup> and

*'[m]aking promises is easy – especially during election campaigns – but carrying them out as a government is very much more difficult.'*<sup>240</sup>

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<sup>238</sup> The Reconstruction and Development Programme (1994), preamble; accessed at 'The Reconstruction and Development Programme (RDP) - The O'Malley Archives' <<https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm>> accessed 24 June 2019.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid, paragraph 1.2.10.

This could be seen as an attempt to temper expectations: to build a bridge between historic social activism in opposition to Apartheid; and current pressures to budget and govern responsibly.

More starkly, subsequent events suggest that the difficulties the new government would face in carrying out its election promises had been significantly underestimated. Apartheid's focus on separateness had entrenched stark resource disparities. One crude example of this is set out in Figure 7. This shows a remarkably skewed distribution of public higher education institutions: 19 were for white South Africans; two were for coloured South Africans; two were for Indian South Africans; and there were 13 for black South Africans (split across five responsible authorities). These figures become even more abominable when complemented by figures of the actual size of the respective sections of the population. Most notably, black South Africans '*constituted close to 80% of the population*'.<sup>241</sup> Furthermore, the availability of public and private funding for these 36 institutions had been racially skewed. Ameliorating such discrepancies even within higher education would be a mammoth undertaking.

Yet the task facing the post-1994 state, and embraced by the RDP (and subsequent macroeconomic policy), was to transform all of South African society. Too little heed was given to the prescient warning that:

*'As a strategy, pains should be taken to stress that things will be difficult, and that resources will be as constrained, if not more so, after apartheid has fallen. The gaping chasm between equality with whites (and even the provision of very basic*

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<sup>241</sup> Bunting (fn 223) 36.

*needs) and the resources available to provide this, is too large for this to be otherwise’.*<sup>242</sup>

This will be a theme of the remainder of my thesis: the manner in which responsible budgeting under conditions of severe resource constraints was cannibalised by social activism. Such cannibalisation frayed the already fragile calibrations regulating tuition fee decisions.

### 1.3. Paradigms and resources

Paradigms can shape both how resources are dispersed, and how this dispersal is contested. The regulatory space of tuition fee decisions was embroiled in the broader societal transformation pursued by the Apartheid and post-1994 states. It was therefore susceptible to changes in the central paradigms pursued by the South African state. A change in a central paradigm could alter which ‘*regulatory issues were subject to public decision*’.<sup>243</sup> This could change the boundaries of the regulatory space of tuition fee decisions by organising actors and issues into and out of this regulatory space.<sup>244</sup>

One outcome of these alterations was the shifting boundary between the regulatory space of tuition fee decisions and other, cognate spaces. Tuition fee decisions at public universities are one aspect of higher education. In South Africa, higher education is perhaps best characterised as a multi-faceted space influenced by multiple timelines. It is one of several overlapping policy and governance spaces. It is

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<sup>242</sup> Nicoli Nattrass, ‘The KwaNatal Indaba and the Politics of Promising Too much’, in John D. Brewer (ed), *Can South Africa Survive? Five Minutes to Midnight* (The Macmillan Press Ltd, 1989), 165, 181.

<sup>243</sup> Hancher and Moran (fn 3) 277 – 278.

<sup>244</sup> Ibid.

part of the 'education' space broadly, while diverging from related sub-spaces (e.g. basic education). It overlaps with, yet is also a discrete element of, the national government's budgeting process.

These factors shape the regulatory space of tuition fee decisions at public universities. Cumulatively, they foster a regulatory space that is quite dynamic and evolving; but also prone to a sense of crisis in the more immediate term, with substantial and disruptive change occurring in a concentrated period of time. These changes are driven partly by contested interactions regarding the relationship between universities and the state, and regarding universities' role within society. This contestation has a bearing on the dispersal of the resources of authority, organisational capacity, and wealth.

The resource of authority is closely associated with institutional autonomy. At its most basic, institutional autonomy is akin to juristic personality. It encompasses a bundle of rights to operate in a specific manner, including the right to sue and be sued, and the rights to acquire and dispose of property. More generally, institutional autonomy refers to internal and external relations being, to a significant extent, self-determined. The Apartheid government saw public higher education institutions as '*creature[s] of the state*'.<sup>245</sup> This view appears to leave little room for institutional autonomy. By contrast, the post-1994 state emphasised the importance of academic

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<sup>245</sup> Bunting (fn 223) 37.

freedom and institutional autonomy while indicating that these values were expected to operate '*within the framework of public accountability*'.<sup>246</sup>

For the resource of organisational capacity, I argue that central paradigms can have a bearing on the mission or purpose which a public university pursues. Section 2.2.1 of this chapter details how a university's support for, or opposition to, the Apartheid state correlated with the purpose it sought to fulfil, or mission it sought to accomplish. In turn, this affected a university's capacity to implement and to shape the regulatory regime pertaining to fee decisions.

Access to wealth, particularly state patronage, can be similarly mediated by central paradigms. This is because wealth is a key resource both for the day-to-day functioning of an institution; and for an institution's implementation and contestation of a regulatory regime. Furthermore, a strong interplay between wealth and organisational capacity is evident. Wealth can enhance an institution's ability to implement, contest, and respond to regulation. Similarly, the capacity to engage effectively in a regulatory space can improve an institution's access to wealth.

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<sup>246</sup> EWP 3 (fn 13) paragraph 3.9. The right to academic freedom is also enshrined in section 16(1)(d) of South Africa's constitution.

## 2. Interventionist States

The ‘*surprising administrative autonomy*’ enjoyed by South African universities is perplexing because the South African state has been very active in education policy.<sup>247</sup>

I argue that universities ‘*unfettered right to set [their] own fees*’ must be understood against the backdrop of the ongoing transformations of society and its main institutions pursued by the Apartheid and post-1994 states.

The Apartheid and post-1994 states assigned a central role to education, and higher education in particular, in the societal transformation they pursued. This resulted in interventions that sought to alter what role public universities play in society. Some of these interventions extend to policies which aimed to shape what is taught or researched, by who, to or for whom. I will argue that such interventions are just as relevant to the regulatory space of tuition fee decisions as more explicit and direct ministerial intervention in fee-setting (such as through a cap on tuition fees).

This section will explore the central role envisaged for education both under Apartheid and post-1994. How universities engaged with and performed this central role, together with the changes to their governance structures which ensued post-1994, will then be analysed. This section will conclude by discussing how higher education institutions were reconfigured post-1994, and what impact this reconfiguration had on the organisational capacity of key actors.

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<sup>247</sup> Cf. fns 218-219.

## 2.1. Centrality of (higher) education

Education policy was an integral component of the vision of society which the Apartheid and post-1994 government sought to realise. To an extent, each viewed education as a mechanism for achieving particular outcomes. Most immediately, it was seen as a means of preparing individuals for their role in society.

### 2.1.1. Education Apartheid

Colonial and Apartheid policy deliberately curtailed educational provision for black South Africans. This was coupled with the reservation of skilled and semi-skilled jobs for white South Africans. This massively restricted black South Africans' educational and professional opportunities. From the soon-to-be-ruling party's perspective:

*'The fragmented, unequal and undemocratic nature of the education and training system...results in the destruction, distortion or neglect of the human potential of our country, with devastating consequences for social and economic development.'*<sup>248</sup>

The stark outcomes of these policies could not be understated. Together with perpetual underfunding, they

*' "could almost have been designed to prevent [the majority of black South African workers] from being adequately prepared for the challenges of the 21<sup>st</sup> century." '*<sup>249</sup>

The 1950s were a pivotal decade for the Apartheid government's engineering of these outcomes. A series of statutes and policy documents were promulgated which

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<sup>248</sup> The RDP, fn 238, paragraph 3.1.2.

<sup>249</sup> William Gumede, *Thabo Mbeki and the battle for the soul of the ANC* (Zed Books Ltd 2007) 99; citing Francis Wilson, *South African Institute of Race Relations Yearbook* (2000).

regulated who would receive what education, at which institutions. The Bantu Education Act of 1953 set out what kind of schooling black South Africans would receive. Essentially, this

*‘...was to be directed to white needs; it was to be centrally controlled and financed under the Ministry [of Native Affairs]’.*<sup>250</sup>

This was complemented by legislation which

*‘...“was to stamp on the field of higher education the pattern of apartheid which the Bantu Education Act had applied in the fields of primary and secondary education.”’.*<sup>251</sup>

This legislation and policy helped embed an enduring distinction in the higher education landscape between historically advantaged / white and historically disadvantaged / black institutions (‘HA/WIs’ and ‘HD/BIs’ respectively).

A significant period when this distinction was entrenched was the build up to, and passage of, the Extension of University Education Act of 1959. The 1959 Act sought two key outcomes: (much more strictly enforced) segregation of institutions which were previously (partially) mixed; and the establishment of segregated institutions in the homelands, to perpetuate the homelands.<sup>252</sup> The backdrop for this vigorous government intervention was that

*‘ “While racially separate schools were the established practice in the lower educational levels, on the upper levels there had been a marked trend towards a measure of multi-culturalism. While the University College of Fort Hare, established in 1916 for non-European students, had come to provide higher education for a small number of black students, increasing numbers of blacks*

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<sup>250</sup> Malcolm Ray, *Free Fall: Why South African Universities are in a Race Against Time* (Bookstom 2016) 97.

<sup>251</sup> Ibid 115; citing Margaret Ballinger, *From Union to Apartheid: A Trek to Isolation* (Juta 1969) 349.

<sup>252</sup> Ibid 107 – 126.

*had sought entry into white universities, many of whom had been accepted in the English medium campuses of UCT, Wits, and [the then University of] Natal.”*<sup>253</sup>

Certain ‘*English medium campuses*’ opposed government policy under the banner of academic freedom:

*‘...in 1956, both the UCT and Wits student representative councils...formed academic-freedom committees to mobilise all university constituencies against the government’s announcement that year that it was going to proceed with the enforcement of university apartheid.’*<sup>254</sup>

These protests were in favour of ‘open admission’: the admission of all academically qualifying students, regardless of race. The stricter enforcement of university apartheid, and the opposition to it, bring into sharp focus the puzzle of whether tuition fee decisions were ‘*fettered*’ under Apartheid. Government’s interventions seemingly placed no legal or policy fetters on such decisions. However, the entrenching of university apartheid blatantly constrained who universities could admit as students - as the protests around academic freedom and the maintenance of open admissions attest. This is significant for the regulatory space of tuition fee decisions, because tuition fee decisions are specifically about admitted students.

Once implemented, the Extension of University Education Act 1959 mostly

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<sup>253</sup> Ibid 110; citing Ballinger, fn 251, 349 – 350. See further: ‘1959. Extension of University Education Act No 45 - The O’Malley Archives’ <<https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01898.htm>> accessed 28 June 2019.

<sup>254</sup> Ray (fn 250) 113: ‘[i]n its newsletter of that year, the Wits SRC noted, “In this endeavour, the SRC was greatly assisted by the Senate after a famous debate in 1954 had endorsed the maintenance of open admission to Wits.”’

*‘ended the enrolment of “non-whites” at the universities of Witwatersrand, Cape Town and Natal...[while beginning to] establish separate tertiary institutions for blacks in the homelands’.*<sup>255</sup>

This was reinforced under the Tricameral Constitution of 1984. Black South Africans *‘had to go to the university belonging to [their] homeland’.*<sup>256</sup> The ensuing segregation was both ethnic and racial. For example, the University of Fort Hare

*‘was opened for Xhosa speaking students only’;*<sup>257</sup> and

*‘...the universities of the Western Cape and Durban-Westville incorporated coloured and Indian students [respectively] into ethnically separate institutions...’.*<sup>258</sup>

The only way a member of one race group could attend an institution reserved for another race group was through

*‘obtain[ing] a permit from the education department to which [that institution] was accountable. Permits were supposed to be granted only if it could be shown that the applicant’s proposed programme of study was not available at any institution designated for the[ir] race group’.*<sup>259</sup>

The councils of public universities therefore exercised their potentially unfettered prerogative over tuition fee decisions against the backdrop of a state that was vigorously enforcing university apartheid.

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<sup>255</sup> Ibid 121.

<sup>256</sup> Interviewee 9 (Johannesburg, 5 April 2018).

<sup>257</sup> sajoboss, ‘Extension of University Education Act No 45 Commences’ (*South African History Online*, 16 March 2011) <<https://www.sahistory.org.za/dated-event/extension-university-education-act-no-45-commences>> accessed 28 June 2019.

<sup>258</sup> Ray (fn 250) 123.

<sup>259</sup> Bunting (fn 223) 37; Interviewee 9.

### 2.1.2. Building a ‘critical civil society’

Post-1994, education was seen as a key to transforming society; and a sector which, itself, had to be transformed. Creating ‘*an education and training system*’ that enabled all South Africans ‘*to realise their full potential*’ was identified ‘*as a basis and a prerequisite for the...achievement of all other goals in [the RDP].*’<sup>260</sup> This ‘*education and training*’ was broadly construed. It encompassed a system of primary, secondary, and tertiary education. And it extended to more general, ongoing learning. It was

*‘not only...something that happens in schools or colleges, but in all areas of our society – homes, workplaces, public works programmes, youth programmes, and in rural areas.’*<sup>261</sup>

The breadth of this ‘*education and training system*’ is important. It clarifies the extent of the education system which the post-1994 state sought to transform. Tertiary education is a sub-space of this broader system. In turn, university education is just one segment of tertiary education. It is only one of the many areas in which the post-1994 government sought to expand and enhance South Africans’ access to education. The regulatory space of tuition fee decisions is therefore located within the much broader regulatory space of the entire education system.

This is highly relevant to debates about social activism and responsible budgeting. The policy vision highlights the range of concerns the post-1994 government was attempting to address under its education policy. This is borne out by the link made

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<sup>260</sup> The RDP (fn 238) paragraph 3.1.5.

<sup>261</sup> Ibid paragraph 1.4.5.

between education and building the post-1994 democracy in South Africa. The new education to be offered:

*‘must be directed to the full development of the individual and community, and to strengthening respect for human rights and fundamental freedoms. It must...advance the principles contained in the Bill of Rights.’<sup>262</sup>*

Higher education was identified as having a particularly important role to play:

*‘Higher education has an unmatched obligation...to help lay the foundations of a critical civil society, with a culture of public debate and tolerance which accommodates differences and competing interests. It has much more to do, both within its own institutions and in its influence on the broader community, to strengthen the democratic ethos, the sense of common citizenship and commitment to a common good.’<sup>263</sup>*

This policy pronouncement further fleshes out the paradigm of society as unitary, egalitarian and democratic; and enlists higher education institutions as exponents and developers of it. Moreover, it singles out higher education – not just university education – as the bearer of this historic responsibility. My focus is on the regulatory space of tuition fee decisions at public universities (i.e. certain providers of higher education), because the Fees Must Fall protests began at public universities. Furthermore, one key focus of these protests was university fees.

The post-1994 government exercised significant, ongoing involvement in higher education as it attempted to unify and transform this sector. An explicit goal of this transformative drive was to create a sector which was *‘planned, governed and*

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<sup>262</sup> Ibid paragraph 3.3.2.

<sup>263</sup> EWP 3 (fn 13) paragraph 1.4, third bullet point.

*funded as a single national co-ordinated system*'.<sup>264</sup> This bolsters the argument that this system as a whole; and tuition fee decisions specifically; would be singular, multifaceted regulatory spaces. The aspiration appears to be one regulatory space populated with a variety of institutions performing different functions. Ideally, the result would be a flexible system with multiple entry, exit, and transition points. It would be '*an integrated system of education and training that provides equal opportunities to all...*'.<sup>265</sup>

More generally, the vision was '*of a transformed, democratic, non-racial and non-sexist system...*'.<sup>266</sup> This knitted the higher education system into the broader paradigm of South African society as unitary, egalitarian and democratic. South Africa's 1996 constitution included the foundational statement that

*'...South Africa is one...democratic state founded on the...values [of n]on-racialism and non-sexism...'*.<sup>267</sup>

The Higher Education Act 1997 similarly recorded in its preamble that

*'...it is desirable to promote the values which underlie an open and democratic society based on human dignity, equality and freedom [and to] respect and encourage democracy [and] academic freedom...'*

This broad vision gave no indication of whether free university education would be made available to some, or all, South Africans. That silence was historically

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<sup>264</sup> The RDP (fn 238) foreword and paragraph 1.3.3.

<sup>265</sup> Ibid paragraph 3.3.1.

<sup>266</sup> EWP 3 (fn 13) paragraph 1.14.

<sup>267</sup> Section 1(b).

contentious, and would become increasingly fractious as the call for free education became more vehement post-1994. In opposition to Apartheid's disjointed and inequitable education system, the Freedom Charter had proclaimed:

*'The Doors of Learning and Culture shall be opened!*

*...Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit...'*

This call became one rallying point for student-led struggles post-1994 for free higher education; even though the Freedom Charter does not mention free higher education.<sup>268</sup>

Rather, the '*higher education and training*' advocated for by the Freedom Charter had '*conditionalities associated with it*'<sup>269</sup> – most notably, '*scholarships awarded on the basis of merit*'.

The Bill of Rights in South Africa's 1996 constitution did not include a right to higher education, let alone '*free higher education for all*'.<sup>270</sup> Instead, section 29(1) of the Constitution confers on

*'Everyone...the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'*

I have argued previously that 'higher' education is distinct from 'basic' and 'further' education in South Africa.<sup>271</sup> Moreover, the 1996 constitution is explicit that it is '*basic education, including adult basic education*' which is an unqualified, universal right. What right there is to '*further education*' is qualified by the state making this right

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<sup>268</sup> Cf. Williams (fn 6) 47 – 49.

<sup>269</sup> Interviewee 38 (Johannesburg, 24 May 2018).

<sup>270</sup> Ibid.

<sup>271</sup> Williams (fn 6) 47 – 49.

*'available and accessible'* through taking *'progressive, reasonable measures'*. I argue in chapters eight and nine of my thesis that protest-driven social activism had by 2017 initiated state policy which both created a 'right' to higher education without amending the constitution; and privileged this 'right' at the expense of the universal and unqualified right to basic, and adult basic, education.

In contrast to the Freedom Charter's vague promise to 'open the doors of learning', state policy in the mid-1990s set out a very detailed vision for higher education post-1994. This vision included a plethora of purposes, goals, and principles. Higher education would fulfil four purposes. These purposes were to be evaluated in terms of eight

*'underlying principles and [18] goals [12 at the 'national or system level' and six at the 'institutional level'] which provide guidelines for assessing the higher education system...the principles...establish the steering mechanism for transformation of the...system. The goals are key targets and outcomes that should be pursued in implementing the transformation strategy...'.<sup>272</sup>*

Cumulatively, these purposes, goals, and principles re-orientated higher education institutions' relationship to the state, and their role in society. In addition, they reconstituted how higher education institutions were to be governed.

The re-orientation and reconstitution occurred along two primary dimensions: an emphasis on democratisation, and a commitment to contributing to national and regional development. The *'underlying principle'* of *'democratisation'* presumably linked to the purpose of

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<sup>272</sup> EWP 3 (fn 13) paragraphs 1.14 – 1.28.

*‘...support[ing] a democratic ethos and a culture of human rights by educational programme[s] and practices conducive to critical discourse and creative thinking...’.*<sup>273</sup>

This was given concrete expression in the policy goal of

*‘transform[ing] and democratis[ing] the governance structures of higher education. New structures should provide for co-operative decision-making between...stakeholders who recognise their different identities, interests and freedoms, while pursuing the common goal of a co-ordinated and participative polity and civil society’.*<sup>274</sup>

This is an ambitious recasting of how higher education institutions were to be governed.

The emphasis of ‘*co-operative decision-making*’ reiterates how South Africa’s post-1994 democracy was to operate in accordance with the tenets of co-operative governance.<sup>275</sup> The importance of ‘*interactive governance*’ - a mode of governance in which ‘*government...work[s] co-operatively with institutions of civil society in a spirit of partnership and mutual dependence*’ – was highlighted.<sup>276</sup> This had a direct bearing on how higher education institutions were to be governed and regulated post-1994:

*‘...to transcend the adversarial relations between state and civil society arising from the apartheid era, the Ministry of Education adopts a model of co-operative governance for higher education in South Africa based on the principle of autonomous institutions working co-operatively with a proactive government and in a range of partnerships.’*<sup>277</sup>

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<sup>273</sup> Ibid paragraph 1.14.

<sup>274</sup> Ibid paragraph 1.28(1).

<sup>275</sup> Cf. section 1.1.2 of this chapter.

<sup>276</sup> EWP 3 (fn 13) paragraph 3.4.

<sup>277</sup> Ibid paragraph 3.6.

This recognises the autonomous nature of higher education institutions, but recasts the environment in which that autonomy will operate. It envisages a clear departure from the adversarial separateness of Apartheid.

The parallel commitment to development is evident in the purpose envisaged for higher education of

*‘meet[ing], through well-planned and co-ordinated teaching, learning and research programme[s], national development needs...’.*<sup>278</sup>

This purpose could be associated with the ‘*underlying principles*’ of ‘*development*’ and ‘*effectiveness and efficiency*’.<sup>279</sup> Both ‘*national or system level*’ and ‘*institutional level*’ goals were attached to these metrics. For the former, policy emphasised the importance of fostering a diverse higher education system with:

*‘...the mix of institutional missions and programmes...meet[ing] national and regional needs in social, cultural and economic development...[and] curricula [that] are responsive to the national and regional context...’.*<sup>280</sup>

As for the institutional level, the policy goals were that higher education institutions

*‘...promote human resource development through programmes that are responsive to the social, political, economic and cultural needs of the country...’;* and

*‘demonstrate social responsibility...and their commitment to the common good by making available expertise and infrastructure for community service programmes.’.*<sup>281</sup>

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<sup>278</sup> Ibid paragraph 1.14.

<sup>279</sup> Ibid paragraphs 1.20 and 1.22.

<sup>280</sup> Ibid paragraphs 1.27(3) and (5).

<sup>281</sup> Ibid paragraphs 1.28(3) and (5).

Higher education institutions were therefore expected to be thoroughly imbued with the paradigm of society as unitary, egalitarian, and democratic. Furthermore, they were expected to contribute to the post-1994 transformation of South African society.

## **2.2. Institutional reconfiguration**

Specific institutions were designated to fulfil the central role assigned to (higher) education by both the Apartheid and post-1994 governments. Additionally, both governments sought to establish particular configurations of these institutions. This is significant, because it delineates how the regulatory space of tuition fee decisions fitted together with other regulatory spaces. Within the broader regulatory space of higher education, these include the related regulatory sub-space of tuition fee decisions at Technikons; and later, the regulatory sub-space for tuition fee decisions at Technical and Vocational Education and Training Colleges ('TVETs'). Regulating institutional form also has a bearing on the forum in which tuition fee decisions are taken, which considerations are taken into account, and the organisational capacity of the decision-taker.

These institutional reconfigurations – redesigning what institutions exist, and how they relate to each other - affected the resource of organisational capacity in three ways. First, it changed what institutions existed: most starkly through terminating existing institutions, or bringing new institutions into existence. Second, the reconfigurations altered what was expected of specific institutions. This was evident in changes to what institutions were expected to do and to achieve - their organisational mission. It extended to what they would teach, and to whom. Third, the

reconfigurations impacted on what institutions were capable of doing in relevant regulatory spaces. Pertinent to my thesis is the effect of reconfigurations on universities' capacity both to contest and to implement regulations impacting on tuition fee decisions. To unpack this, I discuss the key reconfigurations of the higher education landscape initiated by the Apartheid government. Subsequent transformations of organisational interactions pursued by the post-1994 government will then be analysed.

### **2.2.1. A multiply fragmented landscape**

Although a '*surprising*' administrative autonomy was conferred on public universities even under Apartheid, three factors contributed to how different institutions navigated the regulatory space of tuition fee decisions. These were: what function particular institutions were designated to perform; whether an institution positioned itself as pro- or anti-government; and institutions' internal governance. Together, these factors shaped how tuition fee decisions were made, and by whom.

The Apartheid government established a fairly rigid functional distinction between institutions, alongside its racialised segregation of higher education. By the 1980s, this functional distinction separated universities from 'technikons':

*'...the essence of a university was science and the essence of a technikon was technology...“science”...designate[d] all scholarly activities in which knowledge for the sake of knowledge is studied...“technology”...designate[d] activities concerned with the applications of knowledge.'*<sup>282</sup>

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<sup>282</sup>Bunting (fn 223) 37.

Parallel qualification structures were established for universities and technikons. They were not, though, to trespass into each other's designated functions: universities developed knowledge, technikons focused on its application.<sup>283</sup>

The regulatory space my thesis focuses on – tuition fee decisions at public universities – therefore focuses on only one set of higher education institutions operating under Apartheid: universities, not technikons. Moreover, universities were viewed by the government as having a particular function – pursuing ‘*knowledge for the sake of knowledge*’, but not looking to apply knowledge. Put differently, technikons were geared towards preparing their students for particular careers or vocations; while universities were there ‘*to enable [students] to enter high-level professions*’.<sup>284</sup>

While universities were differentiated from technikons, both types of institutions were subject to the major split between being HA/WIs or HD/BIs.<sup>285</sup> For universities, this division was extended from the 1950s onwards. It had several impacts on how interests were organised in this regulatory space. Perhaps the most pervasive and pernicious impact was the fomenting of racialised division at the expense of broader, collective representation.

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<sup>283</sup> Ibid 37 - 38.

<sup>284</sup> Ibid 38.

<sup>285</sup> See section 2.1.1 of this chapter.

For example, the Committee of University Principals and Vice Chancellors ('CUP'), initially a statutory body, was established around 1922. Its main function was to '*represent the collective voice of public universities*' in South Africa.<sup>286</sup> Following several permutations post-1994, the CUP became the voluntary, private organisation Universities South Africa ('USAf'). This vehicle for a collective representation could be fractured by government policy:

*'when the issues became political, in the late 1950s onwards, the CUP was divided. And so did not speak with one voice'*.<sup>287</sup>

This division was partly driven by the legislation introduced by the Apartheid government:

*'the CUP was established under the Universities Act [while] the universities established after 1959, for Coloureds and Africans and Indians, were not "universities" under [that] Act. So their rectors or vice chancellors were not members of the [CUP]...the[se] other institutions...set up their own, non-statutory, parallel organisation called the Committee of Rectors...we used to have these farcical [situations] where the [CUP] and the Committee of Rectors [would] have joint meetings...'*.<sup>288</sup>

Complicating matters further, important fault lines existed between HA/WIs, and between HD/BIs.

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<sup>286</sup> Interviewee 17.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

### 2.2.1.1. HA/WIs

For HA/WIs, the main line of differentiation was between more pro-government universities, and those which ‘referred to themselves as the “liberal universities”’.<sup>289</sup> This split ran largely along linguistic lines – whether institutions were predominantly Afrikaans- or English-medium, respectively. The public universities in each camp are tabulated below.<sup>290</sup>

Afrikaans Universities	English Universities
Potchefstroom University <sup>291</sup> Rand Afrikaans University <sup>292</sup> University of the Orange Free State <sup>293</sup> University of Port Elizabeth <sup>294</sup> University of Pretoria University of Stellenbosch (UNISA) <sup>295</sup>	Rhodes University University of Cape Town University of Natal University of the Witwatersrand

**Figure 8: Afrikaans versus English public universities under Apartheid**

<sup>289</sup> Bunting (fn 223) 42.

<sup>290</sup> Ibid 39 – 44; University State Budgets (March 2015), preface.

<sup>291</sup> Part of the University of the North-West, post-2004.

<sup>292</sup> Part of the University of Johannesburg, post-2005.

<sup>293</sup> Renamed University of the Free State in 2001. See: <https://www.ufs.ac.za/about-the-ufs/ufs-in-focus/brief-history>, accessed 4 June 2020.

<sup>294</sup> Bunting (fn 223) 40: this university was dual medium, but ‘was dominated by Afrikaans-speaking executives and governing bodies’. It became part of the Nelson Mandela Metropolitan University post-2005.

<sup>295</sup> Interviewee 17.

The Afrikaans/English distinction incorporated several points of differentiation, including whether student admission should be ‘open’ or abide by education Apartheid.<sup>296</sup> This created a rift within the CUP:

*‘if you were a university [hosting] a meeting of the CUP, the Afrikaans universities would ask for a [room] to be reserved, so they could caucus beforehand. And the same for [the English universities]’.*<sup>297</sup>

Before exploring further important points of differentiation, a caveat is necessary. Although the English universities were associated with protests in favour of an open admission policy, they ‘weren’t necessarily that open’.<sup>298</sup> They may have explicitly contested government policy; and made a substantially greater effort than their Afrikaans counterparts to admit Coloured, Indian, and African students. But education Apartheid, and Apartheid more generally, were still implemented by the Apartheid state. Towards the end of Apartheid, the bulk of students at English and Afrikaans public universities were white:<sup>299</sup>

<b>Date</b>	<b>Afrikaans Universities</b>	<b>English Universities</b>
1990	96%	72%
1993	89%	62%

**Figure 9: Percentage of students enrolled at HA/WIs who were white**

Three further points of distinction between English and Afrikaans universities are noteworthy. First, aligning as either pro- or anti-government had a considerable

<sup>296</sup> See section 2.1.1 of this chapter; Interviewee 17.

<sup>297</sup> Interviewee 17.

<sup>298</sup> Ibid.

<sup>299</sup> Bunting (fn 223) 40 and 43.

bearing on an organisation's mission. It affected both what an institution taught, and with whom it engaged. The Afrikaans universities broadly

*'accepted the government's ideology of universities being "creatures of the state" and therefore took their chief function to be that of acting in the service of the government...Their student recruitment depended on being seen primarily as institutions involved in the training of staff required for the apartheid civil service and for various professions'.<sup>300</sup>*

One corollary of this was that although as universities their mission was to develop (rather than apply) knowledge,

*'the intellectual agendas of [these universities] were by and large determined by the perception that they had a duty to preserve the apartheid status quo'.<sup>301</sup>*

By contrast, the English universities emphasised *'their commitment to the universal values of academic freedom'*. This, they believed, *'made it impossible for them to act as servants of the apartheid state'*.<sup>302</sup> They went so far as to

*'declare...publicly that "academic freedom in South Africa was dead" because of apartheid restrictions on teaching materials, student admissions and the selection of academics'.<sup>303</sup>*

The focus on academic freedom entailed a far broader reading of what it meant for universities to develop knowledge:

*'[t]heir view was that any university in any country, by its very nature, had to maintain a "distance" from government. They regarded themselves as being part of an international community of scholars...dedicated to the advancement and propagation of all human knowledge.'<sup>304</sup>*

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<sup>300</sup> Ibid 40.

<sup>301</sup> Ibid 40 – 41.

<sup>302</sup> Ibid 42.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid 43.

The Afrikaans and English universities therefore adopted different organisational missions. This had a bearing on how each grouping engaged with the Apartheid government, and what academic project they pursued. These differences arguably affected the composition of the student bodies at different universities; primarily because it translated into different academic offerings at different universities. This is pertinent to tuition fee decisions, because tuition fees are charged to registered students for the courses they take.

A caveat is again necessary. Mahmood Mamdani has argued that despite their anti-apartheid stance,

*‘English...universities were never major agents for social and political change in South Africa...their systems of governance and their intellectual agendas made [them] islands of white privilege...they displayed little sense of social accountability to the broader South African community [under Apartheid]’.*<sup>305</sup>

This is partly borne out by the stark figures set out in Figure 9. It is part of the answer to a spatial question raised in later chapters of my thesis: why did the 2015 Rhodes Must Fall, and then Fees Must Fall, protests originate at UCT and Wits – two historically white English-medium universities? The partial answer this caveat provides is that despite their anti-apartheid stances, several actors saw these universities as having substantial work to do post-1994 to address their role in Apartheid, and in perpetuating Apartheid’s inequities. Any confidence English universities had pre-1994

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<sup>305</sup> Ibid 44, citing Mahmood Mamdani, ‘Is African Studies to be Turned into a New Home for Bantu Education at UCT?’ (University of Cape Town, 1998).

that the post-1994 period would allow them to continue with ‘*“business as usual”*’ was misplaced.<sup>306</sup>

The second point of distinction between English and Afrikaans universities was that the academic project pursued by a university and its stance vis-à-vis the government can shape its access to wealth, as well as the international collaborations it fosters. The ‘*financial strength*’ of Afrikaans universities

*‘depended on them having good relations with the apartheid government, as well as the business sectors with which it had close ties.’*<sup>307</sup>

The international academic boycott of South Africa ‘*disconnected*’ these universities ‘*from the international academic community*’. This limited the private funding on which these universities could rely to: fees paid by students (including tuition fees), and ‘*contracts with organisations serving the apartheid regime*’.<sup>308</sup>

Towards the end of Apartheid, Afrikaans universities’ reliance on the government subsidy was a cause for particular concern for them:

*‘[m]any of those involved in their governing bodies and executives believed that a change in government, from the National Party to the [ANC], would place at risk their flows of government subsidy funds. They believed that their financial reserves could possibly be “confiscated” by the new government...for redress purposes, and that the flow of private funds would diminish as...wider society was transformed...’*<sup>309</sup>

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<sup>306</sup> Ibid 44.

<sup>307</sup> Ibid 40.

<sup>308</sup> Ibid 41.

<sup>309</sup> Ibid 42.

Alongside these fears, the Apartheid government may have had its own misgivings about the funding such universities would receive post-1994. In some interviews, I heard murmurings of a ‘*bequest*’ given by the Apartheid government to Afrikaans universities as the 1994 transition approached.<sup>310</sup> Put rather wryly by a university manager at an English-medium university:

*‘...people say [the Afrikaans universities] got a generous cash injection between 1990 and 1994; when the previous government...feared that they would be squeezed out to pay for their Apartheid sins. We were not exactly the kind of Apartheid university that they were...We were not paid for opposing Apartheid’.*<sup>311</sup>

That is not to say that the English universities received no government subsidy under Apartheid. Instead, they ‘*developed highly ambiguous relationships with the [Apartheid] government*’. One side of this ambiguity arose from English universities ‘*commitment to the universal values of academic freedom*’. At the same time, though, the English universities were expressly public universities who, as such, ‘*accepted that they were...entitled to government funding*’.<sup>312</sup> These universities also cultivated international collaborations, and ‘*[t]heir anti-apartheid stance helped [them] raise considerable funds from international donors*’.<sup>313</sup> Distancing themselves from the Apartheid government did mean that very little research with direct links to the government was undertaken, with

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<sup>310</sup> Interviewee 50 (Johannesburg, 23 March 2017).

<sup>311</sup> Interviewee 3 (Johannesburg, 14 March 2018).

<sup>312</sup> Bunting (fn 223) 42.

<sup>313</sup> Ibid 43.

*‘[n]one of the four permit[ing] their academic staff...to become involved in any kind of policy work for the government and government agencies.’*<sup>314</sup>

The stances taken by Afrikaans and English universities thus had a bearing on what wealth they accessed, and from which sources. This is significant for tuition fee decisions, because these decisions entail consideration of both a university’s overall wealth, and the private income derivable from fee-paying students.

The third pertinent distinction between Afrikaans and English universities was the extent to which they permitted protest internally. At Afrikaans universities, anti-government protests *‘were not countenanced, and were swiftly crushed...’*<sup>315</sup> By contrast, English universities were more tolerant of anti-government sentiment – as is evidenced by the protests in favour of open admission.

More generally, though, the governance systems at both Afrikaans and English universities were mostly authoritarian; with limited participation in central power structures.<sup>316</sup> While English universities may have mixed this authoritarianism with a degree of collegiality, membership of the collegium was restricted to the

*‘professoriate, the principal and the registrar [together with] his/her senior staff...This collegium in effect ran the institution...Junior staff and students had few, if any, rights as far as the management of the institution was concerned.’*<sup>317</sup>

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<sup>314</sup> Ibid 43 – 44.

<sup>315</sup> Ibid 41.

<sup>316</sup> Ibid 41 and 43.

<sup>317</sup> Ibid 43.

Another important similarity between the governance of Afrikaans and English universities was that

*‘they had the mid-level management capacity necessary for controlling the institution and implementing change’.*

This was complemented by *‘tight administrative and financial systems’*; as well as the ability to recruit *‘competent and efficient staff’* to fill most managerial positions.<sup>318</sup>

Both English and Afrikaans public universities therefore had relatively strong and cohesive (if mostly authoritarian) internal governance. This had a bearing on the capacity of these organisations to navigate the regulatory space of tuition fee decisions – in terms of both implementing, and contesting, regulations that had a bearing on fee decisions specifically, and higher education more generally.

#### **2.2.1.2. HD/BIs**

The relationship between HD/BIs and the Apartheid government was fragmented, too. By the 1980s, the government authority responsible for an institution depended on the racial group (African, Coloured, or Indian) for which that institution was designated. The ten public universities for Africans were further split between those which fell under the authority of the four ‘independent’ homelands, and the six which fell under the authority of the Department of Education and Training (for Africans).<sup>319</sup>

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<sup>318</sup> Ibid 41 and 43.

<sup>319</sup> See Figure 7.

Despite this fragmentation, the Apartheid government ascribed a broadly similar organisational mission to all HD/BIs - to be

*‘instrumental institutions...set up to train black people who would be useful to the apartheid state...Their “useful graduates” were primarily the black teachers required by the black school systems and the black civil servants required by the racially divided civil service...’*<sup>320</sup>

The academic project pursued by HD/BIs was therefore substantially curtailed by the Apartheid government, in addition to the more general assault on academic freedom highlighted by the English universities.

For the six HD/BIs within white South Africa, these restrictions were further compounded by the primary source from which their academic staff were initially drawn: *‘the historically white Afrikaans-medium universities’*.<sup>321</sup> There is a strong likelihood that such academics would subscribe to a more instrumentalist academic agenda, in the service of the Apartheid government. Moreover, that agenda

*‘placed little emphasis on the production of new knowledge. As a consequence, few of the academics employed by the [HD/BIs] believed it necessary to introduce research and postgraduate programmes...’*<sup>322</sup>

Furthermore, this organisational mission saw no scope for separation or distance between an HD/BI and the apartheid government. The six HD/BIs operating within the white Republic of South Africa had *‘governance systems [which] tended to*

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<sup>320</sup> Bunting (fn 223) 45 - 46.

<sup>321</sup> Ibid 45.

<sup>322</sup> Ibid.

*be highly authoritarian*'. The Apartheid government sought to maintain these institutions' obedience to Apartheid ideology by

*'ensuring [in the early 1980s] that the leadership and most of the academic staff of these universities were white Afrikaners who had been trained at one of the six historically white Afrikaans-medium universities.'*<sup>323</sup>

Although black vice chancellors were later appointed, government control remained through *'the appointment of members of council'*.<sup>324</sup>

For the four HD/BIs in the 'independent' homelands, the Apartheid government's control was more layered. In theory, these were public universities in self-governing territories. The reality was that the Apartheid government exercised substantial control over the governments of each 'independent' homeland. In turn,

*'[t]he governments of these "republics" treated the universities as an extension of the civil service...[Adam Habib] describes the context of the University of Transkei...as follows...["It] was not a financially autonomous institution...In a very real sense, [it] was simply another line item in the budget of the Transkei's Department of Finance ["]...'*<sup>325</sup>

HD/BIs therefore experienced the constraints of Apartheid in a fundamentally different way to HA/WIs. This impacted on how they were run and what they taught; as well as what wealth they had access to, and from which sources. The entrenching of education Apartheid did create captive populations from which HD/BIs could draw

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<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid 46, citing Adam Habib, 'Structural Disadvantage, Leadership Ineptitude and Stakeholder Complicity: A Study of the Institution Crisis of the University of the Transkei' (Centre for Higher Education Trust, 2001).

their students.<sup>326</sup> However, this also meant that HD/BIs were deliberately excluded from recruiting white students who had far greater access to wealth than their African, Coloured, and Indian counterparts.

Although the Apartheid government sought to subjugate HD/BIs within its project of education Apartheid, these institutions '*became sites of struggle against the apartheid regime*'; especially during the '*turmoil of the late 1980s and early 1990s*'.<sup>327</sup> It could be argued that this resistance was more comprehensively anti-apartheid than, for example, the English universities emphasis on academic freedom. One outcome was that as these '*political agendas came to the fore*', the ensuing boycotts, strikes, and closures of institutions resulted in a substantial amount of the academic calendar being lost.

This opposition extended to the governance systems within these HD/BIs; and, for the four HD/BIs in 'independent' homelands, to struggles against the homelands' puppet governments.<sup>328</sup> One result of this resistance and protest was that the governance of HD/BIs was significantly disrupted. For the six HD/BIs in white South Africa:

*'New structures such as transformation forums were introduced in the early 1990s which gave substantial political powers to students and to administrative and service staff. These new powers dislodged the old governance structures and their associated administrative systems, but the levels of contestation in these institutions were so high that no new governance models and no new*

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<sup>326</sup> Ibid. See also Figure 9: Percentage of students enrolled at HA/WIs who were white.

<sup>327</sup> Ibid 45.

<sup>328</sup> Ibid 45 – 47.

*administrative systems were put in place. By 1994, many experienced managers and administrators had left these institutions, a development which contributed to continued battles around governance in subsequent years.’*<sup>329</sup>

HA/WIs were arguably not subjected to the same extent of disruption, or to a similar exodus of managers and administrators. Historically, they had far greater access to skilled administrators and managers. They also generally had more time to build and maintain their management and administration systems. This speaks to a stark disparity between HD/BIs’ and HA/WIs’ capacity to engage in the regulatory space of tuition fee decisions, including through implementing and contesting regulation.

Before turning to the post-1994 attempts to transform this landscape, it is worth returning to the importance of the place of space – particularly how and where interests are organised. I have highlighted three sets of distinctions in sections 2.2 and 2.2.1 of this chapter: between universities and technikons; between HA/WIs and HD/BIs; and between different groupings of HA/WIs (English versus Afrikaans-medium), and different groupings of HD/BIs (in white South Africa, cf. in an ‘independent’ homeland). These distinctions help to explain how organisational interests were configured under Apartheid in the regulatory space of tuition fee decisions. The distinctions I have drawn should not be applied too broadly or too rigidly, though. For example, picking up on the points in section 2.2.1.2 of this chapter, one interviewee noted this important caveat:

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<sup>329</sup> Ibid 46.

*‘...the history of [HD/BIs] isn’t only the history of people making counter-spaces. It’s also a history of combination. And there were people there who had been appointed because they were seen as pliable’.*<sup>330</sup>

I argue that this point could be extended. The general distinctions I have outlined need to be approached on an institution by institution (if not a campus by campus) basis. This is particularly so for tuition fee decisions. These decisions were ultimately taken by individual institutions. While I argue for a common regulatory space in which institutions decide tuition fees; with common constraints affecting the public universities in that space; the history and locality of a particular public university will have a substantial bearing on where it sits in the broader regulatory space, and how the common constraints affect it.

### **2.2.2. A single transformation?**

Section 1.1.2 of this chapter outlined the new paradigm which the post-1994 South African government followed in its policy: that of society as unitary, egalitarian, and democratic. That section indicated a tension at the heart of this paradigm between responsible budgeting and social activism - a tension which can become particularly acute in the context of scarce resources. The Constitutional and paradigmatic proclamation post-1994 that South Africa was to be a unitary, egalitarian, and democratic society illustrates this.

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<sup>330</sup> Interviewee 6 (Johannesburg, 29 March 2018).

In one sense, this proclamation fundamentally changed how the higher education system was to be structured and governed; and hence, what the regulatory space of tuition fee decisions would look like. All of the distinctions discussed in section 2.2.1 of this chapter; together with education Apartheid and Apartheid more generally; were to be abolished and remedied. The 36 higher education institutions which had been split across 8 responsible authorities, were all brought under one authority.<sup>331</sup> However, this proclaimed amalgamation did not change the discrepancies between HD/BIs and HA/WIs; or the differences amongst HD/BIs, or amongst HA/WIs. Closing those gaps would require substantial social activism. It would also incur significant costs and necessitate multiple trade-offs (or, at least, redistributions), implicating responsible budgeting.

The commitment to the paradigm of society as unitary, egalitarian, and democratic therefore precipitated ongoing intervention by the post-1994 government in higher education. One result of this was that the evolution of higher education policy incubated what one interviewee described as *'a state of perpetual disequilibrium...at the systemic level but also at the institutional level'*. The disequilibrium stemmed from the *'perpetual change[s]'* which were inaugurated, dating back to *'the turn of democracy in 1994'* and *'the most decisive changes [which] started happening from 1997, 1998'*; together, more generally, with *'a lot of upheaval'* in higher education.<sup>332</sup>

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<sup>331</sup> See Figure 7.

<sup>332</sup> Interviewee 8 (Pretoria, 4 April 2018).

Perhaps the most vivid illustration of this change and upheaval was the post-1994 government's reconfiguration of higher education institutions. Three aspects of this reconfiguration are noteworthy. First, the distinction between universities and technikons was removed, with new institutions ('universities of technology') emerging. Second, all universities (i.e. universities and universities of technology) were '*challenged...to do research*' by Kader Asmal, South Africa's Minister of Education from 1999 to 2004.<sup>333</sup> These two shifts speak to the mission or purpose envisaged for certain higher education institutions, post-1994.

Third, and perhaps most dramatically, a process of mergers and amalgamations was initiated, in part as an attempt to remedy the outcomes of education Apartheid. Between 2000 and 2005, 36 public universities and universities of technology were converted into 21 public universities; and increased to 26 universities by the time of the Fees Must Fall protests in 2015.<sup>334</sup> This process included 9 mergers involving 10 universities and 10 former technikons, as well as unbundlings and incorporations.<sup>335</sup>

For certain institutions, this resulted in a large geographic footprint and student body. The Tshwane University of Technology ('TUT') was one example of this. TUT emerged in 2004 from the merger of three technikons.<sup>336</sup> In 2018, it was '*by far the*

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<sup>333</sup> Interviewee 7 (Johannesburg, 3 April 2018). See further 'Professor Kader Abdul Asmal | South African History Online' <<https://www.sahistory.org.za/people/professor-kader-abdul-asmal>> accessed 17 June 2020.

<sup>334</sup> Cf. Clement Baloyi & Goonasagree Naidoo, 'Higher Education in South Africa: A means towards an ends' [2016] *African Journal of Public Affairs* 19, 22.

<sup>335</sup> See *University State Budgets* (March 2017), preface.

<sup>336</sup> *Ibid.*

*biggest contact [university] in South Africa*’; having 63 000 students; and being ‘*active in five provinces*’.<sup>337</sup> Another example is Walter Sisulu University (‘WSU’). It was created in 2005 through merging the University of the Transkei with two technikons.<sup>338</sup> WSU had around 31 000 students in 2018; across four campuses within a ‘*radius of...400 kms*’, several hours’ driving distance apart. It ‘*covers four district municipalities and six kingdoms [presided over by traditional leaders]*’.<sup>339</sup>

Any benefits potentially arising from this consolidation could arguably be offset by these new institutions being patchworks of their constituent organisations’ cultures and histories. Furthermore, the size and spread of some of these new institutions could render them unwieldy; particularly insofar as dispersion created campus-specific dynamics within the broader institutional setting.<sup>340</sup> This size and spread brings to the fore the place of space as significant for understanding key features of this regulatory space.

Alongside the mergers, two new institutions were built, and opened in 2014.<sup>341</sup> A further institution emerged between 2014 and 2015, following a de-merger.<sup>342</sup> The

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<sup>337</sup> Interviewee 22 (Pretoria, 3 May 2018).

<sup>338</sup> See fn 335.

<sup>339</sup> Interviewee 12 (East London, 12 April 2018).

<sup>340</sup> These could include protests at a multi-campus university on one, but not all, of its campuses. This would require intervention by senior managers.

<sup>341</sup> See: ‘Sol Plaatje University | Diploma, Degree & Postgraduate Programmes’ (*Sol Plaatje University*) <<https://www.spu.ac.za/>> accessed 11 November 2019. And ‘University of Mpumalanga’ <<http://www.ump.ac.za/history.html#.XcmTU9UaSUk>> accessed 11 November 2019.

<sup>342</sup> ‘Medunsa to Be No More | IOL News’ <<https://www.iol.co.za/news/south-africa/limpopo/medunsa-to-be-no-more-1795844>> accessed 11 November 2019.

University of Limpopo had been created in 2005 by merging the University of the North and the Medical University of South Africa ('MEDUNSA'). Because of various ensuing difficulties, MEDUNSA was de-merged from the University of Limpopo and became Sefako Makgatho Health Sciences University. One interviewee cited this as an example of a merger not leading to improvements in '*quality and systems*'. MEDUNSA's incorporation into the University of Limpopo

*'[just] couldn't...work. And hence, it...had to be de-merged. And a new university emerged. One would call [it] new; it's not new!...Well, it's when you want to...score some political points, you'll say it's new'*.<sup>343</sup>

Both specific mergers and the underlying rationale for the merger process were contentious. For the post-1994 government, this process was a step towards transforming the higher education landscape. One interviewee recounted how the mergers were presented as part of South Africa's post-1994 de-racialisation:

*'Everything that happened then was presented as emancipatory. Whatever was happening was freedom, and the realisation of a long struggle. And that was a very powerful ideological position for people in power to adopt. And they did it very effectively, whatever they were doing. This is state, or university managers, or other actors.'*<sup>344</sup>

This interviewee's perspective was shaped by Silvia Federici and George Caffentzis' research on experiences in Africa of World Bank imposed structural adjustment packages. The interviewee saw the ensuing

*'commodification of the university [not] as the fruits of liberation, but...as neoliberalisation being justified by the fact that it was'*<sup>345</sup>

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<sup>343</sup> Interviewee 42 (Pretoria, 1 June 2018).

<sup>344</sup> Interviewee 6.

<sup>345</sup> Ibid.

this emancipatory moment.

Rather than merging institutions to create a single, deracialised entity, the interviewee argued that

*‘...both universities should be de-racialised...you didn’t have to merge and cut. You should de-racialise [the University of] Durban-Westville, and de-racialise [the University of] Natal.’*<sup>346</sup>

However, these two universities were merged in 2004 to form the University of Kwa-Zulu Natal.<sup>347</sup> More broadly, the merger process presented several undesirable outcomes:

*‘Whenever [institutions] were merged...you [moved from] two Philosophy departments [to] one. You employ less people. There’s less intellectual divergence...everything that pre-exists is just erased, and you start again. So after the merger...the kind of democratic spaces that existed in both institutions were just annihilated. And it became totally top-down, totally corporatised.’*<sup>348</sup>

Although there was resistance to this process, the interviewee saw it ending in a stark stalemate: *‘...students keep access but there are no resources. And there’s just this steady decline.’* Prominent student protests against financial exclusion are the primary mechanism through which access is retained. But

*‘there was no money. I mean, we had no paper...We just had no resources. There were no tutors...Buying books was totally out of the question...’*<sup>349</sup>

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<sup>346</sup> Ibid.

<sup>347</sup> See *University State Budgets* (March 2017), preface.

<sup>348</sup> Interviewee 6.

<sup>349</sup> Ibid.

This criticism highlights how vigorous social activism (the student protests to retain access) could conflict with responsible budgeting (balancing demands on resources with the availability of resources). It reinforces the idea that social activism inspired opposition to responsible budgeting may lead to a stark stalemate. Similarly, responsible budgeting focused on effectiveness and efficiency (e.g. consolidating the higher education system through mergers) can undermine social activism; as well as sparking further social activism through protest.

Together with geographic and resourcing challenges, the merger process triggered conflicts over institutional culture and philosophy at certain entities. I argue this stemmed partly from the gulf between the paradigm of separateness (which emphasised fragmentation) and the paradigm of society as unitary, egalitarian, and democratic (which sought to stitch South Africa back together). It also arose from challenges inherent in combining different intellectual approaches.

In addition to the splits between and within HD/BIs and HA/WIs; and the split between universities and technikons; the higher education landscape under apartheid differentiated between colleges (e.g. teaching colleges) and university- or Technikon-type institutions. Post-1994, the teachers' colleges were incorporated into universities. However, one interviewee described how the *'process of amalgamating colleges of education into universities was in many ways quite destructive...'*. It could be fraught, because it required the combination of *'two different cultures, two different approaches...'*. More generally, the merger process had to grapple with

*‘separate, siloed institutions....sometimes [with] genuinely different intellectual cultures and traditions’.*<sup>350</sup>

This government tinkering therefore affected which institutions existed, and in what form. It significantly impacted on tuition fee decisions because it determined which institutions existed as public universities. The 21 public universities and 15 technikons which existed in 1994, became 26 public universities by 2015.<sup>351</sup> Yet achieving transformation and de-racialisation required more than rationalising institutional forms. A danger some mergers ran was that the constituent institutions were *‘so far away [from each other]. There’s no racial integration. And the power... and the resources’* remain where they had previously been located.<sup>352</sup> This reinforces the centrality of the place of space to analysing this regulatory space.

Several interviewees highlighted the ambivalence surrounding how far apartheid-era distinctions between institutions persisted post-1994, and especially after 2005. One interviewee stated:

*‘I don’t like using these historically advantaged, disadvantaged [labels]. Because a lot of them merged. I mean, what is [the University of Kwa-Zulu Natal]? It’s a complete merger. You don’t know...how to really label it.’*<sup>353</sup>

However, other interviewees discussed South African public universities in those terms. Despite some common purpose emerging in sector-wide bodies such as USAf,

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<sup>350</sup> Interviewee 9.

<sup>351</sup> Cf. Bunting (fn 223) 39.

<sup>352</sup> Interviewee 9.

<sup>353</sup> Interviewee 39 (Pretoria, 25 May 2018).

the apartheid-era divisions were still visible even after the merger-process.<sup>354</sup> One interviewee indicated that

*‘...there have been underlying tensions between the universities loosely described as the historically disadvantaged universities, and the others. Because they don’t share a common interest in relation to a number of things. Historically disadvantaged [universities] would say...what you’re talking about – access to ultra-fast computers – is actually irrelevant to us. We’re not there yet.’*<sup>355</sup>

In spite of the contested persistence of these divisions, all public universities fell under the same legal and policy framework post-1994. This reinforces my argument that they occupied the same, multi-faceted regulatory space. The common legal and policy framework initiated new conflicts over institutional autonomy; and subjected all public universities to planning, funding, and quality control steered by the national government.

## **Conclusion**

Conspicuously absent from this chapter is any mention of a legal or policy measure that directly or explicitly constrains tuition fee decisions. Does this mean that there is only ‘surprise’, and no puzzle, over councils at public universities’ ‘unfettered’ prerogative to make tuition fee determinations?<sup>356</sup> I argued that this apparent lack of fetters remains a puzzle worth exploring. Since tuition fees are charged to registered students for the courses they take, I indicated the importance of considering how broader law and policy

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<sup>354</sup> Cf. fns.286 and 288.

<sup>355</sup> Interviewee 17.

<sup>356</sup> Cf. fn 219.

may affect what is taught or researched, by who, to or for whom. And how, in turn, this constrains how and what fees can be set.

My argument elaborated how the main driver of the general constraints on tuition fee decisions has been the Apartheid and post-1994 states' pursuit of societal transformation. I used the notion of 'paradigms' to explore how this transformation was framed and articulated; and showed that the most notable outcome has been an interventionist state driving substantial, ongoing policy change. Perhaps more surprising than the administrative autonomy enjoyed by public universities in South Africa, would be if my investigation concluded that university councils' prerogative regarding tuition fee decisions was, in fact, unfettered.<sup>357</sup>

This chapter has also shown the importance of the place of space in regulatory space analysis; particularly where and how interests are organised. I detailed how both 'place' and 'space' evolve over time. I outlined how distinctions drawn by the Apartheid state endure, despite being partially altered by the post-1994 state's reconfiguration of higher education institutions. With this account of *'the "place" of organised interests in the policy process'* in mind, the next chapter will analyse how the post-1994 state-centred planning, funding, and quality control of *'a single national co-ordinated [higher education] system'* affected tuition fee decisions.<sup>358</sup>

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<sup>357</sup> Ibid.

<sup>358</sup> Cf. fn 264.

## CHAPTER 5

### **Institutional autonomy and the framework of public accountability**

*‘...Turning and turning in the widening gyre...’*<sup>359</sup>

In the transition from education Apartheid to the perpetual disequilibrium, universities shifted from being *‘creature[s] of the state’* (under the former), to institutions in which academic freedom and institutional autonomy were expected to operate *‘within the framework of public accountability’* (during the latter).<sup>360</sup> This chapter delves into the triad of planning, funding, and quality control for higher education which is at the core of this *‘framework of public accountability’*. Together with chapters four, six, and seven, this chapter argues that tuition fee decisions at public universities in South Africa were regulated prior to 2015.

I show that this regulation took the form of a delicate calibration of the interactions between three actors and four income streams. The actors were the national government, university managers, and students. The income streams were the government subsidy paid to universities; tuition fees; universities’ income from donations, external research funding, and contract work (‘third stream’ income); and the portion universities received of state-funded student financial aid. The framework of public accountability was an integral component of these delicate calibrations.

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<sup>359</sup> William Butler Yeats, ‘The Second Coming’.

<sup>360</sup> See fns 245 and 246.

My account builds on what I have previously argued about how tuition fee decisions at public universities in South Africa are regulated.<sup>361</sup> I focus on how the dispersal of the resources of wealth (both pre-1994 endowments and the post-1994 four income streams), authority (including that derived from state law and university statutes), and organisational capacity evolved during the perpetual disequilibrium. I highlight how the triad of the planning, funding, and quality control of higher education affected the boundaries of the regulatory space of tuition fee decisions, including through organising actors and issues into and out of this space.

I focus on the interactions between the national government, university managers, and students. The conduct of each party to these interactions was at least partly calibrated, or constrained, by that of the others. The four income streams on which public universities in South Africa rely also affected how these parties interacted. These income streams are shaped by economic factors (e.g. South Africa's GDP, and its growth rate) and actors' decisions in light of those factors (such as what counts as funding available for allocation).

A university's income streams speak directly to the resource of wealth. More broadly, these income streams are comprised of resources which actors in cognate spaces can utilise and compete for. As I argued in chapter three, this stems partly from wealth encompassing financial means.<sup>362</sup> I argue that wealth can flow into and out of

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<sup>361</sup> See Williams (fn 6).

<sup>362</sup> See section 2.3.1 in chapter three.

cognate spaces, highlighting the porous nature of the boundaries of the regulatory space of tuition fee decisions.

However, the amount of wealth dispersed across cognate spaces tends to be finite. This is especially true for wealth allocated through a national government's budget. There was a zero-sum-game dimension to budgetary allocations made by the post-1994 state during the perpetual disequilibrium: funding was allocated either to higher education; or to the '*other pressing social needs*' outside of higher education (including '*housing, energy and water*') which the post-1994 state recognised it had to address; but not to both.<sup>363</sup> Within education, funding allocated to higher education cannot be utilised for basic education or continuing education and training. And funding for student financial aid cannot be allocated to universities to improve their accommodation or subsidise teaching. This goes to the heart of the tension between social activism and responsible budgeting: especially the perverse and unintended outcomes which may ensue when social activism cannibalises responsible budgeting.

Second, the intricacy and fragility of the calibrations regulating tuition fee decisions reinforces the necessity of tempering expectations of what outcomes can be achieved through regulation. As Scott argues,

*'the regulatory space metaphor is useful in challenging overstated claims for what is possible through regulatory activity'*.<sup>364</sup>

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<sup>363</sup> EWP 3 (fn 13) paragraph 4.3.

<sup>364</sup> Scott (fn 10) 352.

In one sense, this is perhaps a counterpoint to the idea that tuition fee decisions were unregulated. The societal transformations pursued by the Apartheid and post-1994 states were highly ambitious projects, both of which leant heavily on law, policy, and regulation. Yet it is questionable how far the legal and regulatory systems adopted could achieve the outcomes sought by either state. For all the post-1994 state's attempts to plan and steer higher education, I argue that the persistence and the extent of disruptive protests highlight the delicacy of the calibrations regulating tuition fee decisions.

In this chapter, I discuss the extensively detailed – but inherently fragile – steering and planning of higher education attempted by the post-1994 state. I build my argument over two sections. First, I discuss the main features of the '*framework of public accountability*'. I show how higher education generally, and university education specifically, was steered and planned in South Africa during the perpetual disequilibrium. Each element of the steering and planning, and the intersections between elements, will be analysed: from the contractual planning university managers and the national government engage in; to the associated financial incentives provided by the funding framework; and the quality control performed by a statutory body, the Council on Higher Education ('CHE').

Second, I turn to the conflicting principles which were outlined in key policy documents and which formed part of the framework of public accountability. I focus on the principle of institutional autonomy, particularly the battleground it became under the Apartheid and post-1994 states. This is an apt principle to focus on, because it sits

at an important confluence. It touches on how universities are governed, including how tuition fee decisions are made within specific governance structures at universities. Moreover, it speaks to the decisions universities make about their academic offering – especially regarding what is taught or researched, by whom, to or for whom.

### **1. The framework of public accountability**

I argued in chapter four that it was puzzling that tuition fee decisions at public universities in South Africa seem to be unfettered. This was puzzling partly because my interviewees mentioned a number of constraints on how tuition fee decisions are made. I argue that a large number of these constraints could be considered regulatory, especially those which emerged from the ongoing and substantial policy changes necessitated by the societal transformations pursued by the Apartheid and post-1994 South African states.

The national government's policies during the perpetual disequilibrium, in particular, entailed significant and direct state involvement in higher education. There was both significant contestation over the state's role in higher education, including over how public funds were disbursed; and broad agreement that the state had an important role to play. This suggests that contentious regulatory constraints were imposed through policy that was underpinned (at least initially) by (fairly broad) consensus. This is another dimension to the negotiated self-regulation I referred to in chapter two.

For instance,

*‘a fundamental policy on which all stakeholders in the higher education system [were] agreed [was that h]igher education must be replanned, governed and funded as a single national co-ordinated system, in order to overcome the fragmentation, inequality and inefficiency which are the legacy of the past...’.*<sup>365</sup>

This suggests a fairly broad commitment by those participating in higher education to shift it away from the paradigm of separateness, towards better aligning with the paradigm of society as unitary, egalitarian, and democratic. It also highlights the significant state involvement which this will entail, since all of ‘*higher education*’ had to be ‘*replanned, governed and funded as a single national co-ordinated system*’.

Similarly,

*‘...there’s been buy-in into the vision of the Department...I wouldn’t know whether to say universal. But institutions bought into [EWP 3]...They bought into the vision of the [2001 National Plan for Higher Education].’.*<sup>366</sup>

This buy-in reinforces the argument that tuition fee decisions, along with higher education more generally, were subject to negotiated self-regulation. It partially explains the puzzle of university councils’ seemingly unfettered prerogative regarding tuition fee decisions existing within the heavily regulated field of higher education. Direct or explicit regulation of tuition fee decisions did not take place. There was a mix of contestation and consensus regarding the regulations that were implemented in higher education.

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<sup>365</sup> EWP 3 (fn 13) paragraph 2.1.

<sup>366</sup> Interviewee 39.

Crudely, university managers and the national government appear to have maintained a broad consensus on the overarching ‘*vision*’ for higher education. However, the detailed implementation of that vision – e.g. how much government subsidy universities should receive, what powers the minister should have to intervene in failing institutions - proved contentious. For the period 1994 to 2000, for instance:

*‘the lack of policy detail and of modelling of the effects that proposed approaches (i.e. [massification], the proposal of central planning of enrolments...) would have on the system and on the country’s other priorities, allowed for a greater sense of consensus than what was going to be possible in the post-2000 period’.*<sup>367</sup>

I tease out this puzzle in this section, focusing on how far state involvement in, and (more narrowly construed) regulation of, public universities went. Reinforcing my argument in chapter four, I show that this regulation and involvement affected what was taught or researched, to whom, by or for whom. I do this by explaining the system-wide and institutional planning cycle which developed for all South African public universities. I then discuss the connection between this planning cycle and the funding framework that underpinned how the state subsidy for university education was disbursed. I conclude this section by analysing the role of a statutory body, the CHE, in performing quality control for higher education. This quality control extended to determining which programmes universities could offer.

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<sup>367</sup> Lange and Luescher-Mamashela (fn 125) 113.

### 1.1. The planning cycle

Developing a carefully managed planning cycle was key to establishing a single, integrated higher education system. It would enable state-driven co-ordination of the higher education system through individual contracts being agreed between the state and each public higher education institution. These contracts would set out how many students each institution would take in each programme they offered. As I will explain, this resulted in both an institutional commitment to register specific numbers of students in each programme offered; and cumulatively, a system-wide view for the national government of the total number of students likely to be registered in each academic programme offered at public higher education institutions in South Africa.

Such detailed steering through planning was seen as essential for two reasons. First, *‘the context of fiscal constraints and the need for greater responsiveness...to the national development agenda’* necessitated that higher education’s *‘size and shape’* be centrally co-ordinated.<sup>368</sup> This co-ordination was far-reaching, encompassing what kinds of institutions existed, and in what form. It was bolstered by

*‘the introduction of the “programme and qualification mix” ...approval process, in which all programmes offered by an institution needed to be approved by the Department on the basis of their importance to the country’s needs and in terms of the institution’s capacity to offer them...’.*<sup>369</sup>

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<sup>368</sup> EWP 3 (fn 13) paragraph 2.7.

<sup>369</sup> Denyse Webbstock, ‘Overview’ in Council on Higher Education, *South African Higher Education Reviewed: Two Decades of Democracy* (Council on Higher Education, 2016) 5, 27.

Second, there was a concern that low-quality, duplicated programmes may saturate the higher education sector. To address these two concerns, higher education would be ‘replanned, governed and funded as a single national co-ordinated system’.<sup>370</sup> The focus on a single, national higher education system was bolstered by South Africa’s 1996 Constitution describing ‘tertiary education [as] an exclusive national competence’.<sup>371</sup>

Significant impetus was given to broadening and diversifying higher education. Growing higher education in this way was deemed necessary ‘to meet the imperatives of equity, redress and development’.<sup>372</sup> The broadening would be ‘of the social base of the...system in terms of race, class, gender and age’. This linked to one form of diversity which was sought: a system that would ‘cater for a considerably more diverse body of learners than at present’.<sup>373</sup> Two other aspects were to be diversification of the ‘access, curriculum, and qualification structure’; and ‘of institutional missions and programme mixes’.<sup>374</sup> Careful co-ordination was identified as a prerequisite, since achieving this broadening and diversification would require the triad of:

‘...a system-wide and institution-based planning process, and a responsive regulatory and funding system’.<sup>375</sup>

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<sup>370</sup> EWP 3 (fn 13) paragraph 2.1.

<sup>371</sup> Schedule 4, Part A of the Constitution; EWP 3 (fn 13) paragraph 2.49. By contrast, ‘[e]ducation at all [other] levels’ was a ‘Functional Area...of Concurrent National and Provincial Legislative Competence’.

<sup>372</sup> EWP 3 (fn 13) paragraph 2.22.

<sup>373</sup> Ibid paragraph 2.2.

<sup>374</sup> Ibid paragraph 2.6, first and second bullet points.

<sup>375</sup> Ibid fourth bullet point.

This planning and co-ordination was for higher education generally, including public university education specifically.

The triad of *'planning...and a responsive regulatory and funding system'* was partly a response to uncertainty about *'what increases in participation rates for black students, and overall'* would be possible. Uncertainty stemmed from the need to balance responsible budgeting and social activism.<sup>376</sup> Such balancing required the expansion of higher education: to be *'responsibly managed and balanced'*; to cater to *'demand for access'*; to respond to *'the need for redress and diversification [and] the human resource requirements of the society and economy'*; and to take place within *'the limits of affordability and sustainability'*.<sup>377</sup> Furthermore, it was necessary to *'offset pressures for homogenisation'* which might be unleashed by centralised co-ordination.<sup>378</sup>

The planning component of the triad would be comprised of an integrated national and institutional planning cycle:

*'[t]he key instruments in the planning process will be the development of an overall national and institutional three-year "rolling plans", indicative plans which facilitate the setting of objectives and implementation targets that can be adjusted, updated and revised annually.'*<sup>379</sup>

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<sup>376</sup> Ibid, and paragraphs 2.23 to 2.24.

<sup>377</sup> Ibid paragraph 2.6, fourth bullet point.

<sup>378</sup> Ibid paragraph 2.37.

<sup>379</sup> Ibid paragraph 2.9.

This planning would affect which institutions existed, and what mission or purpose they pursued; fleshing out (or changing) what state and institutional statutes defined as their purpose.

Furthermore, it would be '*participatory*', '*multi-year*', and

*'in line with the government's budget development process...reflected in the Medium-Term Expenditure Framework'*.<sup>380</sup>

This explicitly tied the post-1994 state's co-ordination of higher education to its overarching budgeting process. While higher education would remain a distinct sector under the auspices of the broader Ministry of Education (later, Ministry of Higher Education and Training), achieving higher education's co-ordinated growth was expressly located within the broader '*place of space*' of the post-1994 state's transformation of South African society.

Hence the repeated echoes of both the need for equity, transformation, redress, growth, and diversification in higher education; and the simultaneous concern with the constraints of '*the limits of affordability and sustainability*', and of responsibly managing and co-ordinating higher education's transformation in a balanced manner.<sup>381</sup> This highlights the tension at the heart of policy seeking to realise the paradigm of society as unitary, egalitarian, and democratic: between social justice (further fleshed out through reference to notions of equity, transformation, etc.) and responsible budgeting (affordability, sustainability, etc.).

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<sup>380</sup> Ibid.

<sup>381</sup> Cf. *ibid* paragraph 2.6.

National and institutional plans would, in theory, provide a mechanism for managing this tension. A national plan was developed to ‘*provide the framework within which institutional plans will be developed*’. It would ‘*in turn be influenced by regional and institutional concerns and proposals*’. Its primary purpose was to

*‘establish indicative targets for the size and shape of the system, overall growth and participation rates, and institutional and programme mixes’.*

All of these would ‘*advance the vision, principles and policy goals*’ set out for higher education.<sup>382</sup> Similarly, a ‘*national research plan*’ was developed.<sup>383</sup>

Complementing the national planning, institutions would negotiate comprehensive ‘*three-year rolling institutional plans*’ with the Department of Education.<sup>384</sup> Very little, if anything, would be left out of an institution’s plans. This is triply significant. The requirement to prepare (and publish, in some way) these plans arguably placed at least some general constraint on what institutions could do and how they could operate. This constraint was rendered more concrete by the requirement that these plans be negotiated with the Department of Education; in line with the national plan. Moreover, significant funding implications were attached to these plans.

Negotiation with the Department of Education is noteworthy because ‘*mismatch[es] between institutional plans and the national plan*’ were expressly

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<sup>382</sup> Ibid paragraphs 2.10 and 2.11.

<sup>383</sup> Ibid paragraph 2.91, first bullet point.

<sup>384</sup> Ibid paragraphs 2.13, 2.14, and 2.96.

contemplated. The envisaged solution was that *‘adjustments to institutional plans will be negotiated by the Department of Education with the relevant institutions.’*<sup>385</sup> Since institutional plans were to operate *‘within the framework of the national plan’*, it is unsurprising that any resolution of *‘mismatch[es]’* would lean towards bringing institutional plans in line with the national plan.<sup>386</sup> What a university could offer would be repeatedly negotiated, and would have to align with national priorities.<sup>387</sup>

In effect, this amounted to ongoing steering through the state playing a significant role in determining what educational programmes public universities could offer. One interviewee summarised this as follows:

*‘...the Department [of Higher Education and Training] plays a role in deciding what programmes you can offer. So university X can’t say we’re offering a medical degree next year. That...is determined as part of your enrolment planning process...So the Department really steers what our university sector looks like...[including] who can offer what.’*<sup>388</sup>

The engagements between actors underpinning this planning extend significantly beyond the programmes a university offers. The back and forth between university managers and the national government was described to me as follows. Enrolment plans are negotiated

*‘for the sector as a whole, but [through negotiating] institution to institution...It’s a six-year plan. With a three-year mid-term review...[The Department will] have certain strategic focuses...linked to [the] National Development Plan, and so on. [It will] also look at each university, and what the universities do. [It will] engage with them around their current enrolments:*

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<sup>385</sup> Ibid paragraph 2.17.

<sup>386</sup> Cf. paragraph 2.13.

<sup>387</sup> Ibid paragraph 2.41.

<sup>388</sup> Interviewee 39.

*where they should be expanding or not expanding. Depending on what it is that they do. There [is]... a very long set of tables. With all the different aspects that [universities] need to put in...Including gender and race and staffing and all kinds of things.*

*So it's not just about...the specific programmes [that universities offer]...Then [universities] look at their own strategic plans, their own processes...They fill out these tables, according to what they think they can manage. Linked to the funding they know they've got. And that's also linked to integrated planning, in terms of the...infrastructure plans for the institutions...*

*Once they've done that...[the Department does] an analysis across the entire system. [To] have a look and see: ok, what is the system going to produce? Is it going to produce the right kinds, at the right levels? Where are institutions over-reaching? Where are they maybe not doing what [the Department] thinks they could be able to do?*

*...that would be followed up with individual meetings with each institution. To look at their enrolment plan, and what they need to do. And then [the universities] will go through a process of finalising it. And their Councils will need to sign-off. And then send it to the Minister...when it comes back to [the Department, the Department analyses] it and sees whether [the universities have] done what they said they would do. And whether it fits with what has to happen...if [the Department agrees] with what [the universities have] done, [the plans will be given] to the Minister...to sign-off. And then that agreement is between [the Minister] and the Council. If [there's a disagreement], then [the Minister] will write back to an institution and say: look, not quite right. Please, we want you to do A, B, C, and D. Please approve that. And then [the Department] might actually change it [themselves]...'.<sup>389</sup>*

A further level to this steering was the requirement that any academic programme offered by a university be approved by the relevant quality assurance body – the Higher Education Quality Committee ('HEQC') of the CHE. Thus what could be offered as a programme of university education; how it could be offered (i.e. by whom, with what infrastructure available); and which universities could offer which programmes; was substantially steered by the national government. This is directly relevant to the

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<sup>389</sup> Interviewee 32.

regulatory space of tuition fee decisions, because tuition fees are charged for the academic programmes which registered students take.

## **1.2. The funding framework**

A common refrain in my interviews was that a declining state subsidy was the prime driver of the tuition fee increases which precipitated the 2015 to 2017 Fees Must Fall protests. This claim merits careful attention for two reasons. First, it was a decline in real terms, per student. Total allocations to universities and to higher education were increasing prior to the commencement of the Fees Must Fall protests in 2015. The problem was whether these increases were sufficient, given the (government-mandated) expansion of the university sector. Second, the state subsidy is not a single lump sum. Rather: it encompasses block grants (split across four categories) and earmarked grants; it is paid in tranches over the academic year; it is linked to (and incentivises) the implementation of institutional plans which have been negotiated with the government (as I outlined in section 1.1 of this chapter); and it is coupled with explicit policy expectations about what fee determinations universities will make.

The state subsidy is important because it is one of the main funding streams for most public universities. Funding speaks not only to the resource of wealth, but also to a tangible and fairly direct mechanism for influencing behaviour (and, therefore, for regulating). Along with the planning cycle, the funding framework is geared towards the paradigm of society as unitary, egalitarian and democratic. Both the planning cycle and the funding framework therefore incorporate the tension between responsible budgeting and social activism. For university managers, this tension was most

prevalent in the process of deciding tuition fee decisions. For the Ministry of Education's post-1994 overhaul of higher education, it was evident in the tension between expanding access to higher education while remaining within the bounds of available resources.

This necessitated a difficult balancing of sustainability and affordability; with the vigorous pursuit of equity, diversity, and transformation.<sup>390</sup> Planning seeks to manage these competing concerns through negotiation, co-operation, and facilitating procedural and financial stability. Funding connects to planning through budgeting. And budgeting can be a mechanism for ensuring that adequate resources are provided on an accountable basis. I show, though, that this kind of budgeting was undermined both by South Africa's increasingly parlous economic predicament; and by protest-driven social activism.

Budgeting can highlight the interconnections between, and conditions attached to, different funding streams. The '*framework of public accountability*' and the transformative agenda pursued by the post-1994 state meant that whatever public funding was forthcoming would not be distributed unconditionally. Rather, its disbursement was an important steering lever for the Ministry of Education, with

*'[t]he planning process in conjunction with funding and an appropriate regulatory framework [being] the main levers through which the Ministry will ensure that targets and goals of [the National Plan for Higher Education] are realised'*.<sup>391</sup>

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<sup>390</sup> EWP 3 (fn 13) paragraph 2.6.

<sup>391</sup> Ibid paragraph 4.10; National Plan for Higher Education (the 'National Plan') (February 2001), section 1.5.

One significant shift from the funding model under Apartheid was that, from around 2004/2005, the funding framework focused on ‘*affordability linked to the achievement of national policy goals and objectives*’, rather than on ‘*institutional costs*’.<sup>392</sup> The ‘*South African Post-School Education*’ (‘SAPSE’) funding formula introduced in the 1980s had adopted a ‘*“follow the student” approach*’:

*‘Funding allocations...were based on student enrolment numbers of two years earlier, as well as course success rates. There was a difference in funding level between students in the natural sciences and the humanities...The formula generated an entitlement for each university and technikon which was then brought into alignment with available state funds by means of an “a-factor”; this represented the proportion of entitlements that could actually be funded’.*<sup>393</sup>

The SAPSE approach was jettisoned around 2004/2005, partly because it was ‘*perceived to be inimical to the achievement of...policy goals [given] its bluntness as*’ a steering instrument.<sup>394</sup> Another issue was the diversity of institutions – as well as funding and governance regimes – which had emerged under Apartheid. To replace it,

*‘[t]he 2003 funding framework...was implemented...from 2007 onwards...based on the principle of shared costs between government and students. It was conceived as a goal-orientated mechanism for [distributing] government grants to individual institutions in accordance with national planning priorities, the quantum of funds available and the approved enrolment plans of individual institutions’.*<sup>395</sup>

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<sup>392</sup> The Higher Education Funding Framework (the ‘Funding Framework’) (November 2003), paragraph 1.8.

<sup>393</sup> Charles Simkins et al, ‘Funding’ in Council on Higher Education, *South African Higher Education Reviewed: Two Decades of Democracy* (Council on Higher Education, 2016) 321, 325 - 326.

<sup>394</sup> Webbstock (fn 369) 26.

<sup>395</sup> Ibid 27 (citation omitted).

### 1.2.1. The funding framework and the planning cycle

Ideally, interactions between the state and individual institutions would be choreographed towards fulfilling the National Plans' *'targets and goals'*:

*'interaction between the Ministry and institutions resulting in the approval of institutional plans...would...trigger...the release of funds based on the quantum of funds available'*.<sup>396</sup>

These *'institutional plans'* are what I discussed in section 1.1 of this chapter. The *'quantum of funds available'* refers to what the Department of Education received through broader state budgeting processes. It is split between *'block grants'* and *'earmarked grants'*.

Block grants were *'general purpose'*, and *'council-controlled funds, which can be used at the discretion of the council and university management'*.<sup>397</sup> The block grant was divided into four categories: teaching input grants; teaching output grants; research output grants; and an institutional factor grant. Earmarked grants were provided *'to achieve specific purposes'* (e.g. the construction of facilities or accommodation).<sup>398</sup>

Block grants could be used for discretionary spending by a university, while earmarked grants could be used for a specific purpose only. How the *'quantum of funds'*

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<sup>396</sup> The Funding Framework (fn 392) paragraph 1.7.

<sup>397</sup> EWP 3 (fn 13) paragraphs 4.16 and 4.20; the Funding Framework (fn 392) paragraph 2.1; Ministerial Statement on University Funding: 2016/17 and 2017/18 (November 2015), p 5.

<sup>398</sup> EWP 3 (fn 13) paragraph 4.16.

would be allocated across block/earmarked grants (as well as across the different categories of block grant) was determined by the Minister of Education ‘*annually*’ and ‘*within the context of the*’ Medium Term Economic Framework.<sup>399</sup> Importantly, allocations are all drawn from the same pool - they are a zero-sum game.

For tuition fee decisions, block grants have a double bearing. They are an important source of revenue, with institutions receiving public money

*‘on the basis of their planned (full-time equivalent or FTE) enrollments in different fields and levels of study which will be related to their institutional missions and plans’.*<sup>400</sup>

Both planning and block grant funding are therefore linked to FTE enrolments. This is a similar metric to that which drives total fee revenue. Both total fee revenue and block grant funding are functions of (some measure of) the number of students enrolled in specific programmes at a particular university. Furthermore, these enrolments are negotiated with the Ministry of Education; taking institution-specific (*‘institutional capacity and performance’*), systemic (*‘public available student demand estimates’*), and macroeconomic (*‘long-range labour market signals’*) into account.<sup>401</sup>

How much money is actually disbursed is regularly planned and forecast, with the Ministry of Education publishing

*‘three-year forward estimates of budget outlays by programme each fiscal year. The Ministry...will issue an annual statement in the budget context that provides*

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<sup>399</sup> The Funding Framework (392) paragraph 2.3.

<sup>400</sup> EWP 3 (fn 13) paragraph 4.20; cf. section 1.1 of this chapter.

<sup>401</sup> Ibid paragraph 4.23.

*the estimated level of block grant funding to each higher education institution for each of the next three academic years*'.<sup>402</sup>

In turn, institutions are expected to report '*all their planned FTE enrollments, whether supported by public subsidy or not*' and broken down by '*fields and levels of study*'. This breakdown extends to where '*institutions plan to expand or contract their enrollments*'.<sup>403</sup> What programmes an institution intends offering, and to who, thus form a key input into not only its own budgeting processes; but also into the state-driven planning cycle and funding framework.

Tying the national government's funding framework to the national government's and universities' planning cycle in this way gives institutions some stability and certainty about what funding they will receive from the state, and on what terms. For the block grant, institutions can forecast how much they will receive based on their agreed FTE enrolments and the formula applicable to each category of the block grant. I analyse each category of the block grant to tease out some of the delicate calibrations which they feed into.

### **1.2.2. Research outputs**

Research output grants are determined on the basis of '*publication units*' and '*research masters and doctoral graduates*'.<sup>404</sup> The weighting for doctoral students tends to be

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<sup>402</sup> Ibid paragraph 4.21.

<sup>403</sup> Ibid paragraph 4.22.

<sup>404</sup> The Funding Framework (fn 392) paragraph 3.1.2.

heavier than for research masters graduates.<sup>405</sup> Similarly, ‘*publication units*’ are further refined into four sub-categories. Articles published in a list of accredited journals are ‘*worth one unit...on a fractional author base*’.<sup>406</sup> The fractional base splits that unit between authors who fall within the public subsidy scheme – i.e. authors based at South African higher education institutions. It ‘*goes down to two decimal places*’, which means that where there are ‘*more than 100 authors, you get nothing*’. Each chapter of a ‘*peer reviewed book*’ which ‘*is a scholarly work*’ is also ‘*worth a unit, also on a fractional basis*’. For books which are ‘*academic, scholarly work; and peer reviewed...up to 10 units*’ of subsidy may be assigned, ‘*based on the number of pages*’. Finally, published peer-reviewed conference proceedings garner half a unit of subsidy; again, on a fractional author basis.<sup>407</sup> An institution’s research output grant allocation is determined by multiplying total outputs, by category, with the relevant unit weighting.<sup>408</sup>

This categorisation and subsequent weighting is an example of the state using funding to steer institutions towards meeting national policy objectives. Yet it also highlights the limits of what such steering can achieve. The National Plan devotes an entire section to ‘*sustaining and promoting research*’,<sup>409</sup> which states that the

*‘value and importance of research cannot be over-emphasised. Research, in all its forms and functions, is perhaps the most powerful vehicle that we have to deepen our democracy...It makes possible the growth of an innovation culture*

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<sup>405</sup> See e.g. Ministerial Statement on University Funding (fn 397) p 11.

<sup>406</sup> Interviewee 7.

<sup>407</sup> Ibid.

<sup>408</sup> See e.g. Ministerial Statement on University Funding (fn 397) pp 10 – 11.

<sup>409</sup> The National Plan (fn 391) section 5.

*in which new ideas, approaches and applications increase the adaptive and responsive capacity of our society, thereby enhancing both our industrial competitiveness and our ability to solve our most pressing social challenges. It contributes to the global accumulation of knowledge and places South Africa amongst those nations who have active programmes of knowledge generation’.*<sup>410</sup>

Yet building a funding system premised on driving research outputs can have perverse outcomes. It can lead universities to adopt ‘*playing-the-game-type approaches*’: such as encouraging the ‘*salami slicing*’ of potential publications (academic ‘*papers become very thin*’) in order to ‘*chase units in a big way*’; rather than ‘*publish[ing] in such a way that the...research has...impactful meaning*’.<sup>411</sup>

In addition, having a fractional authorship system and limiting it to researchers affiliated to South African universities can lead to sub-optimal outcomes:

*‘[one] downside of...the fractional author component is that it discourages collaboration...if two of us can do it, we each get half a unit. But if 10 of us do it, we each get a 10<sup>th</sup> of a unit. But of course, a lot of research is done...in teams.*

*...But [there’re] also international [ramifications]...If you’re in Oxford, and I’m [in South Africa]; I still only get half a unit. You don’t get half a unit but I only get half a unit. And yet we always say: we’ve got to collaborate with African partners. Which we do. But then you lose out half your subsidy every time you do that.’*<sup>412</sup>

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<sup>410</sup> Ibid section 5.1.

<sup>411</sup> Interviewee 7.

<sup>412</sup> Ibid.

### 1.2.3. Teaching inputs and outputs

Teaching input grants are determined by totals of the FTE students enrolled; insofar as that total ‘*conform[ed] to student enrolment plans approved by the Minister*’ and had ‘*been weighted according to ratios contained in a teaching input grid...contained in the Annual Ministerial Statement*’.<sup>413</sup> Those grids are another example of steering. They set out aggregated classifications of education subject matter (‘CESM’) sub-categories, weighted by ‘*funding group and course level*’.<sup>414</sup> Put differently, each funding group contains specific CESMs: e.g. funding group 1 includes education and law; funding group 4 includes life sciences and physical sciences.<sup>415</sup> Higher numbered funding groups are more heavily weighted than lower numbered ones.

Similarly, higher course (or qualification) levels are more heavily weighted than lower ones. Contact learning is more heavily weighted than distance learning. For instance, an undergraduate education degree by contact received a weighting of 1.0; and by distance, a weighting of 0.5. For physical sciences, the parallel weightings were 3.5 and 1.75 respectively. By contact, an education Honours degree was weighted 2.0; a Master’s degree, 3.0; and a doctoral degree, 4.0.<sup>416</sup>

An institution’s ‘*approved*’ teaching input units are then calculated by multiplying its FTE enrolment totals (by course and level) by the relevant cell in the

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<sup>413</sup> The Funding Framework (fn 392) paragraphs 3.3.1 and 3.3.2.

<sup>414</sup> Ibid paragraph 3.3.3.

<sup>415</sup> Ministerial Statement on University Funding (fn 397) pp 7 – 8.

<sup>416</sup> Ibid.

table of funding weightings; and then summing all the totals in that table.<sup>417</sup> Teaching outputs are determined in a similar, but more simplified, manner.<sup>418</sup> The simplifications are that no distinction is drawn between distance and contact learning; or between funding groups differentiated on the basis of CESM categories. In addition, there is no teaching output grant for research masters and doctoral students, since those students are covered by the research output block grant.<sup>419</sup>

The teaching input and output grants tie very closely to the planning cycle I discussed in section 1.1 of this chapter. As with the research output grant, they highlight both the intricacy of the ‘*framework of public accountability*’ and its shortcomings (primarily the incentive for universities to ‘gamify’ the subsidy). One interviewee summarised how these grants operate in practice:

*‘Input is the students that you register. But that is also governed by the government...you don’t take any number of students. You agree a three-year enrolment plan...input subsidy is therefore the students you enrol according to that plan... Output is when the students graduate. Also, it has a variation...For an undergraduate, the input subsidy is [roughly] 68%...for bums in the lecture theatre. That means the output subsidy is less [i.e. 32%]. So there’s a perverse incentive, or could be a perverse incentive. Just take them in. Get the money. But don’t worry about whether they graduate or not. As you know, the system [as a whole] suffers from poor outputs. 50 % of people who register...never graduate with any degree... But also, remember, that even if it’s 68%, you still get the balance - which is 32% - as output. So it’s not small money either. And also, if they finish in time. The subsidy degrades, the longer the students get.*

*For postgrad, it’s flipped. The output subsidy is higher than the input subsidy...So the money is in graduating the postgrads...’*<sup>420</sup>

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<sup>417</sup>Ibid.

<sup>418</sup> The Funding Framework (fn 392) paragraph 3.2.4.

<sup>419</sup> Ministerial Statement on University Funding (fn 397) p 10.

<sup>420</sup> Interviewee 3.

#### 1.2.4. The institutional factor

The institutional factor grant is the final category of block grant. It generates additional teaching input units for institutions in two circumstances. First, a '*disadvantage weighting factor*' is determined based on the percentage of a student body deemed disadvantaged.<sup>421</sup> '*Disadvantaged students*' were '*deemed*' to be '*African and Coloured students who are South African citizens*'. The proportion of such students at each institution is calculated based on historic FTE totals.<sup>422</sup> Second, a size factor is generated '*to give additional teaching input units to small universities*'.<sup>423</sup>

#### 1.2.5. Fee expectations

The funding framework meant that

*'[g]overnment funding rates per FTE student place will vary according to the broad field of study and level of study, but will be standard for all institutions'*.<sup>424</sup>

Institutions could enrol additional students outside of agreed FTE numbers, but such enrolments would receive no public funding. There would also be a penalty for any '*[f]ailure to meet FTE enrolment planning targets*': namely, a liability '*to forfeit equivalent funds by way of reductions to [the offending institution's] operating*

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<sup>421</sup> See e.g. Ministerial Statement on University Funding (fn 397) p 11: the factor ranges from 0 (where the proportion of disadvantaged students is 40% or less); '*and increases linearly up to a maximum of 0,1 at a disadvantaged proportion of 80%*'.

<sup>422</sup> Ibid p 8: '*[t]he academic year of a university in which students are enrolled...lags 2 years behind the financial year of the State's budget*'.

<sup>423</sup> Ibid p 12: the size factor starts at 0,15 '*for universities with up to 4 000...FTE...students, after which it decreases linearly to 0 for universities with totals of 25 000 or more FTE...*'.

<sup>424</sup> EWP (fn 13) paragraph 4.26.

*grants*'.<sup>425</sup> Several interviewees indicated that this became around a two percent permitted variance above and below '*FTE enrolment planning targets*': '*every university has to stick within two percent of their first-time entries*'.<sup>426</sup> Numbers outside this permitted range could result in a '*sanction from the government...a penalty...for not reaching your enrolment targets*'.<sup>427</sup>

Alongside the detailed steering facilitated by the block grant, institutions were given discretion '*to determine their own fees for subsidised student places as well as for student places outside the publicly funded quota*'. This discretion was conferred to '*maximis[e]...the flexibility of institutions under the [post-1994] arrangements*'.<sup>428</sup> For one interviewee, this flexibility was an important counterpoint to the standardisation inherent in the block grant:

*'we're much more flexible because we have fee income that we're in control of [setting]. If the government was to...take that away, and put that into the block grant; then we would have no control over that. Then all universities would get the same*'.<sup>429</sup>

Moreover, this flexibility linked to institutions' capacity to differentiate themselves.

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<sup>425</sup> Ibid paragraph 4.24.

<sup>426</sup> Interviewee 32.

<sup>427</sup> Interviewee 3.

<sup>428</sup> EWP 3 (fn 13) paragraph 4.25.

<sup>429</sup> Interviewee 18.

Although this flexibility appears to leave tuition fee decisions ‘*unfettered at law, unfettered at policy*’, there were several explicit policy expectations.<sup>430</sup> First, fee structures should be ‘*realistic*’. This appears to include taking into account how

‘[a]s the profile of student enrolment becomes increasingly representative of the general population, the proportion of eligible students from poor families is rising steeply.’<sup>431</sup>

Second, and relatedly,

‘[t]he basis on which fee levels are established must be transparent and subject to proper scrutiny within the institution, and must satisfy reasonable equity criteria...the Ministry would expect institutions whose tuition fees were well above the nationally-determined price per subsidised student place, to explain why students should be expected to pay premium rates, and to describe how poor students would be assisted to pay’.<sup>432</sup>

These expectations were not translated into more detailed policy steers, or more explicit or direct regulation of tuition fee decisions.

### 1.2.6. Earmarked grants

While block grants formed the bulk of the public subsidy that institutions received, earmarked funding supplemented institutions’ finances in several important ways. Tied directly to the expectation that tuition fee decisions ‘*must satisfy reasonable equity criteria*’ was the acknowledgement that high fees would be a barrier for poorer students:

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<sup>430</sup> Cf. fn 56.

<sup>431</sup> EWP 3 (fn 13) paragraph 4.8.

<sup>432</sup> Ibid paragraph 4.25.

*‘a realistic fee structure must...go hand-in-hand with a sustainable programme of student financial assistance’.*<sup>433</sup>

A series of interconnections necessitated that this financial assistance be increased if it were to remain sustainable. One connection was that *‘a significant portion of financial assistance’* became fee payments to institutions. Another was that fees, the availability of financial aid, and how institutions functioned, were interrelated; with fees and financial aid affecting *‘the financial health and (in some cases) the viability and social stability of an institution’.*<sup>434</sup> As one interviewee who’d worked at an HD/BI noted:

*‘There were demonstrations at the beginning of every year. Going back 20 years or something. And it was basically linked to this idea that every student who qualifies to be at university, should receive a financial aid package to study. That was the demand’.*<sup>435</sup>

Student financial aid was one form of earmarked funding universities receive; albeit indirectly. Two other forms of earmarked funding were relevant to the post-1994 transformation of the higher education landscape. One of these was to facilitate

*‘[i]nstitutional restructuring, including mergers and the re-capitalisation of institutions [as well as t]he higher education quality assurance framework’.*<sup>436</sup>

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<sup>433</sup> Ibid paragraphs 4.8 and 4.25.

<sup>434</sup> Ibid paragraphs 4.45 – 4.46.

<sup>435</sup> Interviewee 20.

<sup>436</sup> The Funding Framework (fn 392) paragraph 4.1, fourth and fifth bullet points.

Another form of earmarked funding focused on alleviating the discrepancy between HD/BIs and HA/WIs, through making targeted funds available for institutional redress.

This redress funding was expressly envisaged as shorter term,

*‘in time becom[ing] superseded by the goal-orientated subsidy process and by other categories of earmarked funding’.*<sup>437</sup>

Cumulatively, earmarked and block grant funding allocations were zero-sum. For instance, some of the funding earmarked for financial aid would flow to universities as tuition fees, via the poorer students who received state-funded financial aid. But that was arguably not additional or new money being disbursed to universities. Rather, it was money that was not available for block grant funding, once it had been allocated as earmarked funding.

### **1.3. Quality Control**

Quality assurance, programme accreditation, and institutional audits formed the post-1994 state’s third steering lever in its transformation of South Africa’s higher education sector. They played an important role in determining which institutions could offer what, and to whom. As with the planning cycle and the funding framework, quality assurance, programme accreditation, and institutional audits were infused with the paradigm of society as unitary, egalitarian, and democratic.

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<sup>437</sup> EWP (fn 13) paragraph 4.34.

### 1.3.1. National standards

A National Qualifications' Framework ('NQF') was inaugurated as part of creating a single, integrated, and flexible education system post-1994. This speaks to the RDP's demand that the post-1994 government '*develop an integrated system of education and training that provides equal opportunities to all*'.<sup>438</sup> Furthermore:

*'the democratic government has the ultimate responsibility for ensuring that human resources are developed to the full. Education, training and development opportunities must be provided in accordance with national standards'*.<sup>439</sup>

The NQF was part of this, incorporating the development of explicit standards for higher education and a metric for recognising levels of learning achievement (including prior learning). Three of the NQF's core objectives were to:

*'create a single integrated national framework for learning achievements;...facilitate access to, and mobility and progression within, education, training, and career paths; ...[and] enhance the quality of education and training'*.<sup>440</sup>

Initially containing eight,<sup>441</sup> and later ten '*levels of learning achievement*', the NQF envisaged '*a single integrated system which comprises of three co-ordinated qualifications sub-frameworks*'.<sup>442</sup> Higher education constituted one sub-framework;

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<sup>438</sup> The RDP (fn 238) paragraph 3.3.1

<sup>439</sup> Ibid paragraph 3.3.4.

<sup>440</sup> The National Qualifications Framework Act 67 of 2008 ('NQFA'), sections 5(1)(a) to (c).

<sup>441</sup> See regulation 3(1) of the National Standards Bodies Regulation R. 452 in *Government Gazette* 18787 of 28 March 1998.

<sup>442</sup> NQFA sections 6(1) and 7.

with ‘*General and Further Education and Training*’, and ‘*Trades and Occupations*, being the others.<sup>443</sup> Importantly, a ‘*level of learning*’ distinction is drawn between general, further, and higher education and training. ‘General education and training’ covers ‘*all learning and training programmes leading to a qualification of level 1*’ on the NQF.<sup>444</sup> ‘Further education and training’ refers to those ‘*learning and training programmes*’ which lead ‘*to qualification levels 2, 3 and 4*’ on the NQF.<sup>445</sup> Higher education then covers levels 5 to 10 on the NQF.<sup>446</sup>

This reinforces how the regulatory space of tuition fee decisions at public universities is delineated. General, further, and higher education are envisaged as distinct spheres or sub-spaces. While movement between them is possible, it entails vertical rather than horizontal transition: ‘*the NQF is organised as a series of levels of learning achievement, arranged in ascending order from one to ten*’.<sup>447</sup> The inauguration of national standards therefore contributed to the delineation of a specific, singular higher education space; of which university education is a segment. The higher education space is above general and further education and training (in terms of level of learning); and outside of skills training specifically associated with trades and occupations.

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<sup>443</sup> Ibid section 7.

<sup>444</sup> General and Further Education and Training Quality Assurance Act 58 of 2001, definitions section.

<sup>445</sup> Ibid.

<sup>446</sup> Cf. regulation 3(3) of the National Standards Bodies Regulations (fn 441).

<sup>447</sup> NQFA section 6(1).

### 1.3.2. Overlapping oversight

The NQF was ‘*the principal instrument through which national education and training qualifications are recognised and quality-assured*’.<sup>448</sup> Central to achieving the NQF’s objectives was quality control. This was because it could ‘*enhance the quality*’ of what education was offered. Furthermore, it could ‘*facilitate [flexible] access to [and through] education, training, and career paths*’ by standardising entry and advancement criteria. Together, these could ‘*accelerate the redress of past unfair discrimination in education, training and employment opportunities*’ by both broadening access to education, and improving the overall standard of what was offered.<sup>449</sup>

To realise these ideals, four bodies needed to work together: the South African Qualifications Authority (‘SAQA’); and later, the ‘Quality Councils’ established for each of the NQF’s ‘*three co-ordinated qualifications sub-frameworks*’ - higher education, general and further education and training, and trades and occupations.<sup>450</sup> Prior to this split into sub-frameworks in 2008,

‘[SAQA had emanated] *from concerns in the Labour Department about the poor skills base for human resource development in South Africa*’.<sup>451</sup>

Part of this entailed responding to the separation of Apartheid by integrating the fragmented higher education sector. However,

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<sup>448</sup> The NQFA preamble.

<sup>449</sup> Ibid section 5(1).

<sup>450</sup> Ibid sections 6(1), 7, and 24 to 26.

<sup>451</sup> Webbstock (fn 369) 32.

*‘[t]he seamless articulation originally imagined...fed a view that all credits at a particular NQF level were equal and exchangeable, regardless of the curriculum in which they had been designed, which perhaps created unrealistic expectations of access to a higher education system that, already growing rapidly, were difficult to realise’.*<sup>452</sup>

Following the 2008 shift to sub-frameworks within the NQF, SAQA became the overarching body tasked with *‘oversee[ing] the...development and implementation of the NQF’*, and *‘co-ordinat[ing] the sub-frameworks’*.<sup>453</sup> Together with SAQA, the Quality Councils are expected to *‘ensure that South African qualifications are of an acceptable quality’*. What constitutes *‘an acceptable quality’* is spelt out with reference to national and international factors: ministerial criteria, and international comparability, respectively.<sup>454</sup> In addition, the Quality Councils and the SAQA are charged with entrenching the NQF:

*‘developing, fostering and maintaining an integrated and transparent national framework for the recognition of learning achievements’.*<sup>455</sup>

The Quality Council for higher education is the HEQC of the CHE.<sup>456</sup> This committee has three core functions, all of which impact on universities: quality promotion, auditing institutions’ *‘quality assurance mechanisms’*; and programme accreditation. Institutional audits focus on

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<sup>452</sup> Ibid 33.

<sup>453</sup> The NQFA sections 11(b) and (c).

<sup>454</sup> Ibid sections 5(3)(b) and (c).

<sup>455</sup> Ibid section 5(3)(a).

<sup>456</sup> Ibid section 25 read with sections 4 and 5(c) of the Higher Education Act 1997.

*‘improvement-orientated evaluation of the effectiveness of institutional arrangements for quality and quality assurance in teaching...learning...research and community engagement’.*

They entail external evaluation by a panel of peers and experts, in light of an institution’s own quality requirements and the HEQC’s criteria.<sup>457</sup> In addition, the HEQC is required to *‘develop and implement policy for’*, and *‘ensure the integrity and credibility of’*, its quality assurance. This is done partly through complying with Ministerial policy and guidelines, and partly through co-ordinating appropriately with the SAQA.<sup>458</sup>

As for the HEQC’s other core function, 19 criteria are specified for accrediting *‘public and private higher education institutions’ learning programmes leading to qualifications registered on the’* NQF.<sup>459</sup> These criteria cover a variety of aspects, ranging from: student selection, staffing, assessment, and resourcing; to co-ordination and academic development; to *‘retention and throughput rates’* and *‘programme impact’* (defined as *‘enhanc[ing] the employability of students and...alleviat[ing] shortages of expertise in relevant fields’*).<sup>460</sup>

This oversight and management of what institutions could offer, to whom, has a bearing on university fee decisions, because fees are charged to enrolled students for

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<sup>457</sup> HEQC, *Criteria for Programme Accreditation* (CHE, November 2004), 35.

<sup>458</sup> The NQFA sections 27(b) to (d) and (i).

<sup>459</sup> ‘Accreditation | Council on Higher Education’ <[https://www.che.ac.za/focus\\_areas/accreditation/overview](https://www.che.ac.za/focus_areas/accreditation/overview)> accessed 6 November 2019. See also HEQC (fn 457) 28.

<sup>460</sup> HEQC (fn 457) 23 and 28.

(inter alia) the programmes for which they register. Registration on the NQF is compulsory for all qualifications or part-qualifications offered within the Republic of South Africa.<sup>461</sup> This is reinforced by the Higher Education Act 1997, which defines higher education as

*‘all learning programmes which must be registered in accordance with the provisions of the [NQFA] regardless of whether such programmes are in fact registered’.*<sup>462</sup>

Furthermore,

*‘offer[ing], award[ing] or confer[ing] a degree, or a higher education diploma or...certificate, provided for on the’*

sub-framework for higher education on the NQF is prohibited *‘unless such degree, diploma or certificate is registered’* on that sub-framework.<sup>463</sup>

The breadth of this quality assurance oversight is notable. All programmes offered by universities fell under it – even those for which no public subsidy is sought or paid.

As one interviewee pointed out,

*‘all universities, without exception, have to go to the CHE when they want to present a programme. It must go through approvals before they can do it’.*<sup>464</sup>

Similarly, another interviewee stated that

*‘first of all, there’s an accreditation system...say a university says: we want to run some programmes. We don’t mind if they’re not subsidised. We think that there’s enough of a market out there to cover the full cost...and to generate a profit...There’s still a requirement that those programmes have to be accredited by the [CHE]...a university can’t just simply say: don’t worry about the*

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<sup>461</sup> NQFA section 3(1). Cf. the National Standards Bodies Regulations (fn 441) regulation 2: ‘A [NQF] is hereby established to provide for the registration of national standards and qualifications’.

<sup>462</sup> Higher Education Act 1997, definitions section.

<sup>463</sup> Ibid section 65D(1).

<sup>464</sup> Interviewee 21.

*subsidy....The programmes still have to be properly accredited’.*<sup>465</sup>

In addition, the audits of quality assurance performed by the CHE further included the transformation pursued by the post-1994 state. These audits focused on

*‘the quality of three core functions of higher education...teaching and learning, research and community engagement...A...major principle guiding the audits was that institutional purposes could also be interrogated; the fitness of an institution’s purpose in the context of a changing South Africa was a major consideration’.*<sup>466</sup>

Unlike the planning cycle, though, these audits were not directly linked to how higher education was funded. This could be viewed as important for facilitating the

*‘mutual trust between institutions and the HEQC...a determining factor in allowing for engagement with institutional concerns’*

compared to if funding had been directly tied to the audit process.<sup>467</sup> Another reading, though, is that this lack of direct connection to funding limited how far the state’s steering could guide *‘institutions...in governance or management crises’.*<sup>468</sup>

Despite the common view that tuition fee decisions are unregulated, I have outlined in this section the intricate constraints imposed by the *‘framework of public accountability’* on what could be taught or researched, by whom, to or for whom. Since tuition fees are charged to registered students for the courses they take, these constraints significantly shape how tuition fee decisions are made by curtailing which programmes

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<sup>465</sup> Interviewee 20.

<sup>466</sup> Webbstock (fn 369) 30.

<sup>467</sup> Ibid, 31.

<sup>468</sup> Ibid.

may be offered, to how many students, and with what level of financial support from the state.

## 2. The battleground of institutional autonomy

Tuition fees are charged to registered students for the courses they take. National and institutional planning shaped how many students universities registered, and in which courses. Quality control by the CHE limited which courses universities could offer. And the funding framework influenced how public universities were subsidised by the South African state. Running throughout this steering and planning was public universities' '*surprisingly unfettered*' and '*extraordinary*' institutional autonomy, including regarding tuition fee decisions.<sup>469</sup>

What that autonomy entailed, though, could be contentious. In this section, I explore three ways in which institutional autonomy could become a battleground. First, I discuss how institutional autonomy was viewed by the Apartheid and post-1994 states, as well as how it was inscribed in legislation post-1994. Second, I analyse how institutional autonomy could work in conjunction with, or compete against, other principles espoused by the post-1994 state in key public policy documents. Third, I look at how conflict over institutional autonomy could emerge within a university's governance structures.

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<sup>469</sup> Interviewee 17 (Cape Town, 19 April 2018).

Authority over tuition fee decisions is one facet of institutional autonomy. Each instance of institutional autonomy becoming a battleground can shed light, therefore, on how actors and issues were being organised into and out of the regulatory space of tuition fee decisions. Furthermore, each instance of institutional autonomy becoming a battleground provides some insight into the shifting places occupied by different organised interests in the regulatory space of tuition fee decisions.

## 2.1. Legislative limits

I analysed in chapter four how, under education Apartheid, the government viewed universities as '*creatures of the state*'.<sup>470</sup> This suggests little to no scope for institutional autonomy - albeit that this was contested. One major change during the perpetual disequilibrium was that the post-1994 state, while stressing the importance of the principles of institutional autonomy and academic freedom, expected these principles to operate '*within the framework of public accountability*'.<sup>471</sup> Academic freedom was, moreover, enshrined in South Africa's constitution as part of the right to freedom of expression.<sup>472</sup>

Although recognised as important, self-standing principles, both institutional autonomy and academic freedom were to be pursued and realised alongside other, equally important policy principles. These policy principles further fleshed out how the

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<sup>470</sup> Bunting (fn 223) 40 and 43.

<sup>471</sup> EWP 3 (fn 13), paragraph 3.9.

<sup>472</sup> Section 16(1)(d).

post-1994 state intended pursuing and realising the paradigm of society as unitary, egalitarian, and democratic.

Most immediately, *'public accountability'* would be the *'framework'* within which institutional autonomy and academic freedom would operate. Legislative and policy definitions and discussions fleshing out institutional autonomy and the framework it was to operate within foreground how seemingly unfettered institutional autonomy might be constrained. Most explicitly:

*'there is no moral pretext for using the principle of institutional autonomy as a pretext for resisting democratic change or in defence of mismanagement. Institutional autonomy is therefore inextricably linked to the demands of public accountability'*.<sup>473</sup>

This suggests a broad understanding of *'public accountability'* - one which extends to the post-1994 state's pursuit of the paradigm of society as unitary, egalitarian, and democratic.

Put differently, this policy pronouncement recognised that some institutions may fall back on institutional autonomy to resist state-driven transformation. In chapter four I highlighted one place of space puzzle relevant to my thesis: why did the Rhodes Must Fall and Fees Must Fall protests emerge at historically white, English-medium institutions? One reason I offered was that despite their opposition to Apartheid, these institutions were mistaken if they thought that *'business as usual'* could continue for

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<sup>473</sup> Ibid paragraph 1.24.

them post-1994.<sup>474</sup> One interviewee indicated how contentious state-driven transformation at an English-medium HA/WI could be:

*‘[When the university] was exploding prior to 1994...the ANC stepped in to mediate in the wars between the students and this in-the-throes-of-transformation institution...everything was a battleground...it wasn’t a very constructive experience. Because...the [university’s] people came to the process quite reluctantly...they felt they were forced to be there...[The university] didn’t believe in it at all.’<sup>475</sup>*

Institutional autonomy and public accountability could, therefore, compete. Moreover, which principle came to the fore would emerge from both policy emphasis and the positions occupied by different organised interests in key processes.

Another interviewee pointed out how limited the legislative recognition of institutional autonomy post-1994 was:

*‘the key issue in autonomy, in relation to the Higher Education Act [1997], is the provision...that a university is a legal person and has full legal rights...The only restrictions on that in the Act are that a university may not...alienate fixed property which has been acquired in part or in full with the assistance of the state’.<sup>476</sup>*

This autonomy was, on this interviewee’s view, ‘*completely different*’ and ‘*distinct*’ from questions around academic freedom. It did, though, encompass universities’ ‘*unfettered right*’ to determine their own fees. I argue, though, that the policy recognising these principles proved contentious. Furthermore, I tease out how the multiple principles recognised by policy could (and did) come into conflict.

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<sup>474</sup> Bunting (fn 223) 44.

<sup>475</sup> Interviewee 9 (Johannesburg, 5 April 2018).

<sup>476</sup> Interviewee 17.

## 2.2. Policy tensions

When I outlined the post-1994 state's paradigm of society as unitary, egalitarian, and democratic in chapter four, I argued that the democratic leg of that paradigm included the ideal of co-operative governance. However, the development and implementation of higher education policy from 1997 onwards entailed

*'a shift [away] from the original intended cooperative governance model between higher education and the state...to stronger state steering...through national planning, funding, and in the amendments to the Higher Education Act (1997) that introduced mechanisms which allowed the Minister to intervene in troubled institutions and to appoint an Administrator to take over the function of a university Council'.<sup>477</sup>*

Importantly, the amendments enabling the appointment of Administrators

*'showed in no uncertain terms that ultimate responsibility for addressing institutional failure would be with government'.<sup>478</sup>*

In several respects, EWP 3 marked a shift to a '*harder reality*' and a '*change in the governance relationships with institutions*'. This encompassed

*'the [emphasis on] alignment with the government's economic framework...the location of planning and allocative functions [within the Department rather than an independent body] and the rejection of massification as a strategy for increasing access, equity and redress in favour of controlled growth'.<sup>479</sup>*

This shift was further exacerbated by governance crises at several institutions, including after the 2001 to 2005 merger process was completed. In addition, the

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<sup>477</sup> Webbstock (fn 369) 46.

<sup>478</sup> Lange and Luescher-Mamashela (fn 125) 117.

<sup>479</sup> Webbstock (fn 369) 47.

overhaul of how universities were governed – including mandating that a variety of stakeholders be represented on all governance structures - potentially contributed to these crises.

One outcome was that

*‘challenges at a governance level have been such that a number of institutions have been rendered almost dysfunctional at different times...The government’s response has been to intervene more often, and appoint administrators for longer periods. There were 14 instances of external intervention between 1998 and 2012 (with some still in progress), sometimes more than once at the same institution’.*<sup>480</sup>

A further driver of this dysfunctionality was the

*‘increasing “stakeholderisation” of higher education...the tendency of groups with vested interests to pursue those exclusively and for different such groups to come into conflict with each other’.*<sup>481</sup>

This suggests a further turn away from the initial ideal of co-operative governance, at least insofar as this ‘*stakeholderisation*’ rendered relations increasingly adversarial.

Ministerial interventions, especially the appointment of an administrator, were likely to chafe against institutional autonomy. The Higher Education Act 1997 prescribed ‘*very limited circumstances*’ in which an administrator could be appointed. Any appointment could be only ‘*for a very limited period of time*’. Even so, appointing an administrator would change by whom a university was governed:

*‘the administrator takes over two roles: the governance and the administration... the Council gets booted out...The administrator’s job is to restore the institution to normal running. It’s not in the way that when a state-owned enterprise is put under*

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<sup>480</sup> Ibid 49.

<sup>481</sup> Ibid.

*administration, the state takes over and can stay there and run it forever...as an administrator...you've got to restore order and...stability. And you've got to reinstate a new Council...the Minister doesn't appoint the members of the new Council. At most, the Minister will appoint 5 out of the 30 members of the new Council.*<sup>482</sup>

The appointment of five council members is something the Minister is entitled to do at any university, regardless of whether an administrator has been appointed.<sup>483</sup>

It is possible that the chafing of intervention and steering against autonomy arose more from the concatenation of several factors, than isolated cases or provisions. One reading is that the combination of state-driven transformation of society at large and of higher education specifically; with a higher education '*sector that...continued to be marked by institutional governance and management crises*' precipitated

*'a lean towards greater government intervention and less of a relationship of co-determination than had originally been envisaged. The [2012 amendments to the Higher Education Act 1997], which potentially allowed the Minister to intervene in institutional governance matters on much broader grounds than before, the establishment of a controversial Transformation Oversight Committee to monitor institutions in this respect...were interpreted by many in the sector; albeit one struggling to cohere and speak with one voice; to be road signs to a different, more edgy relationship with government'*.<sup>484</sup>

Another example of the friction between the post-1994 state and universities was the establishment in 2013 of the National Institute for the Humanities and the Social Sciences ('NIHSS'). This body was founded with the

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<sup>482</sup> Interviewee 17.

<sup>483</sup> Section 27(4)(c) of the Higher Education Act 1997.

<sup>484</sup> Webbstock (fn 369) 48 (citation omitted).

*‘role...broadly...to enhance and support the [Humanities and Social Sciences] in South African and beyond, and to advise government and civil society on [Humanities’ and Social Sciences’] related matters’.*<sup>485</sup>

One interviewee cited this as a possible threat to academic freedom; and potentially, institutional autonomy –

*‘[NIHSS] has as its objective the idea that the state ought to be centrally involved in ensuring that the intellectual agenda that South Africa ought to prioritise is pursued by institutions. So it’s a worrisome tendency. [It did mean that they] put resources into doctoral education...which we’re very appreciative about. But there was a sense of...why not just give the money to the institutions to do this themselves?’.*<sup>486</sup>

I argue that this level of contention was inherent in, and to be expected from, the multiplicity of principles EWP 3 sought to implement. I say this because how some of these principles were defined foreshadowed this conflict. In EWP 3,

*‘institutional autonomy refers to a high degree of self-regulation and administrative independence’;*<sup>487</sup> while

*‘public accountability implies that institutions are answerable for their actions and decisions not only to their own governing bodies and the institutional community but also to the broader society’.*<sup>488</sup>

More specifically, public accountability required three things from institutions: that those *‘institutions receiving public funds [must] report how, and how well, money has been spent’*; that *‘institutions...demonstrate the results they achieve with the resources*

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<sup>485</sup> ‘OVERVIEW AND MANDATE | National Institute for the Humanities and Social Sciences (NIHSS)’ <<https://nihss.ac.za/content/overview-and-mandate>> accessed 20 August 2019.

<sup>486</sup> Interviewee 56 (Johannesburg, 12 April 2017).

<sup>487</sup> EWP 3 (fn 13) paragraph 1.24.

<sup>488</sup> Ibid paragraph 1.25.

*at their disposal*’; and that *‘institutions...demonstrate how they have met national goals and priorities’*.<sup>489</sup>

Laudable as these requirements may be, they could quite easily chafe against institutional autonomy. The planning cycle and funding framework discussed in sections 1.1 and 1.2 of this chapter clearly show how public funds could be specifically directed, or have conditions attached to them. In turn, this could impinge on a university’s *‘administrative independence’*.<sup>490</sup>

Complicating matters further, the principles of institutional autonomy and academic freedom might spill into each other – rather than being *‘completely different’* and *‘distinct’*.<sup>491</sup> Autonomy is defined as encompassing

*‘independence with respect to student admissions, curriculum, methods of teaching and assessment, research...’*.<sup>492</sup>

Academic freedom

*‘implies the absence of outside interference, censure or obstacles in the pursuit and practice of academic work’*.<sup>493</sup>

Two significant points of friction could emerge. First, the potential chafing of public accountability against institutional autonomy could have a knock-on effect regarding academic freedom. This could occur if public funding flows were linked to specific

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<sup>489</sup> Ibid.

<sup>490</sup> Cf. Ibid paragraph 1.24.

<sup>491</sup> Cf fn 476.

<sup>492</sup> EWP 3 (fn 13) paragraph 1.24.

<sup>493</sup> Ibid paragraph 1.23.

outcomes being met. This linking is a key feature of the planning cycle and funding framework I analysed in sections 1.1 and 1.2 of this chapter.

More generally, EWP 3 also trumpeted the principles of development, and of effectiveness and efficiency. These appear to be focused on the purpose of ‘*meet[ing] national development needs*’, through planning and co-ordination.<sup>494</sup> Relatedly, the third requirement of the principle of public accountability is that ‘*institutions...demonstrate how they have met national policy goals and priorities*’.<sup>495</sup> Attaching conditions to public funding could be seen as ‘*outside interference, censure, or [an] obstacle*’ to the ‘*pursuit and practice of academic work*’ insofar as it amounted to pressure exogenous to a university to pursue particular topics or fields of inquiry.

### 2.3. Internal disagreements

The second potential point of friction is internal to a university. There, too, the distinction between academic freedom, institutional autonomy, and public accountability might start to blur. One crude way to draw the distinction would be to associate academic freedom with a university’s senate, and institutional autonomy with its council. An interviewee provided an example of this:

*‘Council...[is] where the big decisions ultimately get made...Senate...are responsible for the academic programme of any university...You have problems when Council would say: it is not Senate’s business to concern itself with matters such as fees. We have a fiduciary responsibility to ensure that the*

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<sup>494</sup> Ibid paragraph 1.14, second bullet point.

<sup>495</sup> Ibid paragraph 1.25.

*university doesn't get into...debt that it cannot appropriately service. Those sorts of things are not academic concerns.*

*Members of Senate would typically come back and say...if the university finds itself in a position where it needs to make decisions about current programmes, because it has...decided to invest in other areas...then...that is our concern. To the extent that raising fees might also have consequences for our students, and it might exclude students from access to the institution, that's also our concern.*

*So there was this...grey area over which [debate not infrequently took place]'.<sup>496</sup>*

Linking academic freedom to which students are enrolled recalls the protests against university apartheid in the 1950s. Part of the impetus for those protests had been a 'famous debate' in the Wits' Senate 'which had endorsed the maintenance of open admission'.<sup>497</sup>

The blurring of the distinctions between principles was further muddled by the 'fiduciary responsibility' shaping a council's obligations. This responsibility brings in another principle – effectiveness and efficiency. EWP 3 defines '[a]n efficient system or institution' as

*'one which works...within the bounds of affordability and sustainability. It does things correctly in terms of making optimal use of available means.'*<sup>498</sup>

A focus on 'affordability and sustainability' would be at the core of a university council's 'fiduciary responsibility', because that responsibility focuses on a university's long-term viability. Viability is premised on an institution operating in a

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<sup>496</sup> Interviewee 56.

<sup>497</sup> Ray (fn 250) 113.

<sup>498</sup> EWP 3 (fn 13) paragraph 1.22.

financially sustainable manner, and remaining able to afford to run its operations. What was affordable for a university, though, could differ from what was affordable for students; thus raising intricate questions of sustainability. Similarly, a focus on affordability could curtail what academic project a university pursued. And, therefore, what was taught or researched, by who, to or for whom.

## Conclusion

The regulatory space of tuition fee decisions contains multiple tensions and dilemmas. One means of managing them was through the intricate, fragile calibrations which I have outlined in this chapter. These calibrations regulated the key interactions: between university managers, the national government, and students; and between a universities' main income streams – the state subsidy, fee income, third stream income, and that portion of NSFAS funding which universities received.

The framework of public accountability brought to the fore the tension between the paradigms of social activism and responsible budgeting. Put differently, one central theme of South African higher education post-1994 was '*the equity versus development debate*', alongside '*the transformation agenda*'. However:

'[u]nderlying the equity-development tension lay not only ideological and political contestation, but the hard realities of limited resources, and a gap between the high expectations that followed from the end of apartheid, the difficulties of accommodating competing priorities and demands – not only in higher education – and limited government and institutional capacity'.<sup>499</sup>

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<sup>499</sup> Webbstock (fn 369) 20.

Several interviewees were explicit that these calibrations were increasingly in peril in the build-up to the 2015 to 2017 Fees Must Fall protests. This peril stemmed from who and what was being organised into and out of the regulatory space of tuition fee decisions. It was also driven by South Africa's macro-economic deterioration, coupled with increasingly virulent student protest. To further explore the fragility of these calibrations, I analyse how the planning cycle, funding framework, and quality control discussed in this chapter influenced tuition fee decisions at specific universities.

## CHAPTER 6

### **Tuition fee decisions at specific universities**

*‘The university didn’t need such a big increase. They wanted it. And they were trying to justify it as if they needed it’<sup>500</sup>*

Tuition fee decisions are an important part of universities’ annual budgeting processes. For the four universities I focused on in my fieldwork, fee decisions were usually one of the last building blocks in the compilation of their budget. In this chapter, I focus on how the shifting boundary between the regulatory space of tuition fee decisions and cognate spaces included and excluded various actors and issues. I also develop my argument that at the centre of this regulatory space was a tension between the paradigms of social activism and responsible budgeting.

Fee decisions bring the planning, funding, and quality control framework I discussed in chapter five into the heart of how universities are managed. This is because tuition fee decisions are specifically about how much registered students pay for the courses they take. One aspect of that is how many students can register, and for what courses. Another significant factor is students’ capacity and willingness to pay fees. When fees are paid, and how, has a bearing on a university’s cashflow; and, thus, on its budgeting.

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<sup>500</sup> Interviewee 5 (Johannesburg, 28 March 2018).

My earlier discussion of relevant legislation and public policy documents confirmed that tuition fee decisions are ‘*unfettered at law, unfettered at policy*’.<sup>501</sup> I argue that these decisions are nonetheless regulated by an interlocking mesh of fragile calibrations. These calibrations regulated tuition fee decisions by requiring university councils to adjust their behaviour in response to funding flows, and in light of the behaviour of key actors (e.g. the national government, protesting students).

I will make this argument over two sections. First, I explore the seemingly innocuous question: what are fees? I discuss how transparent or opaque tuition fees could be, and highlight how decisions about what fees are organise actors and issues into and out of several cognate regulatory spaces. I highlight how student protests were one mechanism through which the boundaries of this regulatory space were contested.

Second, I delve into who makes tuition fee decisions, and how. I explore the primary calibrations which affect how fee decisions are made: a university’s budgeting process - especially repeating next year what was done this year; considerations of what impact a fee decision might have on students; and considerations of what impact a fee decision might have on the university. I argue that tuition fees are intimately associated with what academic project universities pursue. Those making tuition fee decisions therefore have to navigate a dilemma. High fee increases may be driven by a desire to achieve quality and differentiation. They also limit access to university education. Yet

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<sup>501</sup> Interviewee 17 (Cape Town, 19 April 2018).

varied fees, from low to high, may be necessary to fund the provision of quality, differentiated university education.

## 1. What are fees?

What constitutes a fee decision, and what comprises tuition fees, can be more loosely bounded than may at first appear. Just as actors and issues may be organised into and out of a regulatory space; so students, university managers, or the national government may bring a variety of matters (including aspects of university education) closer to, or further away from, a tuition fee decision. This organising into and out of is evident in one debate several interviewees mentioned. It focused on the different fees different institutions charged for the same degree.

### 1.1. Transparency

In discussing the ongoing issues ‘*around transparency of fees*’, one interviewee justified their institution’s charging model as follows:

*‘In 2005, 2006 [we] moved to course-based fees, rather than programme-based fees. [Where there had been] a programme fee...they’d have additional costs or levies...it might be something like a lab access fee [, or] a notes levy, cos you get handouts. We abolished that...We said...fees must be all inclusive. So in a sense, what you see is what you’ll pay. We...felt it was more transparent to students and their families. [And] a lot of bursary funders...would fund the programme fee but not the add-ons. By rolling them in, external funders...paid the full fees...’*

*we...were...asked by the [Department of Higher Education and Training] to...write a common fee setting policy for the sector. Which we did. Most institutions agreed to it...but never implemented it. So what you still have is fees*

*being very, very hard to compare. And even harder to understand. More so for people who...are new to the system'.<sup>502</sup>*

However, an interviewee at a comparable institution explained why their institution had decided against adopting a similar fee charging model:

*'charging...a composite fee...assumes that...a person is taking courses in one faculty. And that, in general, courses have the same requirement: a tutor, a lecturer, a blackboard or whiteboard or whatever. Whereas in Science, there could be a lab fee. Some students...take geography which has field trips'.<sup>503</sup>*

Complicating matters further, fee decisions extend beyond tuition fees: to, for instance, accommodation fees. I have focused my research question on tuition fee decisions. However, issues of transparency and of which costs tuition fees cover remain part of the regulatory space of tuition fee decisions. Different definitions of 'fees' would also draw different boundaries to this regulatory space.

## **1.2. An expanding catch-all**

The breadth of actors and issues being organised into and out of this regulatory space is further evident in the 'fees' on which the 2015 to 2017 Fees Must Fall protests focused. These protests centred initially on a specific fee increase at Wits; but grew to incorporate a demand that fees decrease nationally; and demands for (inter alia) free education, insourcing of workers, and the decolonisation of curricula. As one interviewee described this agglomeration:

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<sup>502</sup> Interviewee 29 (Cape Town, 11 May 2018).

<sup>503</sup> Interviewee 3 (Johannesburg, 14 March 2018).

*‘...because there’s a hashtag, it was very easy to be in touch...The common thing was we hate this institutionalised [culture]. And we hate [Wits’ vice chancellor]. And we hate [fees]’.*<sup>504</sup>

More generally, another interviewee indicated how the demand for free education formed part of protests which extended substantially beyond a particular tuition fee decision made by a university council:

*‘when you have organised and mobilised yourselves, you use that opportunity to express whatever...needs to be expressed. And the context of free education does not only speak to fees. That has always been an ideological understanding we have...It speaks about dismantling capitalism. And the commercialisation and commodification of education...the concept “free”...was speaking about breaking all these suffocating attitudes, reactionary attitudes. Whether structurally, or physically...*

*the issues are then packaged in trying to make a clarion call to society...But over and above, [these issues have] always been there...[The South African Student Congress is] a democratic non-racial non-sexist organisation. So, that...consolidates most of these issues’.*<sup>505</sup>

These quotes highlight the breadth of actors and issues that came to the fore in protests which initially focused on a fee decision at Wits. Relatedly, the shifting of this regulatory space’s boundaries suggests that the resource of wealth in the regulatory space of tuition fee decisions incorporated resources that cascaded into and out from cognate spaces – most notably through funding flows. This cascade can exacerbate or reduce the tension between social justice and responsible budgeting; highlighting especially how protest-driven social activism can cannibalise responsible budgeting.

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<sup>504</sup> Interviewee 55 (Johannesburg, 10 April 2017).

<sup>505</sup> Interviewee 35 (Pretoria, 21 May 2018).

I say this because ‘*other pressing social needs*’ (including ‘*housing, energy and water*’) competed for funding otherwise spent on higher education in South Africa.<sup>506</sup> These other needs are another way of talking about policy spaces cognate to the regulatory space of tuition fee decisions. One interviewee succinctly captured the dangers of expansive social activism:

*‘I...worry about the extent of the pressures on the public purse. And I feel that this is not an issue that can be resolved outside of the kind of political process that takes all of that into account...you have to look at primary healthcare, primary education, [early childhood development], water, sanitation, and get all of these things in perspective’.*<sup>507</sup>

The expansion of a protest initially focused on a fee decision to a questioning of the commodification of education, and its effect on cognate spaces, are good examples of how actors and issues were organised into and out of the regulatory space of tuition fee decisions. It also illustrates how funding could cascade into, and out from, cognate spaces.<sup>508</sup>

Before I turn to the minutiae of how tuition fee decisions are made at particular universities, one final point bears mention. The main figure announced as a fee increase is often an average.<sup>509</sup> Wits’ announcement of a 10.5% fee increase for the 2016 academic year triggered the initial Fees Must Fall protests in October 2015. 10.5% was an average, which means that the amounts by which individual courses increased could differ. I have stressed that tuition fees are charged to registered students for the courses

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<sup>506</sup> EWP 3 (fn 13) paragraph 4.3.

<sup>507</sup> Interviewee 52 (Johannesburg, 31 March 2017).

<sup>508</sup> Interviewees 35 and 52; cf. fn 506.

<sup>509</sup> Interviewee 3.

they take. If the announced fee increase is an average figure, then the increases for specific courses would vary around that average. As an average, though, the headline figure can contribute to students who take different courses (and therefore face different actual increases) organising into a single protest movement. But it also glosses over important differences and tensions.

## 2. Tuition fee decisions: the who and how

A university ‘*council certainly has th[e] authority, in terms of the Higher Education Act [1997]...to determine...fees*’.<sup>510</sup> The processes through which that determination is made, though, are regulated by public policy documents and by universities’ institutional statutes. Public policy shapes primarily how university managers and the national government interact. This influences what tuition fee decisions are made, by who, and how. A university’s institutional statute delineates what internal processes will be followed when a tuition fee decision is made. These internal processes bring university managers into contact with students, as well as other constituencies of (or stakeholders in) the university.

The place of space – where organised interests are located in key processes – remains an important dimension of how tuition fee decisions are regulated. In chapters four and five, I analysed overarching features of the regulatory space of tuition fee decisions. I focused on elements of public policy which influence how tuition fee decisions are made. Although all public university councils occupy a single regulatory

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<sup>510</sup> Interviewee 1 (Johannesburg, 12 March 2018).

space which is subject to these overarching features, tuition fees are ultimately decided by the council of a particular university. How tuition fee decisions are made, and by who, is therefore shaped by both overarching and more localised factors. I will address first the overarching features of the regulatory space of tuition fee decisions. Then I will turn to institution-specific features of the four public universities (two HA/WIs and two HD/BIs) that I focused on in my fieldwork.

## 2.1. Overarching features

In emphasising the paradigm of society as unitary, egalitarian, and democratic, public policy documents demanded the democratisation of university governance structures.

This democratisation was an explicit policy goal:

*‘New structures should provide for co-operative decision-making between...stakeholders who recognise their different identities, interests and freedoms, while pursuing the common goal of a co-ordinated and participative polity and civil society’.*<sup>511</sup>

One way universities implemented this democratisation was through ensuring that

*‘the [Student Representative Council (‘SRC’)] is represented on all...governance structures’.*<sup>512</sup>

This included representation on university councils and senates.

Whether this democratic representation was sufficient, was contentious. The main issue was how far student voices were heard as a result of the SRC’s representation *‘on all governance structures’*. A repeated complaint I heard in my

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<sup>511</sup> EWP 3 (fn 13) paragraph 1.28(1).

<sup>512</sup> Interviewee 1.

interviews was that this representation could collapse into a right to vote in key meetings. One reason this was inadequate was that students were often outvoted – including on proposed fee increases. Although a tuition fee decision could go to a vote, *‘it’s hugely stacked against the students’*:<sup>513</sup>

*‘the problem with all these statutory bodies...is that they are undemocratic... Because students have a very minimal representation. You’d find that, for instance, at Council, we have one seat. Which is the president of the SRC...your voice is very minimal...Where you have to vote on matters, you are always outnumbered. In all these structures’*:<sup>514</sup> and

*‘When we are deciding whether we must raise fees...I’ll sit there as the president of the [SRC] and...there’ll be another, say, member of post-graduate association...the rest of them is just old, male, largely white; largely very...dismissive. Full of themself, in many ways. No real discussions would take place...Cos we were largely outnumbered...Sometimes, we are 20 or 30 in a meeting. And students are two. The discussion wouldn’t last more than five minutes until one of them suggests voting’*:<sup>515</sup>

Some interviewees who were aware of this issue indicated that where possible, fee decisions would ideally be taken on the basis of consensus:

*‘an astute chairperson...will not ask for a vote in Council on student fees. But will generally let the decision be made by consensus...and a general consensus’*:<sup>516</sup> and

*‘the decision on fees in Council would be taken preferably on the basis of consensus. But if not, it’s a vote’*:<sup>517</sup>

Others, though, were adamant that agreement or consensus was not required:

*‘Consultation doesn’t necessarily mean agreement. The Higher Education Act [1997] protects universities there...it says: we are required to consult*

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<sup>513</sup> Interviewee 20 (Pretoria, 26 April 2018).

<sup>514</sup> Interviewee 35.

<sup>515</sup> Interviewee 33 (Johannesburg, 18 May 2018).

<sup>516</sup> Interviewee 12 (East London, 12 April 2018).

<sup>517</sup> Interviewee 19 (Cape Town, 23 April 2018).

[students]. *It doesn't say you have to get...agreement or consensus on [a fee decision]'*;<sup>518</sup> and

*'Statutorily, all universities are required...to consult with students about fees; ...We consult with labour as well'*.<sup>519</sup>

Consensus could be hard to achieve, in part because of the inherent tension between social activism and responsible budgeting. Increasing fees could limit poorer students' access to higher education; thereby undermining any social activism seeking to expand such students' access:

*'[Fees Must Fall] didn't come out of the blue. It...came out of years of students protesting against increasingly high and unaffordable increases. But it is also true that [university managers] were...informing their [university] Councils that the fees were unsustainable'*,<sup>520</sup>

*'students always engaged the [fees] issue at Council. Always said: very soon, this will put the university system out of reach of poor students'*.<sup>521</sup>

Yet university managers were also expected to budget responsibly:

*'[we] have a fiduciary responsibility...to ensure that the university is financially sustainable. So whatever decision we make, in whichever realm, we always have to take that into consideration. It's one of the factors, it's not the only factor...I do think [financial sustainability] comes through [as a principle] in the Higher Education Act [1997]...I'm comfortable that's not just something they're paying lip service to. The difficulty is: it's there as a principle; but how that gets implemented, and how practical it is, is where the nub lies'*.<sup>522</sup>

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<sup>518</sup> Interviewee 1.

<sup>519</sup> Interviewee 12.

<sup>520</sup> Interviewee 3.

<sup>521</sup> Interviewee 20.

<sup>522</sup> Interviewee 1.

These difficulties were captured succinctly by one interviewee in describing the fee decision process at their institution:

*‘the issue with fees is that management normally should consult with all stakeholders on campus. The SRC, the unions, [etc.]. Then they would bring a recommendation through to Council. Because Council are mostly external people like myself...I would then ask the SRC: were you consulted? And they would say yes, but they don’t agree. Workers, were you consulted? Yes, but they don’t agree. And then at the end of the day, we have to make a decision based on the financial situation of the university. And inevitably what then happened, was we outvoted those other two constituencies. We hear what you say, but we have to balance the books*

*And I think that was one of the disappointments. The students felt that they were not being heard. They’re being played, they’re being consulted; and then once the decision gets made, we say that we’ve consulted with them and continued with this. But, to a large extent we were painted into a corner because of the declining state subsidies. To balance the books, to maintain the level of staff, the quality of staff; even the internal competition in South Africa between universities for staff...So over the past few years [prior to 2015], we mostly had to balance the budget’.<sup>523</sup>*

This indicates the importance of the state subsidy to how tuition fee decisions were made. It also suggests that university managers could find themselves caught between their engagements with the national government, including pressures to take the agreed number students while also running financially sustainable institutions; and pressures from students, who were finding fees increasingly unaffordable.

Possible tensions between university managers, students, and the national government were further aggravated by universities becoming spaces in which broader societal issues were refracted and contested. In chapter four, I argued that universities

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<sup>523</sup> Interviewee 10 (Pretoria, 10 April 2018).

were assigned a critical role in transforming South African society post-1994. Moreover, they were to be transformed themselves. When coupled with the post-1994 ‘*framework of public accountability*’, a complex dynamic could ensue.

Part of this dynamic can be gleaned from interviewees expressing the view that universities are microcosms of society. However, in what sense they are a microcosm is open to competing interpretations:

*‘as a person who’s worked with students over many years...you have to watch the balance of power within the student groups on campus; in every campus...Because what happens on a campus, it’s a microcosm of any governance structure of a political system, any polity...’;*<sup>524</sup> and

*‘[Universities are] a microcosm of the tensions in society. In general, the universities are better organised than a...lot of institutions...Compare universities to government departments in the North West Province, for instance...those [government departments] have just collapsed and are now bankrupt...the universities are doing much better than that. But it’s still putting a huge pressure on them’.*<sup>525</sup>

These competing interpretations suggest that both what role universities could play in transforming South African society post-1994; and how these universities could be transformed; were contentious. This could organise a variety of actors and issues into and out of the regulatory space of tuition fee decisions. I say this because tuition fees combine considerations of what organisational mission particular higher education institutions pursue; with issues of who can access that education, and on what terms.

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<sup>524</sup> Interviewee 9 (Johannesburg, 5 April 2018).

<sup>525</sup> Interviewee 24 (Cape Town, 9 May 2018).

A further dimension to this place of space is the disagreement around who should sit on a university council, and who could therefore be in a position to outvote students on a tuition fee decision. Beyond being perceived as

*‘just old, male, largely white...very...dismissive. Full of themselves, in many ways’*,<sup>526</sup>

the majority of council members are not students and are *‘mostly external people’*.<sup>527</sup>

While students may oppose this, it is an express requirement of the *‘framework of public accountability’*:

*‘Councils are the highest decision-making bodies of public institutions...To sustain public confidence, councils should include a majority of at least 60 per cent of members external to the institution’*.<sup>528</sup>

This reiterates a tension affecting tuition fee decisions. Students may be galvanised by a tuition fee decision into making a *‘clarion call to society’* regarding the issues they face.<sup>529</sup> These issues could be unique to particular institutions, or more general issues facing society. Yet the imposition of a *‘framework of public accountability’* was partly premised on the *‘other pressing social needs’* which the national government needed to keep *‘in perspective’*.<sup>530</sup> While students may feel university managers were treating them dismissively, university managers remained bound by a *‘framework of public accountability’* which mandated that the majority of council members come from outside of a university. Arguably so that, in part, council

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<sup>526</sup> Interviewee 33.

<sup>527</sup> Interviewees 10 and 41 (Johannesburg, 31 May 2018).

<sup>528</sup> EWP 3 (fn 13) paragraph 3.34.

<sup>529</sup> Interviewee 35.

<sup>530</sup> Cf. fn 508.

decisions would incorporate some appreciation of ‘*other pressing social needs*’.

Another way of looking at these tensions is that they indicate the breakdown in key interactions (e.g. between students and university managers), and the undermining of the fragile calibration regulating tuition fee decisions. Since university councils were the bodies ultimately charged with making tuition fee decisions, council members’ interactions could influence what fee decisions were made, and how. Unfortunately, practice often fell short of the ideal of co-operative, democratic decision making. From the perspective of one interviewee at Walter Sisulu University (‘WSU’; a HD/BI):

*‘Council is the board of directors of the institution...a council member...owes a fiduciary duty to the institution...some...council members are drawn from constituencies that have got some interest in the institution....But they are there as individuals. They are not there on a mandate. They are not there to report back to their constituency...Although there is a very large degree of “stakeholderisation”. But that...is constituency-based thinking and decision making’.*<sup>531</sup>

This highlights another dimension to how university councils make tuition fee decisions. Students may have felt that ‘*they’re being played*’: they were consulted, but ultimately outvoted.<sup>532</sup> A counterpoint could be that a university council’s ultimate obligation - including when building a budget and making a tuition fee decision – was to the university as a whole; not to particular constituencies.

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<sup>531</sup> Interviewee 12.

<sup>532</sup> Interviewee 10.

There were exceptions to such ‘*stakeholderisation*’. One was the

*‘very different relationship between the [University of Venda, (a HD/BI)] university management and the SRC. Which was probably the type of relationship that could’ve stopped the whole [Fees Must Fall] protests...if more institutions had that...The SRC understood the financial position of the university. The university understood the financial position of the students. And they were working together, to try and overcome that...Quality, sustainability, access, all of that...It’s not a well-funded [university or] student body...they [are] poor students. They [are] the ones who you’d think would be most active in such a protest. But [they weren’t]’.*<sup>533</sup>

Where a mutual understanding was absent, protests were one mechanism whereby students could circumvent dismissive university managers. These protests could be against the particular fee increase, or extend to a range of associated issues - including objections to the process through which fee decisions were made. Two interviewees at the University of the Witwatersrand (‘Wits’, a HA/WI) made the following observations on this score:

*‘protests in response to the announcement of fee increases were something like an annual ritual; and constituted part of the negotiating tactics of the students, generally led by the SRC’;*<sup>534</sup> and

*‘Every year, [the] university increases fees. Students oppose this and vote against it, but would be outvoted. Then there would be demonstrations, which sometimes lasted for more than a day’.*<sup>535</sup>

Student protests could, therefore, constitute one step in the process through which tuition fee decisions were made.

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<sup>533</sup> Interviewee 39 (Pretoria, 25 May 2018).

<sup>534</sup> Interviewee 56 (Johannesburg, 12 April 2017).

<sup>535</sup> Interviewee 49 (Johannesburg, 22 March 2017).

## 2.2. Primary influences

The processes through which tuition fee decisions are made at the two HA/WIs and two HD/BIs I focused on in my fieldwork further highlight how actors and issues can be organised into and out of the regulatory space of tuition fee decisions. This is largely because tuition fee decisions are financial decisions, and decisions that have broader implications. This was aptly captured by one interviewee at Wits:

*‘I look at it less from a finance perspective; just because that isn’t my key role or function...the financial decisions may have been made. But how that impacts on the university, and on students, is probably the role that I would be playing’.*<sup>536</sup>

This comment helpfully captures three themes pertinent to how tuition fee decisions are made at the two HA/WIs and two HD/BIs I focused on in my fieldwork: how universities compile their budgets; and what the likely impact of a fee decision on the students, and on the university, would be. I consider each in turn.

### 2.2.1. Building the budget

From several of my interviews, budgeting struck me as an essential component of tuition fee decisions. It speaks to how actors may seek to achieve the paradigms of responsible budgeting and social activism; and to how these paradigms may come into conflict. At the four universities I focused on, budgeting centred on three main income streams: the state subsidy; the ‘third stream’ income universities accrue through private contracting and research, and through philanthropic donations; and fees (including tuition fees, but covering accommodation etc. too). Several interviewees presented fee income, and therefore fee decisions, as the final budget building block: meaning that it

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<sup>536</sup> Interviewee 1.

was built on assessments of how to balance the budget, given the other income streams and forecasts of the university's expenses. Budgets were also often compiled on the basis of repeating this year's academic activities, next year.

At Wits, the tuition fee decision process would commence roughly halfway into the first semester with a senior executive team commencing consultations with faculties:

*'each school gets a fees schedule of its courses. [The Head of School has] to look as to whether the course fees are appropriate. And that's consolidated at the Faculty level'.<sup>537</sup>*

Benchmarking was one mechanism for ascertaining the appropriateness of a course fee. It could be internal to the university, or entail '*look[ing] over the fence*' at what comparable universities are charging – albeit with the difficulties around fee transparency which I raised in section 1.1 of this chapter.<sup>538</sup> The central finance team also provides '*guidelines*' for the budgeting process:

*'typical increases for operating costs, guided around a certain level; salary, we are working on a certain level'.<sup>539</sup>*

The senior executive team then has '*a robust debate*' with faculties regarding their proposed fee schedules:<sup>540</sup>

*'all the departments come together and present their first-round budgets...By giving the guidelines, we're more or less all in sync. If there's anything special*

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<sup>537</sup> Interviewee 3.

<sup>538</sup> Ibid.

<sup>539</sup> Interviewee 7 (Johannesburg, 3 April 2018).

<sup>540</sup> Interviewee 3.

*that [a department] want[s] to put forward, then [they've] got to motivate [it]'*.<sup>541</sup>

Next, the senior executive would '*consult with students, through the SRC*'. These consultations would typically commence around the beginning of the second semester, and would entail '*a lot of arm wrestling*' in which the SRC '*would rail against the increases and denounce them*'. This '*arm wrestling*' would take place on the finance sub-committee of the university's council ('Finco'): the committee '*that processes these budget proposals and recommends them to council*'. Any fee decision would need to be approved by council by its final meeting in December that year, when council approved the university's budget for the following year.<sup>542</sup>

At UCT, a fairly similar budgeting process is followed:

*'we start off by assessing what we call the internal rate of inflation. Which is how we think all our costs will increase, in order to do the same thing next year that we did this year. We make a guess on what we think salaries will increase by. Because that's a key element of the internal rate of inflation. We evaluate where we pitched [our fees] this year...in relation to our competitors...And then we...estimate...what the market will bear. In terms of whether we've found that people are not coming because of the fees'*.<sup>543</sup>

A similar consultation process with students ensues, starting at Finco and then progressing to the council; albeit that

*'the decision on fees in Council would be taken preferably on the basis of consensus. But if not, it's a vote'*.<sup>544</sup>

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<sup>541</sup> Interviewee 7.

<sup>542</sup> Interviewee 3.

<sup>543</sup> Interviewee 18 (Cape Town, 20 April 2018).

<sup>544</sup> Interviewee 19.

The focus on ‘do[ing] *the same thing next year that we did this year*’ helps to contain a budgeting process that is

*‘as long as a piece of string. We could expand, we could invest twice as much in research; or set up a new centre or a new programme. And the budget would have to increase by an extra 10% to cover that...what we are concerned about is that we shouldn’t go into deficit. So that if we were to, basically, do very similar things next year as this year, what do we need?...that’s why the internal inflation rate is the main driver...’*<sup>545</sup>

Another interviewee at UCT echoed this sentiment:

*‘it’s always been pretty challenging. Part of why we’re taking a longer-term view is because we want to make sure we’re sustainable. We...don’t want to be sitting here asking the state for a bailout...because we’re not growing as fast as the rest of the system, our funding, in real terms, has been way below inflation...we’ve seen increases in our state funding...between two and four percent per annum. With inflation anywhere between six and ten’*.<sup>546</sup>

Targeting sustainability could, though, take university managers into murky waters. This is partly because ‘financial sustainability’ could be construed in different ways. One reading would be: ‘doing next year what we did this year’. In which case some measure of inflation would be the main driver of a budget. However, longer-term financial planning may adopt a more comprehensive view:

*‘We try and target a surplus of three percent of operating income... We strip out one-off expenditure... We also don’t include interest revenues, because...they can vary from year to year. So the core operating budget is supposed to fund recurring operations. Three percent surplus adds into the investment income; to invest in capital plant. So [in] the market crashes of [2007 – 2009], we didn’t have a massive issue. Because we...were not reliant on that sort of funding to fund day-to-day operations’*.<sup>547</sup>

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<sup>545</sup> Interviewee 18.

<sup>546</sup> Interviewee 29.

<sup>547</sup> Ibid.

This could be a tough sell to students who will have to pay the resulting fee increase, though. Targeting a surplus could be the same as seeking to make a profit. At Wits, an interviewee was explicit that

*‘public universities are not here to make money. We are here...for the public good. We are not here to generate profit. What we earn gets ploughed back into the plant, if I have to be simplistic about’.*<sup>548</sup>

Unpalatable as these surpluses may be, there is an argument linking them to a university’s long-term financial viability. For poorer students already battling to afford fees, though, seeking the fee increases necessary to accrue such surpluses may be perceived as illegitimately limiting their access to higher education.

Budgeting in this way - particularly the idea of repeating next year what was done this year - focuses on the resource of wealth in three ways. First, there is the assessment of what wealth was needed this year. Second, there is the conjecture of what amount will be needed for next year. Third, and perhaps underlying the previous two facets of wealth, there is the prevailing distribution of wealth (or legacies of wealth) which enabled what was done this year and may facilitate repeating it next year. Put crudely, wealthier universities can do more, and can better position themselves to ensure that their operations recur.

This suggests that the wealth differences between HA/WIs and HD/BIs would contribute to tuition fee decisions at these institutions facing different pressures. Or

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<sup>548</sup> Interviewee 1.

perhaps more accurately, the impact of resource scarcity (a common feature of the regulatory space of tuition fee decisions) would differ between institutions. Wealthier institutions may still feel wealth pressures, but they are likely to be far more pronounced at poorer institutions. Given the context I set out in chapter four, this suggests that HD/BIs faced more acute scarcity constraints than HA/WIs.

One facet of this scarcity was captured by an interviewee at WSU:

*‘what people don’t understand, in running an organisation. Is that it is not so much the fees that you charge, but how much money you have in the bank...In the end, for a viable institution, you have to have money in the bank’.*<sup>549</sup>

Having money in the bank – including through prior wealth endowments – gives a university more options in managing its budget, and therefore its academic offering.

Compared to HA/WIs, HD/BIs had far smaller endowments. Moreover, they had student cohorts that were, on average, significantly poorer than their HA/WI counterparts. This adds additional constraints to what fees an HD/BI can charge. At WSU, an interviewee indicated that

*‘one of the reasons why institutions like mine, and [another HD/BI], are in very, very tight financial conditions; is because there was a very strong focus on the fact that the majority of our students come from deep rural areas, from poor communities. Where most of the families have heads of household who are unemployed, and living on social grants...as a result, there was a very strong tendency not to increase fees at economically viable rates. So if inflation was ten percent, we would increase fees by five percent’.*<sup>550</sup>

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<sup>549</sup> Interviewee 12.

<sup>550</sup> Ibid.

Similarly, an interviewee from the Tshwane University of Technology ('TUT'; a HD/BI) pointed out that

*'ninety percent of this very big university are coming from deep rural...our students are basically...from the poorest of the poor. About sixty percent of our students are coming from quintile 1, 2, 3 schools. So, very poor schools. And...students...who are getting grants to make a living...we call ourselves and we try to establish ourselves as "the people's university" '.<sup>551</sup>*

This made it far harder for these institutions to budget sustainably. They started their annual budgeting process with much less of an endowment than their HA/WI counterparts. Although they participated in the same state subsidy scheme as HA/WIs, HD/BIs third stream income was more muted than HA/WIs. An interviewee at Wits indicated that

*'universities in South Africa are all grappling with this – the financial sustainability. There are some that are doing better than others; just because of legacy. There are...some that are doing better than others because they are better managed...you've also got the [HD/BIs which] are still relatively young and...have not been able to build up this alumni database. Although South African institutions don't have the same history of [alumni] giving to their alma mater as, for example, universities in the States do...But having said that...there are some universities that get very little funding from their [alumni]. And I do think that plays a little bit of a role as to where some universities find themselves now'.<sup>552</sup>*

Moreover, HD/BIs faced significant pressures against charging high (or even 'economically viable') fees. Even for the fees they did charge, they could face substantial difficulties in recovering them from students. While HA/WIs would also

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<sup>551</sup> Interviewee 22 (Pretoria, 3 May 2018).

<sup>552</sup> Interviewee 1.

face pressure not to charge high fees; and could also have certain difficulties in collecting their fees; these were of a different magnitude to those facing HD/BIs.

The starkness different institutions face in their budgeting is perhaps best illustrated by the deteriorating ‘*stalemate*’ that could ensue. In chapter four, I discussed one interviewee’s fear of such a ‘*stalemate*’ emerging: initially from the reconfiguration of higher education in South Africa between 1994 and 2005 (especially the university mergers); and subsequently, from the 2015 to 2017 Fees Must Fall protests. In this ‘*stalemate*’: ‘*...students keep access but there are no resources. And there’s just this steady decline*’.<sup>553</sup> An interviewee at a HD/BI captured a similar concern by describing how they were in a position where ‘*what you’re doing is you’ve got to constantly make do with less*’.<sup>554</sup>

The particular difficulty HD/BIs faced was that they began the budgeting process with poorer endowments. In particular, compared to their HA/WI counterparts: they had substantially less legacy wealth; they had a significantly lower fee base; and they had minimal third-stream income. Compounding these deficiencies was the fact that

*‘you can’t make any quantum leaps. You can’t say: I want to now peg that fee in relation to the industry norm. Because then it...means [a] twenty percent increase. And then you get [a] student revolt’*.<sup>555</sup>

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<sup>553</sup> Interviewee 6 (Johannesburg, 29 March 2018).

<sup>554</sup> Interviewee 13 (12 April 2018).

<sup>555</sup> Ibid.

Three important consequences flowed from this.

First, poorer institutions had little to no capacity to source bridging finance from their own resources. This could exacerbate the cashflow difficulties an institution might experience. Second, the low fee problem was not limited solely to tuition fees. Since *'more affluent universities...source their students from a component who can afford to pay'*, they could *'differentiate the fees...the residence fees, they push it up'*.<sup>556</sup> A poorer institution was less able to do this. Being saddled with a low, less differentiated fee base could undermine an institution's ability to finance even those projects for which there was a pressing demand:

*'we are contemplating going for funding to finance a residence. But, because at first [we looked at it] on the historic fees – so the fees that we are currently charging – it just doesn't become viable...[you] can't finance it'*.<sup>557</sup>

Third, and more generally, *'[for] equipment and things like that...you've got to finance [them] out of fees'*.<sup>558</sup> Adequately funding a university's capital developments and operations therefore becomes increasingly unworkable if that institution is stuck in a spiralling *'stalemate'* of *'constantly mak[ing] do with less'*.<sup>559</sup>

This is borne out by the experience of another HD/BI, the University of the Western Cape ('UWC'). UWC's experience is especially pertinent, given the pressure

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<sup>556</sup> Ibid.

<sup>557</sup> Ibid.

<sup>558</sup> Ibid.

<sup>559</sup> Ibid and interviewee 6.

which emerged during the 2015 to 2017 Fees Must Fall protests for free education (or at least for universities not to increase their fees). An interviewee pointed out that

*‘UWC at some point in the...1990s...introduced a zero percent fee increase...And...as a result, UWC fell into serious financial problems thereafter’.*<sup>560</sup>

The ramifications of this zero percent increase were as follows:

*‘at the time, despite [UWC’s] fees already being amongst the lowest in the country, [we] heeded the minister’s call for 0 fee increase; to allow indigent students to register without paying. But we didn’t get state support. And that led to [an] increase [in] students’ debts, without state support. Our student...numbers dwindled...and in 1998, UWC’s liabilities exceeded its assets to the tune of three times. It was a very emotional...And a very destructive period at the university. 41 academics and 300 non-academic or professional staff were retrenched’.*<sup>561</sup>

This painful experience highlights the pitfalls of pursuing social activism (such as expanding access to higher education) without also engaging in responsible budgeting. It also suggests that the pursuit of financial sustainability is a necessity not a luxury; even though what that pursuit entails may be contested. Finally, the references to a lack of state support for the zero percent increase are significant on two fronts.

They show the dangerous decline, not just stalemate, which a public university can face if it pursues a financially unsustainable course. Moreover, ‘state support’ refers to the resource of wealth in the regulatory space of tuition fee decisions. One dimension to this wealth is the state funding which cascades into and out of cognate

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<sup>560</sup> Interviewee 39.

<sup>561</sup> Presentation by the University of the Western Cape to the Commission of Inquiry into Higher Education and Training, Transcript (session four, 5 September 2016) 87.

spaces. At a more macro-level, any appeal for increased state support in the regulatory space of tuition fee decisions ripples out into the delicate calibrations that national government navigates: during the national budgeting process; and in attempting both to transform higher education, and to ensure ‘*other pressing social needs*’ are kept ‘*in perspective*’.

### **2.2.2. Impact on students**

The impact of a fee decision on students is an important consideration alongside issues of a university’s financial sustainability. Even if the impact on students was not front of mind for university managers, students could raise it during the consultation processes I analysed in section 2.2.1 of this chapter. One important factor would be whether students could (and would) pay a proposed fee increase. In turn, this raises the availability of financial aid: both from the state, and from private sources (e.g. company bursaries).

The availability of financial aid provides a link between how university managers build a university’s budget, and what impact the fee component of that budget has on students. It also speaks to the income streams a university may draw on. As I argued in chapter five, this is primarily because the national government’s allocation of its financial resources is a zero-sum game. Money the Department of Higher Education and Training allocates to the National Student Financial Aid Scheme (‘NSFAS’) cannot be allocated to the block grants (i.e. the subsidy universities receive from the state).

However, universities may still receive this money from the state insofar as it is used by students to pay their fees. This raises several questions: including whether the state would then be paying university fees, and if this amounted to free education (at least for those receiving NSFAS funding). How these questions are raised and answered, and by whom, influences the boundaries of this regulatory space. Most immediately, student's access to financial aid could affect: what fees a university could charge; whether and how those fees would be paid; and – most importantly for the purposes of my thesis - what issues might drive student protests concerning those fee decisions.

One way this manifested was in the connection between what cohort of students attended a university, the financial aid available to those students, and the debts those students may incur. A higher proportion of students were NSFAS recipients at TUT and WSU (two HD/BIs), compared to Wits and UCT (two HA/WIs). To give some perspective on this, NSFAS recipients were means-tested. Several interviewees referred to a ceiling (pre-Fees Must Fall) of annual family income of around R122,000.00 for a student to qualify for NSFAS funding. An interviewee at WSU indicated that

*'for 2017...we had 17 000 students on NSFAS. And we registered in the region of 31 000 students [that year]'.<sup>562</sup>*

There was a catch to this financial support. Prior to the 2015 to 2017 Fees Must Fall protests, *'the funding at NSFAS [was] done at average cost of study...not full cost*

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<sup>562</sup> Interviewee 12.

*of study*'.<sup>563</sup> A NSFAS recipient could therefore find themselves unable to fund their full cost of study, even with support from the state. This could result in their incurring a debt to the university, over and above any debt they may owe to NSFAS. This debt was more likely to be accrued at institutions charging higher fees, since those institutions' costs of study were more likely to be above the average cost of study at which NSFAS recipients were funded.

This debt was more likely to be incurred by NSFAS students studying at HA/WIs than at HD/BIs, given that the former had historically charged higher fees. In addition, even where NSFAS funding covered the full tuition fee, it may not cover the additional fees a university charged – such as lab or fieldtrip fees. This echoes the concern I discussed in section 1.1 of this chapter: that even private bursaries would not cover additional fees if they were charged separately (as opposed to being rolled into a composite fee).<sup>564</sup>

Perhaps perversely, it was also the universities that charged higher fees that had more scope to ameliorate this potential deficit. An interviewee at a HD/BI stated that certain HA/WIs

*'had the ability, out of their own coffers, to provide bursaries for some categories of deserving students. We just haven't had the ability to do that'*.<sup>565</sup>

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<sup>563</sup> Interviewee 40 (Pretoria, 30 May 2018).

<sup>564</sup> Cf. fn 502.

<sup>565</sup> Interviewee 13.

In fact, a justification presented by some interviewees at UCT for charging higher fees was that UCT could internally redistribute the money paid by wealthier students to fund bursaries for poorer students. Part of this redistribution was specifically geared towards eliminating the debt NSFAS recipients attending UCT might otherwise have incurred, given that its fees were above the average cost of study for all South African public universities.

### 2.2.3. Impact on the university

The third theme shaping tuition fee decisions was the impact that decision might have on the university for which it was made. This impact was partly addressed by budgeting and by considering what impact fee decisions had on students, both of which I have just outlined. For budgeting in particular, the necessity of a fee increase at least equal to inflation was stressed by several interviewees as essential to a university's long-term viability. A core component of this inflation was staff salaries. An interviewee from UCT noted that

*'salaries are about 70% of university costs. So the real determinant [of a university's internal inflation] is salaries. And the question is: why are salaries going up by so much above [consumer price] inflation?...it's a...chicken and egg. If you've got the money, you may pay the salaries...if you didn't, you wouldn't'.<sup>566</sup>*

The question of what salary to pay was not limited to a particular institution making its own fee determination. Because staff could and did move between

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<sup>566</sup> Interviewee 18.

universities, some ‘look[ing] over the fence’ might be necessary for a university to retain staff:

*‘we decided to try and catch up with [other HA/WIs] in terms of the salaries we pay. We were lagging behind, seriously...[In] 2012, there was [a] strike by...academics, because of low salaries...we decided that...one of our aims was to be one of the better paying universities; if not the best paying university...in 2014/15, we did a huge restructuring of the salaries upwards. And so we became quite competitive’.*<sup>567</sup>

More generally, though, several interviewees tied the question of adequate funding – including through sufficient fee revenue - to maintaining the quality of the academic offering. One interviewee at TUT summarised the position:

*‘You should never...argue that money is the problem. My point is, quality education is why I’m engaging [with] you...Your education needs to be a return on investment, if I can put it mechanically. It’s far more than that...But let’s look at it from the poorest of the poor. You are investing, government is investing...So it’s not about the money issue. It’s about protecting the quality. And it’s not about affordability, only. It’s about sustainability. ...It’s about...relevancy and quality’.*<sup>568</sup>

On this view, maintaining quality is essential if a public university is to adequately equip graduates for employment. This requires sufficient funding, so that teaching can be up to date:

*‘we have state of the art equipment...cutting edge technology. I can’t train a mechatronic engineer with archaic equipment’.*<sup>569</sup>

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<sup>567</sup> Interviewee 3.

<sup>568</sup> Interviewee 22.

<sup>569</sup> Ibid.

Quality could be not only about maintaining international recognition of qualifications; but also a means of competitive differentiation. As an interviewee at Wits indicated,

*‘we say to students: ...you can have a university degree, or you can have a Wits degree. We can probably offer you a degree of lower but accepted quality. But if we have that five to ten percent more resources, we can offer you the degree at a level which will make you competitive as a graduate. Simple as that’.*<sup>570</sup>

Taking the argument one step further, an interviewee at UCT pointed out that fees are one route through which universities can differentiate themselves competitively; especially since the block grant is standardised:

*‘that is ultimately what differentiates universities. We all get the same amount of money from government, in our block grant, per student. The difference is what we get from fees. And in our case, because we generate another R20,000.00 or R30,000.00 per student, in fees. That enables us to employ more staff and do all the good things we do’.*<sup>571</sup>

Behind this distinction between national government standardisation and university differentiation lurks a much broader point about institutional autonomy and path dependency of access to the resource of wealth. The distinction between standardisation and differentiation speaks to potential tensions around what education public universities could offer, and at what cost. I argue in sections 2.2.1 and 2.2.3 of this chapter that these two issues are inter-related and were seen as interrelated by several of my interviewees.

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<sup>570</sup> Interviewee 14 (Johannesburg, 16 April 2018).

<sup>571</sup> Interviewee 18.

The link between institutional autonomy, and the distinction between standardisation and differentiation, can be drawn in another way. Standardisation could speak to centralisation by the national government; while differentiation could be associated with more diffuse, university-specific prerogatives. One concern which emerged during the 2015 to 2017 Fees Must Fall protests and their settlements was that a longer-term outcome could be more centralised funding of public universities in South Africa. This could be associated with greater standardisation of university offerings:

*‘I worry...that you’re creating centralised financing mechanisms that take away from the universities the autonomy to make some of these critical decisions [around institutional transformation]...you can’t separate finance from these other issues...no business would ever say: we [are] going to give the finance issues to one group of people, and strategic thinking is going to take place completely independently. Because everybody understands [that] the money drives the process, at least to some [extent]’.*<sup>572</sup>

I shall return in chapters eight and nine of my thesis to this concern with the association between institutional autonomy and how universities are funded. It links to my discussion in section 1 of this chapter about what constitute fees:

*‘what are fees? It’s the whole academic project. If a university is not funded sufficiently for research, for quality, for staffing at the level you need it; it’s actually not autonomy about fees that has been taken away. It’s autonomy about how to run an institution: what the priorities of the institution are; and how to maintain academic. I don’t want to say academic standards, but it’s the only word I can think of’.*<sup>573</sup>

An interviewee at UCT expressed a similar concern, linked specifically to the question

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<sup>572</sup> Interviewee 51 (Johannesburg, 24 March 2017).

<sup>573</sup> Interviewee 39.

of standardisation versus differentiation:

*‘we do a whole lot of internal manipulation and cross subsidisation; and we’re much more flexible. Because we have fee income that we’re in control of. If the government was to...take that away, and put it into the block grant. Then we would have no control over that. Then all universities would get the same. And you would have a mediocre higher education system. Because the government won’t fund us all at the level that [we are currently funded, given our fee income]’.*<sup>574</sup>

This highlights a dilemma at the centre of the regulatory space of tuition fee decisions. Tuition fee decisions by public universities emphasising quality and differentiation could limit students’ access to those universities. This is because universities emphasising quality and differentiation are more likely to charge higher fees. It could also lead to students on NSFAS accruing debts to those universities whose fees are above the average cost of study. However, the average cost of study plus funding through the standardised block grant is not necessarily sufficient to fund particular levels of quality at, or differentiation between, public universities. Furthermore, what funding public universities can access, and in what form, is intimately associated with what institutional mission and academic project they can pursue.

## **Conclusion**

The regulatory space of tuition fee decisions contains multiple tensions and dilemmas. One means of managing them was through the intricate, fragile calibrations which I have outlined in this chapter. These calibrations regulated the key interactions: between

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<sup>574</sup> Interviewee 18.

university managers, the national government, and students; and between a universities' main income streams – the state subsidy, fee income, third stream income, and that portion of NSFAS funding which universities received.

The 'place of space' of tuition fee decisions at public universities in South Africa shaped how these calibrations affected different interactions. One level to this was how universities related to other institutions and spaces – particularly those which also relied on government funding (the '*other pressing needs*'). Another is the different places various universities occupied in the regulatory space: because of general factors (being a HD/BI or a HA/WI); and because of more specific factors (such as the history and endowments of the particular university making the fee decision).

Several interviewees were explicit that these calibrations were increasingly in peril in the build-up to the 2015 to 2017 Fees Must Fall protests. This peril stemmed partly from who and what was being organised into and out of the regulatory space of tuition fee decisions. University managers increasingly found themselves caught between pressures to budget sustainably despite receiving declining funds from the state; and to keep tuition fees low so that poorer students could access university education. The peril was also partially driven by South Africa's macro-economic deterioration. This deterioration limited what funding the state could disburse, and increased the demands placed on institutions (such as universities) which had some capacity to meet certain needs. Making matters worse, the key interactions and funding flows underpinning an effective student financial aid system were deteriorating, too. I delve into these fraying calibrations in the next chapter.

## CHAPTER 7

### Disrupting the disequilibrium

*‘Things fall apart; the centre cannot hold’<sup>575</sup>*

I argued in chapters four to six of my thesis that tuition fee decisions at public universities in South Africa were regulated prior to 2015. During the perpetual disequilibrium, this regulation occurred through the delicate calibration of the interactions between university managers, the national government, and students; as well as the links between the subsidy universities receive from the national government, tuition fee income, third stream income, and the portion of the National Student Financial Aid Scheme (‘NSFAS’) grant which universities receive from the national government.

In this chapter, I turn to the accelerated fraying of these calibrations in the build up to the 2015 to 2017 Fees Must Fall protests. My main argument is that the protests and their settlements shifted the regulation of tuition fee decisions into an interregnum. By this I mean both the transition period between regulatory regimes (before and after the protests); and the uncertainties and tensions at play in that period – including over whether any, and what kind of, order (and thus what type of regulatory space) might be restored. One interviewee captured the uncertainties and sense of crisis engendered by the protests:

*‘[the new system] was developed in haste. To try and get things in place for [2018]. So it’s only now that we are beginning to deal with the longer term policy issues...you have multiple political risks of what can happen on*

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<sup>575</sup> William Butler Yeats, ‘The Second Coming’.

*campuses when there's so much change. And then there's the system level changes...Fees Must Fall...has put us into a completely different context'.<sup>576</sup>*

Part of the sense of crises stems from the increasing urgency to ameliorate the unsustainable tensions in South Africa's higher education sector during the perpetual disequilibrium. This urgency extended to an expanding array of interventions. The urgency around the implementation of these interventions collapsed the space required for longer-term planning:

*'We're in a situation now where there is an uneasy, fragile, that is happening. All kinds of things have been negotiated in the system...We are going to have to deal with those problems...we have to find a long-term solution. We can't continue with this going on forever'.<sup>577</sup>*

I argue in this chapter that this uncertainty was exacerbated by disruptive protests.

This is partly because disruptive protest can act as a regulatory force, particularly through disturbing the prevailing regulatory regime. I attempt to track some of this disruption and the resulting uncertainty in this and subsequent chapters, through two themes I have focused on in my thesis thus far. One major theme I develop is the tension between the paradigms of social activism and responsible budgeting. I have emphasised that protest-driven social activism can cannibalise responsible budgeting. In this chapter, I show how this cannibalisation can be exacerbated by a deteriorating macroeconomic, and tumultuous government policy, environment.

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<sup>576</sup> Interviewee 37 (Pretoria, 23 May 2018).

<sup>577</sup> Interviewee 58 (Pretoria, 20 April 2017).

The second theme I flesh out is the importance of the place of space. I tease out several facets of this theme in this chapter. One is that disruptive protests can realign how interests are organised in a regulatory space. Such protests can organise actors and issues into and out of a regulatory space. Relatedly, these protests and their ramifications can cascade through physical and regulatory spaces: from university campuses to parliamentary precincts; and from the regulatory space of tuition fee decisions, to the budgeting process followed by the national government and all the regulatory spaces on which that budgeting process impinges (e.g. housing, water, electricity).

Especially noteworthy for my thesis is that disruptive protests can be a feature of a distinct place of space. South Africa has a pre- and post-1994 history of protests being used by a variety of actors to pursue multiple ends. Protests are a significant feature of the regulatory space I am analysing:

*‘there is a very clear relationship between the evolution of...higher education funding policy. And resistance from working class students...Since the establishment of the Department of Higher Education [and Training] in 2009...we protested, protested, protested...Protest has...a strong...currency in South African history...Cos of the history’.*<sup>578</sup>

Through challenging and disrupting the prevailing regulatory regime, protests can alter how the boundaries of a regulatory space are drawn and contested. I argue in this chapter that they can also compound the fragility of the calibrations that regulated tuition fee decisions. Furthermore, disruptive protests amplified the *‘state of perpetual*

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<sup>578</sup> Interviewee 33 (Johannesburg, 18 May 2018).

*disequilibrium*' affecting the higher education system;<sup>579</sup> as did a tumultuous policy environment.

I explore these two themes across two sections. First, I tackle the role played by student protests in the regulatory space of tuition fee decisions at public universities in South Africa. I discuss protests as a response to tuition fee decisions, and I analyse the paradigms which such protests may flesh out (especially the democratic leg of the paradigm of society as unitary, egalitarian, and democratic). I also explore the delicate calibrations which linked tuition fees and financial aid. These delicate links are another facet of the 'planning, funding and quality control' triad I discussed in the previous chapter.

Second, I analyse the place of space: where organised interests are located in key processes, and how key calibrations are shaped by culture and history. I focus on the fluctuations in South Africa's national government's policy around higher education, the changing context in which that policy was implemented, and how these changes reconfigured the regulatory space of tuition fee decisions. To show how this place of space is informed by wider forces, I then turn to macro-economic features of the place of space South Africa occupied in the build up to the 2015 protests.

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<sup>579</sup> Cf. interviewee 8 (Pretoria, 4 April 2018).

## 1. Student protests

Protests can form part of regulatory processes: both through contesting prevailing regulation, and through lobbying for regulatory reform. In the regulatory space of tuition fee decisions, student protests challenged the fee decision a university council had arrived at, the processes through which that decision was arrived at, and the implementation of that fee decision. A focal point for disruptive student protests in South Africa post-1994 was the financial exclusion of students. Protestors would demand that an inability to afford the costs of university education – especially increasing tuition fees - should not impede access to it. This demand, and the dynamics it highlights, reveal how contentious and how delicate the calibrations regulating tuition fee decisions could be.

### 1.1. Protests and academic freedom

In chapter six, I quoted the view expressed by one interviewee that

*‘protests in response to the announcement of fee increases were something like an annual ritual; and constituted part of the negotiating tactics of the students, generally led by the SRC’.*<sup>580</sup>

This suggests that student protests were both a response to tuition fee decisions, and part of the process through which such decisions were made. For instance, where students were outvoted; and where they felt they had not been properly consulted; protest remained one means through which they could contest a tuition fee decision.

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<sup>580</sup> Interviewee 56 (Johannesburg, 12 April 2017).

Though triggered by and intimately associated with tuition fee decisions, student protests could also be expressions of paradigms – and even demands that measures be taken to realise certain paradigms. In chapter four, I discussed the paradigm of society as unitary, egalitarian, and democratic. Democratisation was a core element of the transformation of society which the post-1994 state sought to achieve. This extended to broadening and institutionalising democratic forms of engagement and expression. I developed this point further in chapters five and six by arguing that the democratisation of universities' governance structures formed part of this broader push.

I argued that the implementation of this democratisation at universities – especially the establishment of novel governance structures – was contested. For instance, did an SRC's voting and consultation rights fulfil the requirement that students participate democratically in a university's budgeting processes, especially its fee decisions? I expand this question in this chapter by asking: was the right to protest part of this democratisation? If so, which forms of protest were permissible?

These questions about protests became increasingly pressing during the perpetual disequilibrium. Students who were not members of the SRC often participated in these protests. The occurrence of protests frequently raised issues about who conducted the protests and how: issues which might be additional to whatever grievance had triggered the protests. Furthermore, protest retained valuable currency in South Africa because of its history, both generally and in higher education specifically. Questions about which forms of protest aligned with the paradigm of

society as unitary, egalitarian, and democratic would therefore be hard for university managers (and, potentially, the national government) to duck. They included questions such as which forms of disruption were permissible.

At one HA/WI, fee protests prior to 2015 had initiated a bigger discussion about university policy on student protests. One outcome of those discussions was that work began on developing a protest policy for the university. Over time, this work fell under that university's Senate's '*Academic Freedom Committee*'. In its work, this committee

*'celebrated the role of, and right to, protest; as part of the liberal arts education that is part of the spirit of the university... We also suggested that the repertoire of protest... should form some part... of the curriculum at the university'*.<sup>581</sup>

This reading links the right to protest, and what forms of protest are permissible, to the question of academic freedom. I indicated in chapter five that tuition fee decisions could be linked to academic freedom insofar as they had implications for what a university could offer to prospective students, and which students could afford to register at that university. Students opposing the fee decision could protest against it; exercising a right which could be linked not only to the democratisation pursued by the post-1994 state, but one which some actors thought '*should form some part... of the curriculum at the University*'.<sup>582</sup>

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<sup>581</sup> Ibid.

<sup>582</sup> Ibid.

An alternative view, though, is that ‘*academic freedom [may] violate governance regulations*’: at least insofar as demands framed in terms of academic freedom could undermine how a university council made decisions (including fee decisions).<sup>583</sup> The contestation around what academic freedom encompassed heightened the fragility of the calibrations regulating tuition fee decisions, particularly as the issue of financial exclusions gained prominence post-1994.

### **1.2. Fee decisions and financial aid**

Financial exclusions covered cases in which academically qualifying students were, on monetary grounds, prevented from registering to start (or from continuing) their university studies. The possibility of such exclusion occurring was recognised in policy. It emerged primarily from an attempt to balance very necessary social activism (expanding access to university education); with the demands placed on national governments (and passed on to universities) to budget responsibility - given the ‘*other pressing social needs*’ the national government had to address post-1994.

The cost-sharing model attempted to achieve this balance. It entailed university education being funded by the state and by students:

*‘we were aware of the challenges in the system...particularly around the [underfunding] of NSFAS students, of poor students... We allowed students who were poor to enter into the system, on the grounds that we would find money to support them later on...Which, in hindsight,...was about opening access to groups of students who, otherwise, would never be able to get there. And that was one of the fundamental principles behind the cost-sharing model. That you*

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<sup>583</sup> Interviewee 59 (Johannesburg, 20 April 2017).

*can't deny people coming into university because they don't have the funding. But people who do have funding need to pay'.<sup>584</sup>*

This highlights another important aspect of the calibration regulating tuition fee decisions: the interplay between fee decisions and the financial aid made available to students, particularly by the national government.

The availability and adequacy of state-funded financial aid played an important role in shaping how equitable access to, and success at, university was for poorer students. One outcome was the emergence of an association between the national government's financial commitments, and tuition fee decisions:

*'until NSFAS came about in the late [19]90s, there was no relationship between fees and financial aid at all. So the state's obligations were [independent from the universities]...and therefore what universities did in terms of fee levels had no impact on financial aid provided by the state'.<sup>585</sup>*

The post-1994 state's emphasis on expanding access to university education, especially for poorer students, linked increasing financial aid provided by the national government to tuition fee decisions.

Cost sharing was necessary given the '*other pressing needs*' the national government had to meet. Part of cost sharing was universities charging fees. Poorer students, though, might not be able to afford these fees. To avoid poorer students being denied access to university education because they lacked funding, the financial aid available to students – particularly state financial aid – would need to expand. This

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<sup>584</sup> Interviewee 58.

<sup>585</sup> Interviewee 54 (Pretoria, 5 April 2017).

financial aid would need to cover the tuition fees a prospective student would have to pay.

The fragility of the ensuing calibration between fee decisions and the availability of financial aid was succinctly captured in national government policy, as was the recognition that:

*‘a significant proportion of student financial assistance currently flows into institutional revenues as fee payments. The inter-relationship of the scale of student assistance per institution, the level of fee tariffs, the financial health and (in some cases) the viability and social stability of an institution, argue for an increase in the volume of student financial assistance from public funds’.*<sup>586</sup>

The recognition of the need for increasing state-funded financial aid for students is particularly important. It was emphasised several times in policy:

*‘[the planning, funding, and quality control framework] will enable planned goals and targets to be pursued. The process will ensure that the expansion of the system is responsibly managed and balanced in terms of the demand for access, the need for redress and diversification, the human resource requirements of the society and economy, and the limits of affordability and sustainability’.*<sup>587</sup>

*‘while it is possible to achieve rapid enrolment growth without extra expenditure, the penalties for doing so are harsh’.*<sup>588</sup> and

*‘a realistic fee structure must...go hand-in-hand with a sustainable programme of student financial assistance’.*<sup>589</sup>

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<sup>586</sup> EWP 3 (fn 13) paragraph 4.45.

<sup>587</sup> Ibid paragraph 2.6.

<sup>588</sup> Ibid paragraph 4.4

<sup>589</sup> Ibid paragraph 4.8.

This calibration of fee decisions and financial aid policy was awkward and fragile in two respects. First, limits on the funding available to the national government were recognised as a constraint on what financial aid would be forthcoming. This points to another instance of actors and issues being organised into and out of the regulatory space of tuition fee decisions. The success or failure of the national government's macroeconomic policy would have a bearing on this regulatory space, because this success or failure would influence what funding was available to the national government. In addition, I showed in chapter six that allocations by the national government were ultimately zero-sum: to student financial aid, or to the block grant; and more broadly, to higher education, or to '*other pressing social needs*'.

Second, the awkwardness and fragility of this calibration is evident in the differing positions and perspectives of the main actors affected by it. For students, receiving their financial aid

*'allowances is the tail end of a process...If any [part of that process isn't] working properly, who doesn't get paid? The student'*.<sup>590</sup>

This policy brought together universities and the national government. From a student's perspective, though, the success or failure of this policy would come down to whether they received their allowances, timeously.

The interactions between university managers and the national government were intricately calibrated, too. I analysed in chapter six how universities make fee decisions as part of their annual budgeting processes. A major input into this process is

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<sup>590</sup> Interviewee 28 (Cape Town, 11 May 2018).

the block grant universities expect to receive from the national government. The block grant is drawn from the same pool of funds as the earmarked grant for financial aid.

Thus the national government's funding allocation between the block grant and financial aid is a zero-sum-game. However, this trade-off is complicated by the fact that

*'a significant proportion of student financial assistance...flows into institutional revenues as fee payments'.<sup>591</sup>*

Furthermore, the number of students who could register for a particular programme at a university is negotiated between university managers and the national government. Any prospective financial aid recipient would be taking up one of these negotiated places.

Initially, students received their financial aid allowance through the university they were registered at. This could make the university the immediate point of friction: because of a breakdown somewhere in the financial aid process; or, and perhaps relatedly, because of an unaffordable fee decision. Either such a breakdown, or ever-increasing tuition fees, could contribute to financial exclusions.

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<sup>591</sup> EWP 3 (fn 13) paragraph 4.45.

### 1.2.1. Unpacking ‘financial exclusions’

I define the term ‘financial exclusion’ as denying a prospective student access to university education for monetary reasons, usually the failure to make a required payment. Prior to 2015, there were five main points in the academic year when these exclusions might take effect. The first was in respect of the registration fee, upfront payment, or minimum initial payment. This fee was usually a percentage of the total fee a prospective student would have to pay:

*‘you had to have those payments upfront [made]. Or...have bursary commitments to cover your payments for the rest of the year. Otherwise you weren’t allowed to register...that...was the only mechanism in which you could ensure financial sustainability in the first...three months of the year...for the first three months of the year, universities do not get any income from government... you must either have some savings, that can see you through that period. Because you still have to pay salaries and all those things. Or you get your income from fees, upfront, in January’.*<sup>592</sup>

However, another interviewee was sceptical of both the justification for this payment requirement, and the manner in which it was calculated at their university:

*‘the government’s financial year is from the first of April to 31 March. So, if universities only receive their subsidy at the beginning of April, what they...do is:...work out the costs of running the university for the first three months, before the subsidy comes in. And simply divide that by enrolment...that formed the basis for the registration fees. At least, that’s what this university said...I say that’s what this university said...because then you would ask the question: ...if your funding cycle is from April to March, why are you running out of money in December?’.*<sup>593</sup>

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<sup>592</sup> Interviewee 12 (East London, 12 April 2018).

<sup>593</sup> Interviewee 36 (Johannesburg, 22 May 2018).

Whether or not this reasoning was accepted, the first financial exclusion a student could face was for a failure to pay the registration fee. Relatedly, and also potentially at the beginning of the academic year, a returning student who had outstanding debts from prior years of study would have to clear those debts before they would be allowed to return: *'you most certainly couldn't come and register with historic debt'*.<sup>594</sup>

The next potential point of exclusion would be when the remainder of the fees were due. Where students had unpaid fees or outstanding debts, universities could: prohibit them from writing exams; prohibit students from viewing their results; and prevent students from graduating. Interviewees who discussed these kinds of exclusions raised questions about its necessity, and its effectiveness:

*'If [students] had unpaid debts at the end of the year, that they couldn't clear, then students couldn't come back the next year. Or they couldn't graduate. That's the only way we have to enforce fee payment. And all universities essentially do that. And [poorer universities] had high levels of financial exclusion. Which was always a source of protest. But when you do that, you don't then get the money. You still have a bad debt'*,<sup>595</sup> and

*'at all three [HD/BIs] that I went to subsequently, the management of cash-flow was very similar...you still insisted on payments for historic debt. But you realised that the socio-economic conditions did warrant a different approach to the issues of payment... you were probably a little more lenient in allowing people to make payment regimes; especially upfront payments. Although in each one of those institutions, we did have a very strict rule that you could not walk across the graduation stage if you had any outstanding debt'*.<sup>596</sup>

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<sup>594</sup> Interviewee 12.

<sup>595</sup> Interviewee 18 (Cape Town, 20 April 2018).

<sup>596</sup> Interviewee 12.

One further aspect of these exclusions is that they were relatively rule-bound and process-heavy. This impacted on students and university managers. One university manager I interviewed indicated that ‘*our debt collection...in the past relied on rules, administrative rules within the university*’.<sup>597</sup> Specifically, these were rules requiring payments of outstanding fee debts to register, to graduate, and so forth.

Another interviewee noted the following caveat about ‘financial exclusions’:

*‘I hate the term...“financial exclusion”. Because it becomes too easily used outside of [the] context of the situation...If you did not apply for funding, yes; you’re going to have debt. How did the institution financially exclude you?’*.<sup>598</sup>

This illuminates another way in which the interaction between fee decisions and financial aid were awkwardly calibrated. To access what funding was available, students were required to apply both to a particular university; and to complete whatever further applications may have been required. Each of these applications could organise different actors and issues into the wider regulatory space of tuition fee decisions.

### **1.2.2. Universities as financial institutions**

Financial exclusions were one mechanism through which universities enforced fee payments. The prohibition on students with outstanding debt graduating provides an insight into a perhaps unexpected transformation of universities: their partial

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<sup>597</sup> Interviewee 1.

<sup>598</sup> Interviewee 28.

conversion into financial institutions. One university manager gave this reason for insisting on payment prior to allowing students to graduate:

*‘if you looked at the payment graphs at [the three HD/BIs, you’d find] no payment being made throughout the year. And then, suddenly, in April, prior to graduation, there would be a clearance of the debt...What that signified to many people was that there was not a financial problem to an extraordinary extent. It was more of a management of the cash that was happening from the student community...*

*...if somebody was not progressing; was failing along the way or dropping out. That payment was never being made. It was only being made upon the successful opportunity to walk across the stage. So...universities were...being used as bankers...or managers of loans...the university would... give somebody a loan for the year, or for three years. And the payment would only be made at the very last moment’.*<sup>599</sup>

This experience was echoed by an interviewee at a HA/WI, who referred to a colleague’s similar experience at a HD/BI:

*‘we’ve always found that around the time of graduation ceremonies, we all of a sudden see a massive influx of payments. Where...people will find the money...A few of us [spoke] to [a colleague at an HD/BI]...they implemented [this policy] for the first time late last year, early this year. And they’ve said the same thing – it’s made a massive difference. Where...in one week, they pull in R53 – R55 million of outstanding fees. Simply because students...were barred from going to the graduation ceremony’.*<sup>600</sup>

This suggests that broader issues of how university education would be financed in South Africa (such as which institutions provide loans) were being organised into the regulatory space of tuition fee decisions. While universities would not ordinarily be considered financial institutions, these examples indicate that several universities were being used as such by some students.

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<sup>599</sup> Interviewee 12.

<sup>600</sup> Interviewee 29 (Cape Town, 11 May 2018).

This dynamic complicates how the interactions between students and university managers were being calibrated. It suggests a subtle repurposing of what kind of organisation universities were. Adding further complexity to these dynamics is the fact that universities might deliberately resist acting as financial institutions. For instance, one HA/WI's policy of charging high(er) fees in order to make internal redistributions to poorer students involved both loans and bursaries being offered to certain students. However:

*'NSFAS administered the loan. Not being a bank...we're not allowed to administer a long-term loan system'.<sup>601</sup>*

This approach linked the university's internal financial aid scheme to the NSFAS. Although these interconnections between financial aid and fee decisions are important, it is still necessary to distinguish protests against fees from protests about financial aid.

### **1.2.3. Fee protests and financial aid protests**

One response to financial exclusions could be student protests. I briefly distinguish two kinds of protests which could take place in response to the prospect of financial exclusion: fee protests, and financial aid protests. I distinguish them on the basis of the time of year at which they were more likely to occur, and based on their slightly different dynamics.

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<sup>601</sup> Interviewee 57 (Cape Town, 13 April 2017).

Financial aid protests were more likely to occur at the start of the academic year. One interviewee explained that:

*'the struggle at the [HD/BIs] was always for more financial aid. Not for free education. It was really about saying: how do I get in?...There were demonstrations at the beginning of every year. Going back 20 years or something...linked to this idea that every student who qualifies to be at university, should receive a financial aid package'.<sup>602</sup>*

These protests would occur at the beginning of the academic year, because that was when prospective students would discover whether they would receive financial aid; and if so, how much:

*'we got to the point where we knew that every year there was going to be – and rightly so – these demonstrations. What we did...is change the university calendar to build in a couple of weeks to sort out the financial aid situation'.<sup>603</sup>*

A fee protest would often take place around the time at which a university announced its fee decision for the following year. Quite often, this could be around exam time:

*'I do think there's a whole lot of problems converging. [One] problem...is the...lack of throughput. So when you look at the timing of the protests...beginning of the year is when you'd expect protests to be linked to funding. Cos that's when you have to pay registration fees...The fact that these protests also always happen at exam time, in October. Does make you think there's another discussion going on, as well. And that's [about] access without success'.<sup>604</sup>*

Another reason fee protests may occur in October, around exam time, is that by then, universities would need to be close to finalising their budget for the forthcoming year.

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<sup>602</sup> Interviewee 20 (Pretoria, 26 April 2018).

<sup>603</sup> Ibid.

<sup>604</sup> Interviewee 39 (Pretoria, 25 May 2018).

The distinction I have drawn helps to tease out the more indirect interactions between fee decisions and financial aid policy. A fee decision would determine the cost of study which a prospective student would have to meet. Because they are announced in advance of the year in which they will apply, the sting to a fee decision would be the possible financial exclusion a student could face in the future. One factor shaping whether such exclusions arose would be what level of financial aid a student had access to.

Together, these factors could be rolled into protests by students against the prospect of financial exclusion from university education: either because their current financial aid was insufficient; or because the proposed fee increase would place the cost of university education beyond their financial means (even with financial aid). I turn now to how South Africa's deteriorating macroeconomics, coupled with its tumultuous macroeconomic and higher education policy environment, rendered fee decisions increasingly unaffordable while also limiting what financial aid was available.

## **2. Revisiting the place of space**

Localised factors are equally important for understanding which protests emerge on which campuses, and how these in turn shape the delicate calibrations in the regulatory space. My identification of common features should not be read as an argument that all the protests I am considering – even those in the same category (e.g. fee protests) – would have precisely the same features. Rather, campus-specific factors should be included in analysing a protest on a particular campus.

In this section, I discuss aspects of the evolving place of space in South Africa during the perpetual disequilibrium, focusing on the tumultuous policy environment which destabilised the regulatory space of tuition fee decisions. Relatedly, I analyse how the national government's financial aid policy organised actors and issues into and out of this regulatory space. I then turn to the increasingly binding constraint of South Africa's deteriorating economic position, which limited the achievement of explicit policy targets (including in relation to education).

### **2.1. Changing policy in a changing context**

I noted in chapter four the sense of crisis which pervaded higher education in South Africa during the perpetual disequilibrium:

*'for almost 20 years, we've had perpetual change in higher education. A lot of upheaval'.<sup>605</sup>*

There are two facets to this sense of crisis which could have entrenched and exacerbated it: ongoing policy changes, and the fact that South Africa's socio-economic conditions were changing in conjunction with these policy changes.

One difficulty this generated was that South Africa's changing socio-economic condition post-1994, and the policy changes attempting to address some of these changing conditions, failed to synchronise. Furthermore, repeated policy changes potentially undermined large organisation's capacity to implement and respond to those

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<sup>605</sup> Interviewee 8.

policy changes. They also undermined key actors' capacity to adjust to the changing context. This is paradoxical, given the apparently regular and long-term planning and funding framework for tuition fee decisions which I discussed in chapter five.

A driver of these disconnects was the push to expand access to higher education. Initial policy was explicit that any expansion must remain within the bounds of affordability:

*'there's always the economic and the social. And it's trying to find a balance...from [19]94, they spoke about the equity, development balance...Because we cannot afford an expanded system any other way. It was decided that we should not expand too quickly. Because that could lead to perverse consequences. And [the] collapse of the system...'*<sup>606</sup>

Significantly, the context in which initial policy was promulgated was one in which the number of prospective university students had actually decreased:

*'you must...bear in mind when you read old policy...that actually, in the late 90s; and 2000, 2001...They had experienced a decrease in student applications. And universities were competing for students...Compared to...now...where everybody [is] trying to get access...'*<sup>607</sup>

Over the period 1994 to 2015, access to higher education generally; and to university education in particular; expanded significantly. However, several interviewees questioned whether this has been done affordably and equitably:

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<sup>606</sup> Interviewee 39.

<sup>607</sup> Ibid.

especially whether expanded access had been coupled with increasing success at university. One interviewee provided the following indicative overview:

*‘The participation rate [in university education in South Africa] is getting to around 2 in 10 for the current generation. That’s much higher than it has been. That’s the result of a huge expansion of access to higher education...The problem is the drop-out rate is very high. The number of people across the South African sector at undergraduate level, who drop out without finishing a degree, is...approaching 50%...among the people who get NSFAS support, the number of people who don’t finish their degree is...above 70%’.*<sup>608</sup>

Another interviewee raised a similar concern – that the expansion of access had been too narrowly focused:

*‘It’s about quality and relevance. That is a big problem...looking at [whether] access [is accompanied] with success...I am worried that we are chasing quantity and not quality’.*<sup>609</sup>

The questions of access, and access with success, are another instance of how actors and issues were organised into and out of the regulatory space of tuition fee decisions. This is because tuition fee decisions have a bearing both on who can access university education, and on what education (including what quality of education) a university can offer.

Perhaps most troublingly, expanding access could come into conflict with the limits of affordability. This further illustrates the tension between the paradigms of social activism and responsible budgeting. Despite the emphasis on keeping any

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<sup>608</sup> Interviewee 16.

<sup>609</sup> Interviewee 22.

expansion within the limits of affordability, one interviewee referred to changes from around 2009 following which the Department of Higher Education and Training

*‘almost adopted a growth at all costs mindset...there was this...push for volume growth almost at all costs’.*<sup>610</sup>

A danger inherent in pursuing one paradigm at the expense of others is that it is likely to disintegrate the fragile calibrations regulating tuition fee decisions.

This is because volume growth is explicitly about expanding access. For students, tuition fees could be a hindrance to access:

*‘[This HD/BI] is a...politically volatile institution. We have more days of students in the streets than in the classrooms. Well, it’s not quite as bad as that. But...[o]ur students are very politicised. And it is...essentially around local issues...And also, access issues. And fees are seen as the form of prevention of access’.*<sup>611</sup>

Although fees were one factor that could limit access, an interviewee at an HA/WI indicated how other issues were also part of the fight for access:

*‘we understand that [the students] feel frustrated. That so many years into democracy, student access is still restricted. And even if they are allowed access, their chances of success are very small. Because of funding issues. You know, conduciveness of the environment they live in. And frankly speaking, some racist behaviour of some lecturers. Untransformed academia. Untransformed mind-sets...So their grievances [are] real’.*<sup>612</sup>

Some of these broader issues around the ‘*conduciveness of the environment*’ could be traced to a question of whether sufficient funding had been provided.

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<sup>610</sup> Interviewee 29.

<sup>611</sup> Interviewee 12.

<sup>612</sup> Interviewee 10 (Pretoria, 10 April 2018).

These broader issues could also be read as a prime example of how

*‘...it is possible to achieve rapid enrolment growth without extra expenditure, [but] the penalties for doing so are harsh’.*<sup>613</sup>

Without a commensurate increase in funding, the per student subsidy universities received from the national government would decrease with the expansion of access. Furthermore, I have stressed that there is a zero-sum-game dynamic to the allocation of funding between the subsidy to universities, and to financial aid for students. Yet increases in financial aid became especially necessary as poorer students’ access to university education increased. The objective was expressly

*‘[to] allow...students who were poor to enter into the system, on the grounds that we would find money to support them later on’.*<sup>614</sup>

As I intimated in chapter four, though, the post-1994 state substantially underestimated how hard finding the *‘money...later on’* would be.

Two different pressures combined to exacerbate the challenge of navigating the equity/development tightrope. The first pressure was that there were only so many places available at universities:

*‘In...a situation in which there are an estimated 2.8 million (or over 40% [of]) 20-24 year olds who are not in employment, education or training, relative to just under a million places in higher education and roughly 400 000 in colleges, the pressures on [NSFAS] are daunting; despite rapid increases in the allocation of funding to the scheme, demand far outstrips supply’.*<sup>615</sup>

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<sup>613</sup> EWP 3 (fn 13) paragraph 4.4

<sup>614</sup> Interviewee 58.

<sup>615</sup> Webbstock (fn 369) 28 – 29.

The second pressure is that the demand for financial assistance *'far outstrips supply'*. One way this manifested was through fewer NSFAS awards being made to an expanding student cohort:

*'In 2011, NSFAS made 221 653 awards to students in universities, compared with a total undergraduate enrolment of 703 747...in 2013...NSFAS made 194 923 awards, with a total enrolment of 800 955. NSFAS awards were thus made to 31% of all undergraduate university students in 2011 and 24% in 2013'.<sup>616</sup>*

One dire consequence was rising student discontent about limited access. Finding insufficient money *'later on'* also generated very difficult rationing decisions for university managers:

*'what resources were available tended to be spread, rather than concentrated...it's a very difficult call on any university leadership. Do you take your resources and give a little to many students? Because you've got the pressures of access. Or do you give bigger amounts, which would really sustain students better, to far fewer students? So it's that very difficult call. In a period where resources were very limited'.<sup>617</sup>*

This already *'difficult call'* was exacerbated by repeated tinkering with South Africa's macroeconomic policy; and with how financial aid would be distributed.

## **2.2. University managers and means-testing**

For university managers, tuition fee decisions tended to focus on balancing the university's budget given a university's two other main income streams (the government subsidy and third stream income). Students, however, faced a combination

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<sup>616</sup> Simkins (fn 393) 328.

<sup>617</sup> Interviewee 25 (Cape Town, 9 May 2018).

of increasing tuition fee decisions, decreasing availability of sufficient financial aid, and increasing personal indebtedness. The national government, meanwhile, had to balance universities' and students' demands for more funding against all the other demands placed on its languishing resources. Cumulatively, these factors undermined the already fragile calibrations which regulated tuition fee decisions during the perpetual disequilibrium.

Uncertainties around the ultimate collectability of fees increased; as did the likelihood of student protests centred on financial exclusions. At the same time, the pressure to expand access to university education and financial aid for students contributed to the national government providing decreasing funds per student under the block grant. University managers were caught in the centre of this: they were central to making tuition fee decisions; they were expected to run their institutions with long-run sustainability in mind; and until around 2013, they played an elevated role in how financial aid was distributed to students.

The NSFAS' funds were originally distributed by the national government to universities, rather than directly from the national government to students. The distribution of the NSFAS' funds was thus initially influenced by both national policy and institution-specific decisions. Nationally, a means test was used to determine NSFAS-eligibility. The financial aid provided by the NSFAS, from around 2010, covered the average (not full) cost of study.<sup>618</sup>

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<sup>618</sup> Interviewee 40 (Pretoria, 30 May 2018).

One reason for covering only average cost of study was that

*'The [full cost of study (FCS)] is determined by each institution and ranges from almost R55 000 at [UCT] to just under R26 000 at Walter Sisulu University...if all institutions were to receive the average FCS per student, which was R43 358 in 2009, the vast majority of institutions would benefit...Only five universities charge more than the average'.<sup>619</sup>*

The five 'above average cost' universities were HA/WIs. An interviewee at a HA/WI pointed out that focusing on average cost of study

*'is in some ways a fairer system. It's a fair system if the universities are going to be able to find the money...in some situations, that led to students not being able to go to those universities [that were above the average cost] because the universities didn't have the money...that's unfair because it means poor students go to the cheaper universities, and don't get to the wealthiest or to the most expensive universities because financial aid doesn't cover it; nor does anyone else'.<sup>620</sup>*

Again, social activism focused on expanding access subjugated responsible budgeting; with questions of affordability becoming issues of 'be[ing] able to find the money', 'later on'.<sup>621</sup>

What money was found, was often loaned to students. The NSFAS was originally a loan scheme, albeit with a partial conversion into a bursary if certain academic success criteria were met. In fact, NSFAS recipients could incur debts to two different debtors during their studies:

*'Because the funding at NSFAS [was] done at average cost of study, and not at full cost of study...[those] study[ing] at [for example, one of the five universities charging more than the average cost of study would] have a debt. Because*

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<sup>619</sup> Review of the NSFAS (fn 24) paragraph 2.2.3 of the executive summary.

<sup>620</sup> Interviewee 57.

<sup>621</sup> Ibid; cf. interviewee 58.

*funding only covers your tuition fee, or your accommodation fee. But it will not cover allowances, it will not cover books, etc...you will...have a debt at the university...and the debt at NSFAS*.<sup>622</sup>

This adds a further layer of pressures to the already fragile calibrations regulating tuition fee decisions. Because a portion of the financial aid provided to students to expand access took this form, it meant that those who benefitted from it accrued debt. This rising debt could feed into a sense of financial exclusion; particularly when a student was no longer able to pay it. In addition, this reinforces how actors and issues were being organised into and out of the regulatory space of tuition fee decisions. The interactions between financial aid and tuition fee decisions increasingly incorporated broader issues around how university education was financed. Similarly, the move to covering average rather than full cost of study underlined another debate which had not been settled: what the cost of university education was, and what should be included in financial aid that sought to expand access to it.

The evolution of financial aid policy indicates how policy changes could run out of kilter with South Africa's post-1994 changing socio-economic conditions; and how actors and issues were being organised into and out of the regulatory space of tuition fee decisions. How NSFAS initially allocated funding to universities provides an example of this:

*'NSFAS...developed an allocations formula to determine how its funds are distributed to universities. The objective is to ensure funds are allocated to institutions in proportion to the likely relative population of students in need of financial aid, and to the extent of that need...so-called "needy students" were*

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<sup>622</sup> Interviewee 40.

*defined in terms of race, which was assumed to provide a reasonable proxy measure of relative economic need. It was also a form of redress, ensuring that [HD/BIs], which served predominantly historically disadvantaged communities with higher levels of need, would receive a greater proportion of NSFAS funds.*

*The direct correlation between race and poverty has become less straightforward over time. While recognising that race remains the central determinant in South Africans' access to material resources and to opportunity...both the access and skills-pool imperatives in education policy and in the NSFAS Act would be better served by prioritising class-based socio-economic criteria over those of race to determine levels of need'.<sup>623</sup>*

The ultimate allocation to universities had from the establishment of the NSFAS in 1999 until around 2010 been

*'based on the number of disadvantaged students [at a university] and the FCS at [that] institution'.<sup>624</sup>*

The proposed shifts were to average cost of study, and to an assessment of need based more on '*class-based socio-economic criteria*' than on race. This placed an eligibility criterion on financial aid – '*eligibility in terms of financial need*'.<sup>625</sup> The other significant eligibility criterion was that

*'the student [has and retains] an academic place at a public [higher education institution] (as determined by the [institution]'.<sup>626</sup>*

The policy envisaged institutions'

*'us[ing] the NSFAS means test to determine eligibility in terms of financial need, the ceiling amount of the loan and the recommended award as per NSFAS guidelines'.<sup>627</sup>*

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<sup>623</sup> Review of the NSFAS (fn 24) paragraph 3.1.

<sup>624</sup> Ibid paragraph 3.1.2.

<sup>625</sup> Ibid paragraph 3.2.

<sup>626</sup> Ibid.

<sup>627</sup> Ibid.

The means testing was specific, and contentious. In addition to students' receiving financial aid as a loan, they might be required to make an expected family contribution ('EFC'):

*'depending on your income, you might have to pay anything between R0 and R30 000'.<sup>628</sup>*

#### Means testing

*'determine[d] the [EFC], based on...parameters[:] family size...where you come from, subsistence allowance...Then it determines the size of the award....your cost less EFC...is supposed to be your award size. And they set an annual max on that'.<sup>629</sup>*

In effect, the EFC decreased how much a student received from the NSFAS.

There were several issues with this means testing:

*'it was just crazy...what they did in terms of the means test...it will be...combined family income. But it was not the parents' income only. They wanted the income of every single person who lived in that house...We've done away with all of that nonsense'.<sup>630</sup>*

Two further problems with means-testing were that it

*'is incredibly inaccurate....One reason is that, in South Africa, where you've got a history of the migrant labour system; so, another legacy of Apartheid. It's certainly not the case – it's not the case anywhere, but least of all in South Africa – that families live as mum and dad and two children...Families are very complicated here';* and that

*'a lot of student protestors were saying...that they found [means testing] humiliating...[having to] prove how poor they were. They really didn't like*

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<sup>628</sup> Interviewee 57.

<sup>629</sup> Interviewee 28.

<sup>630</sup> Interviewee 40.

*this...'*.<sup>631</sup>

Despite these deficiencies, a cut-off point for eligibility was needed. In practice, this cut-off crystallised into a numeric threshold:

*'current NSFAS funding is limited to students whose family income is less than R122 000 per annum, which represents the upper limit of the lowest band of the South African Revenue Service's...tax tables. This limit is not a NSFAS policy guideline but appears to be used by most institutions as a cut-off point for eligibility, given the limited funds available relative to demand'*.<sup>632</sup>

The R122 000 cut-off provides an indication of how national policy intersected with university-specific decision-making.

Prior to 2013, each university was given

*'an allocation...to manage...institutions would do the assessment of eligibility...institutions would see how far they could spend that money to assist people. So...actually, eligibility differed by institution. Because it depended how many people you allocated money to. It depended how much you allocated'*.<sup>633</sup>

Because of this institution-specific dynamic, one interviewee referred to the R122 000 cut-off as a 'myth':

*'It's a means test. Money did not follow the student...in the past...they put you through the means test...Then they will rank all of these students...But there's an allocation [per university]. So [each university] will allocate until there [was] no...money left...So that means test means absolutely sweet bugger all...you could've had a combined income of R300,000.00. But because there's this ranking; and because there's enough money for you...you will get [NSFAS] funding'*.<sup>634</sup>

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<sup>631</sup> Interviewee 16.

<sup>632</sup> Review of the NSFAS (fn 24) paragraph 3.2.

<sup>633</sup> Interviewee 28.

<sup>634</sup> Interviewee 40.

Which students received what financial aid therefore emerged from the interaction between funding provided by the national government, national policy and guidelines, and decisions taken by university managers at specific institutions.

Increasing university fees might have been necessary to ensure long-term financial viability in the context of declining subsidies. However, these increases would place further pressure on how financial aid was distributed. One interviewee described the two main strategies adopted by institutions to manage the ensuing allocation problem:

*‘when...universities put their own fees up, when the whole system went up more than inflation...what happened was that NSFAS just couldn’t cover as much. Different universities handled that differently. Some spread the NSFAS money over all eligible students, and were then paying less than the full cost of study...it often ended up in the so-called financial exclusions...the student could start and the financial aid would pay their registration fee and their first semester fee. But then they would end the year never having been able to find the remaining [funds]. So they would not be able to clear their fee debt, and then they wouldn’t be able to register the following year...Other universities...would give students the full amount they needed, but [to] fewer students. So it rationed access’.*<sup>635</sup>

Insufficient funding was therefore one major constraint on how far access could be expanded. This lack of funding created an intersecting set of problems, prior to 2015:

*‘It [was] well known...that the [higher education] sector’s underfunded. It’s well known...that student fees have increased, at above inflation level, in order to make up the shortfall. It’s well known that students are struggling with NSFAS. And that NSFAS is oversubscribed’.*<sup>636</sup>

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<sup>635</sup> Interviewee 57.

<sup>636</sup> Interviewee 39.

By 2009,

*‘the main impediment to NSFAS achieving its objectives is chronic underfunding...Although NSFAS has received a steadily increasing budgetary allocation, its resources lag significantly behind need. This is compounded by the steady proportional decline in the allocation to higher education over the 15 years of South Africa’s democracy’.*<sup>637</sup>

Alarming, forecasts in 2009 suggested that the NSFAS funding would need to increase by between 1.5 and more than four times:

*‘Preliminary costings show that...the most conservative scenario – at the current participation rate of 17 percent and fully subsidising 14 percent of the student population – would require R5,2 billion in 2010, compared to current state funding of NSFAS [of] approximately R2,2 billion...if we assume that at least 25 percent of the student population is from poor or working class backgrounds, which is a more realistic scenario, then the cost goes up to R9,2 billion in 2010’.*<sup>638</sup>

These financial constraints were exacerbated by legal and governance problems within the NSFAS. These included high organisational turnover, and a very poor recovery rate for the loans the NSFAS made to students. For instance:

*‘NSFAS operates with inadequate organisational and systemic checks and balances...The organisation has had three CEOs and two acting CEOs during its 10-year existence’;*<sup>639</sup> and

*‘the processing of NSFAS loan agreements does not meet good governance or audit requirements...Several NSFAS debt recovery practices are non-compliant with the [National Credit Act 2005]’.*<sup>640</sup>

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<sup>637</sup> Review of the NSFAS (fn 24) paragraph 2.2.1 of the executive summary.

<sup>638</sup> Ibid paragraph 3.1.3 of the executive summary.

<sup>639</sup> Ibid paragraph 2.2.9 of the executive summary.

<sup>640</sup> Ibid paragraphs 2.2.10a, 2.2.10c, and 2.2.11 of the executive summary.

Of particular concern was the ‘*revolving door*’ to which poor students were being subjected:

*‘poor students [were] being enabled to enter the higher education system, but [were] unable to complete their studies, so being “revolved” back into poverty’.*<sup>641</sup>

2009 data painted a damning picture:

*‘Of the [441 430] NSFAS students who are no longer studying, 28 percent have...graduated and 72 percent have dropped out or otherwise not completed their studies’.*<sup>642</sup>

Alongside the increase in student debts,

*‘as a consequence of underfunding and simultaneous efforts by institutions to increase access by black students, institutional debt has ballooned to R2,7 billion in 2009’.*<sup>643</sup>

The debts of some universities were therefore increasing in conjunction with the more general increase in student indebtedness; both of which were partially driven by the underfunding of higher education generally, and of student financial aid in particular. One response to these difficulties was to change how the distribution of NSFAS funds was managed.

### **2.3. Towards student-centred financial aid**

Instead of NSFAS grants being distributed to universities,

*‘NSFAS introduced a new student-centred model in October 2013, followed by the piloting of the first phase of the student centred model in January 2014 at 6*

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<sup>641</sup> Ibid paragraph 2.2.2 of the executive summary.

<sup>642</sup> Ibid.

<sup>643</sup> Ibid paragraph 2.2.4 of the executive summary.

*universities and 5 TVET colleges, constituting 15% of student loans and bursaries being processed under the new student-centred model. Students in the new system, apply directly to NSFAS...allocations to students are managed by NSFAS and students know...their funding status before registration’.*<sup>644</sup>

This was a marked departure from the allocation of funds to universities, whose financial aid offices then determined how to distribute those funds.

There were several reasons for this shift, including some of the disgruntlement I touched on in section 2.2 of this chapter. In essence:

*‘In 2009...then Minister Blade Nzimande...appointed [the Review of the NSFAS]...One of the recommendations was that NSFAS should move to a central application service...Because students were complaining about the inefficiencies at the universities’ financial aid offices. And...all these rumours...that there was fraud; not the right students are funded...And there was no way to control...or manage that...up ‘til today, there’s actually no way to control that...Between 2009 and 2013 August...NSFAS...started planning this new student-centred model. I call it student-centred...because money must follow the student’.*<sup>645</sup>

However, there were several issues with the new model. One was that most universities were better placed to administer financial aid to students. This was in part because universities retain a more proximate relationship with students. Relatedly, the new system had implications for how universities’ financial aid offices (and officers) would work:

*‘this approach looks...attractive...you want [NSFAS] to have a relationship with students...the complication is...students...are housed at universities. And the integration of that, in terms of systems, will create problems...Because institutions use different systems to what NSFAS has...People were feeling*

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<sup>644</sup> Ministerial Statement on University Funding: 2016/17 and 2017/18 (November 2015) 22.

<sup>645</sup> Interviewee 40.

*threatened...now, NSFAS is taking over the job: what am I doing here? And others were even organising protests indirectly...The students, when they come [to the financial aid office, they] say...they have a problem. Because money is always a problem. The [financial aid officers] say: well, go ask NSFAS. And the students mobilise, and strike’.*<sup>646</sup>

The inadequacy of consultation was raised by another interviewee as a reason for difficulties in implementing the shift to the student-centred approach. Furthermore, there was significant political pressure from students to expand the system, even though the initial roll-out of the pilot had encountered various difficulties:

*‘Since the pilot in 2013, 2014...there was a lot of system problems...in terms of implementation...it was a very volatile...period. So it was at the [Higher Education Transformation Summit in October 2015] when the students make a call. Again, please expand. And the decision then, at the NSFAS board meeting after the Summit...was based on the call: should we not expand to all universities?...I think...it wasn’t thought through, By all, by everyone...there was a lot of political pressures. Pressure from students...And then they expanded the...system to everyone...And it was just terrible. It was a terrible implementation’.*<sup>647</sup>

Another interviewee put it even more starkly:

*‘Whenever a university says it’s student-centred, you must know they’re talking bullshit...that’s just ideology. They very seldom actually implement it...A typical problem in South Africa is you have a few weak institutions. And instead of sorting out the weak institutions, they try and change the system...in more than 80% of the...institutions, the capacity in the universities to manage the students is infinitely better than [that of] NSFAS’.*<sup>648</sup>

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<sup>646</sup> Interviewee 21 (Pretoria, 2 May 2018).

<sup>647</sup> Interviewee 40.

<sup>648</sup> Interviewee 24 (Cape Town, 9 May 2018). Cf. Lange and Luescher-Mamashela (fn 125) 117.

Fully exploring the minutiae of this policy shift would be a project in its own right. I have outlined the shift here to draw attention to yet another way in which the fragile calibrations regulating tuition fee decisions was being undermined prior to the Fees Must Fall protests. The shift to a student-centred model compounded the other challenges university managers, the national government, and students were grappling with. It added a layer of governance and implementation challenges to the funding, policy, and governance challenges the NSFAS was already facing. These destabilised the regulatory space of tuition fee decisions: because of the link between tuition fees and student financial aid; and because any breakdown anywhere in the financial aid system could trigger financial exclusion protests by students.

#### 2.4. A ‘road to serfdom’?

I indicated in chapter four that a theme I would develop in my thesis was the manner in which responsible budgeting under conditions of severe resource constraints can be cannibalised by protest-driven social activism. I cited this prescient warning from 1989:

*‘As a strategy, pains should be taken to stress that things will be difficult, and that resources will be as constrained, if not more so, after apartheid has fallen’.*<sup>649</sup>

I argue here that this warning was not heeded. I have shown in sections 1.2 and 2.1 that higher education policy documents demonstrate an explicit awareness of the dangers of not remaining within the bounds of affordability. I highlight in this section how post-1994 South Africa was subjected to repeated macro-economic policy changes; and that post-2000, policy goals fell increasingly out of touch with South Africa’s macroeconomic reality.

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<sup>649</sup> Natrass (fn 242) 181.

I demonstrate this by providing a snapshot comparison of the policy targets for economic growth, with the economic growth South Africa actually achieved. This comparison highlights a broader way in which policy goals and the actual place of space may run out of kilter:

*'We have a National Development Plan [(NDP)]...people...say...the [government's budget] doesn't give effect to the [NDP]...the [NDP] says there should be a growth rate of five percent...if [the NDP] is based on five percent economic growth, and you've never got there...you should be saying: we have not achieved this level of economic growth. Hence we will not be able to implement it in this way. These are the reduced [targets]. Or we'll extend the timeframe for achieving some of those things'.<sup>650</sup>*

Instead of making these adjustments, social activism was increasingly emphasised in policy without recourse to responsible budgeting. This exacerbated the '*disequilibrium*' in higher education in South Africa.

#### **2.4.1. Policy ideal vs macroeconomic reality**

An overarching factor contributing to disequilibrium in South Africa more generally was turbulence in government policy. Although the ANC has remained the ruling party in South Africa since 1999, macroeconomic policy changed three to four times within the 18 years from 1994 to c. 2012. The first major change occurred within two years; while the third occurred five years after the third macroeconomic policy had been announced. Later policy changes also incorporated ever-receding time-frames. The third macroeconomic policy focused on the decade 2004 to 2014, split into two five-year phases. The NDP was even more long-term, covering 2012 to 2030. Most

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<sup>650</sup> Interviewee 23.

puzzling, however, is that these repeated changes did not include adjusting explicit policy goals in line with economic reality.

These macroeconomic policies were replete with the tension between social activism and responsible budgeting. The RDP was implemented from around 1994, and tilted in favour of social activism. It aimed ‘*to address and redress the inherited gross inequalities of apartheid*’.<sup>651</sup> But it faltered, owing to a lack of capacity in government to deliver its objectives and a failure to achieve the desired economic growth. The lack of growth was particularly constraining, since Apartheid bequeathed the new government a very poor fiscal and economic legacy.<sup>652</sup> To address the growth deficiency, South Africa’s macroeconomic policy shifted from the RDP in 1994, to Growth, Employment, and Redistribution (‘GEAR’) in 1996. The latter was supposed to stimulate faster economic growth which would, in turn, increase the resources available to meet social policy goals.

The RDP’s social objectives were supposed to be retained in GEAR, while macroeconomic stability would be garnered through *inter alia* reducing budget deficits, lowering inflation, and liberalising capital flows. Although GEAR was credited with achieving greater macroeconomic stability and enhancing accountability, it was criticised by some as a neoliberal project which ultimately did little to address

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<sup>651</sup> Abongile, ‘South Africa’s Key Economic Policies Changes (1994 - 2013)’ (*South African History Online*, 6 May 2014) <<https://www.sahistory.org.za/article/south-africa%E2%80%99s-key-economic-policies-changes-1994-2013>> accessed 24 June 2019.

<sup>652</sup> *Ibid.*

inequality.<sup>653</sup> To rectify the shortcomings of GEAR and to alleviate the problem of enduring poverty driven by unemployment, the Accelerated and Shared Growth Initiative for South Africa ('ASGISA') was unveiled in 2005.<sup>654</sup> ASGISA's targets for economic growth for the decade 2004 to 2014 are detailed in Figure 10, which contrasts the policy targets with the economic growth rate actually achieved.

This comparison shows the disparity that emerged between policy ideal and economic reality. Barring a brief spurt of optimistic growth figures for the period 2004 to 2007, the broad macroeconomic picture for South Africa was one of declining average annual growth. Yet economic growth had been explicitly mentioned as a constraint on what government could achieve in higher education, since it would determine what resources were available:

*'significant real increases in public expenditure on higher education are unlikely to exceed the real rate of economic growth'.<sup>655</sup>*

A significant constraint on ASGISA was the lack of official pronouncements on its future. It was replaced in 2010 with the New Growth Path, which sought to accelerate growth to decrease inequality, unemployment, and poverty. At the beginning of 2013, the NDP was launched as a roadmap for South Africa's long-term socio-economic development.<sup>656</sup> A comparison of its average annual growth target to what was actually achieved is also illustrated in Figure 10. Alongside reducing

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<sup>653</sup> Ibid.

<sup>654</sup> Ibid.

<sup>655</sup> EWP 3 (fn 13) paragraph 4.1.

<sup>656</sup> Abongile (fn 651).

unemployment and elevated economic growth, the NDP targeted an increase in enrolments at universities ‘*to about 1.62 million*’ by 2030, ‘*from 950 000 in 2010*’; and an increase in doctoral graduates ‘*from 1 420 in 2010 to well over 5 000 a year*’ by 2030.<sup>657</sup> Expanding access to higher education was therefore a key tenet of the NDP.

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<sup>657</sup> The *National Development Plan 2030: Our Future – make it work* (the National Planning Commission, August 2012) 69 – 70. 2012 GDP was to be increased 2.7 times by 2030 (ibid, 64).

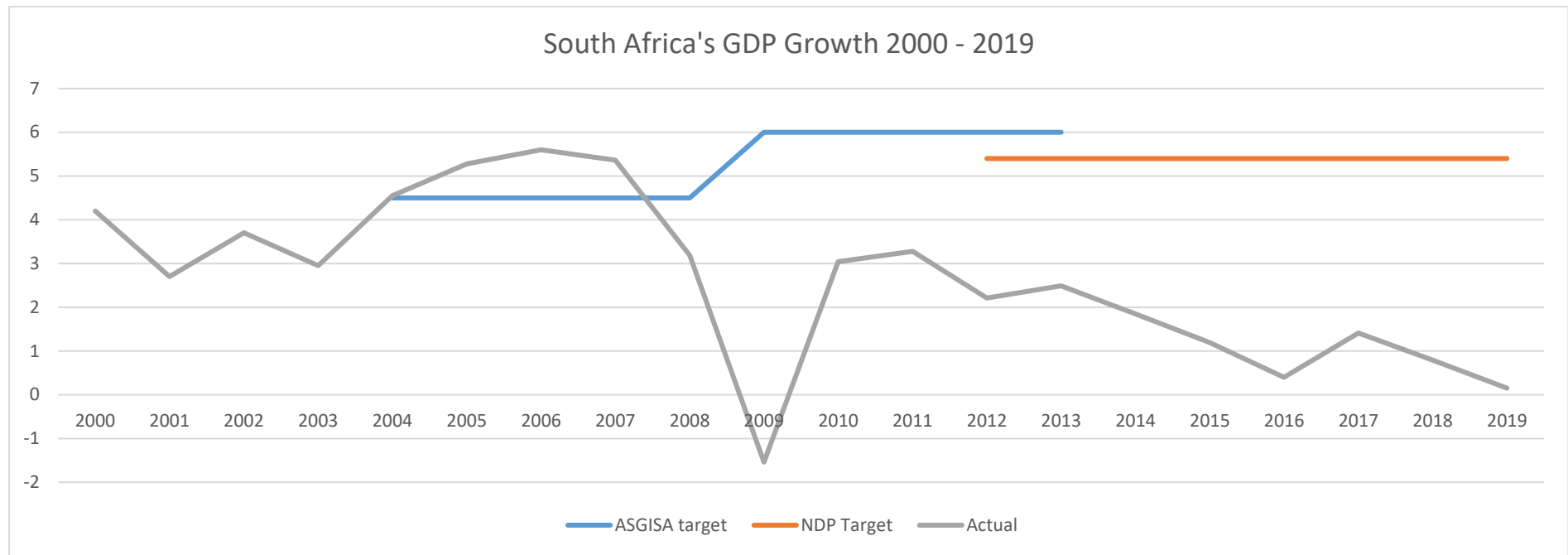


Figure 10: Comparison of South Africa's actual and targeted GDP Growth, 2000 - 2019<sup>658</sup>

<sup>658</sup> 'Accelerated and Shared Growth Initiative for South Africa (AsgiSA) - The O'Malley Archives' <<https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v02409/041v02410/051v02415/061v02416.htm>> accessed 7 November 2019. The NDP 64. 'GDP Growth (Annual %) - South Africa | Data' <<https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2018&locations=ZA&start=1993&view=chart>> accessed 3 November 2020.

The failure to revise policy goals in light of economic reality is particularly striking post-2008. Although the growth targets for ASGISA and the NDP are averages, South Africa's actual GDP growth from 2009 to 2019 remained more than two percent below these targets. While an increasing need to achieve social policy objectives was acknowledged, it was not married with an improved or improving economic outlook. Furthermore, attempts in higher education policy to splice social activism and responsible budgeting had been expressly premised on more funding being made available: to higher education specifically, and to student financial aid in particular. South Africa's dismal economic outlook potentially negated that possibility.

In chapter four, I discussed an interviewee's historic example of a stark stalemate emerging from this disconnect between the demands of social activism and the limits of responsible budgeting. Although access to universities could be maintained, including through struggle and protest, what ensued could be

*'a kind of stalemate. Because the university was open, people had access. But there were no resources. So the universities radically declined'.<sup>659</sup>*

A counterpoint is that protests – especially by students – could lead to government making more resources available to higher education. I have emphasised, though, that the resource of wealth in the regulatory space of tuition fee decisions was a resource which flowed into and out from cognate spaces (basic education, housing, water, etc.). Protests for better funding of higher education therefore ran the risk of resources being allocated away from *'other pressing social needs'*.

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<sup>659</sup> Interviewee 6 (Johannesburg, 29 March 2018).

### 2.4.2. Splitting responsibility for education

Several years after the conclusion of the university merger process I outlined in chapter four, the Department of Education was itself re-organised. In 2009, it was split into the Department of Basic Education ('DBE'), and the Department of Higher Education and Training ('DHET'). Three notable changes flowed from this, all of which impacted on the configuration of organised interests in higher education. First, Dr Blade Nzimande was appointed as Minister of Higher Education and Training ('MHET') in 2009; replacing Naledi Pandor, who had headed the former Department of Education. Dr Nzimande remained as MHET until October 2017.<sup>660</sup>

Second, the newly formed DHET was given a broad policy remit: all post-school education and training. Universities fell within this scope, and were DHET's largest line item in South Africa's national budget.<sup>661</sup> But there were four other significant line items and responsibilities: technical and vocational education and training; skills development (as well as the skills fund); community education and training; and Sector Education and Training Authorities. Thus while universities would be an important focus for the DHET, they were not its only area of concern.

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<sup>660</sup> See 'Education Stakeholders Welcome Department Split' (*SAnews*, 11 March 2013) <<https://www.sanews.gov.za/south-africa/education-stakeholders-welcome-department-split>> accessed 4 July 2019. And Associated Magazines 21 St Johns Street Cape Town 8001, 'Hlengiwe Mkhize' (*People's Assembly*) <<http://www.pa.org.za/person/hlengiwe-buhle-mkhize/>> accessed 11 November 2019.

<sup>661</sup> See e.g. *South Africa's Estimates of National Expenditure* (2018) 281.

Third, this departmental re-allocation of functions and responsibilities contributed to zero-sum games regarding resources and capacity. Adult basic education was enshrined in South Africa's constitution as an unqualified, universal right.<sup>662</sup> Yet one interviewee stated that adult education and community education and training had been largely neglected by DHET:

*'...the 'and Training' part means that [DHET] is responsible for all adult education...that's adult education from read and write upwards...it's not happening...nothing's happening. On paper, we've got a curriculum called...the National Senior Certificate for Adults. The curriculum was approved and gazetted I think four, maybe five years ago. It's not being offered yet...by the state; the state has [also] not agreed to allow private institutions to use this curriculum...On paper, we've got community colleges. We don't have them.'*<sup>663</sup>

One reason for this neglect could be the breadth of the DHET's remit. In addition to functions outside of universities, it incorporated aspects which had previously fallen under the Department of Labour: specifically, skills development. On its own, skills development was broad. It covered enhancing the skills of those entering the labour market; in settings ranging from universities to colleges to provincial and community fora. It sought to prepare a range of actors, from learners to *'the unemployed, to move from learning space[s] into the working environment'*; and therefore had to address a spectrum of needs. Moving these functions from the Department of Labour to DHET led to *'fundamental changes'* in how providing for those needs was approached.<sup>664</sup> These shifts impacted on universities, and on the sectors concerned.

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<sup>662</sup> Section 29(1)(a).

<sup>663</sup> Interviewee 17.

<sup>664</sup> Interviewee 42 (Pretoria, 1 June 2018).

## Conclusion

The calibrations regulating tuition fee decisions were becoming more fragile in the build up to the 2015 to 2017 Fees Must Fall protests. The national government's policies and universities' decisions concerning student financial aid were increasingly being linked to tuition fee decisions. Those policies and decisions also highlighted the importance of how the resource of wealth was flowing into and out from cognate spaces. The fragility of these calibrations and linkages was compounded by South Africa's deteriorating macroeconomic predicament and its tumultuous policy environment.

One outcome was increasing uncertainty in the regulatory space of tuition fee decisions. This uncertainty affected both how regulatory and policy processes unfolded, and what policy and regulations were implemented. The interregnum of the 2015 to 2017 Fees Must Fall protests instilled a more pervasive uncertainty in this regulatory space. As one interviewee stated:

*'2015 was only the beginning of developments that are very much ongoing. I think you will face a challenging task if you look only at 2015 to see what impact that had on [the] regulation of university fees. I don't think we know yet... Things are very much still in flux...'*<sup>665</sup>

In the next two chapters, I explore how the distribution of the resources of authority, organisational capacity, and wealth shifted during the interregnum in the regulatory space – including as a result of this increasingly pervasive uncertainty.

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<sup>665</sup> Interviewee 47 (by email, March and April 2017).

## CHAPTER 8

### Reorganising who decides

*‘There is no certainty...that the next orthodoxy to emerge will be any better than the last.’<sup>666</sup>*

Having outlined the perpetual disequilibrium which reigned between 1994 and 2015, I turn now to the disruptions unleashed by the 2015 to 2017 Fees Must Fall protests and their settlements. These disruptions shifted the regulatory space of tuition fee decisions at public universities in South Africa into an interregnum: a period of acute uncertainty about who makes tuition fee decisions, and how. I argue that during the interregnum, the fragile calibrations which had operated during the perpetual disequilibrium frayed further.

In this chapter, I focus on how the fora in which tuition fee decisions were made were reorganised during the interregnum. I argue that the protests and attempted settlements fundamentally disrupted how tuition fees were decided. New relationships between large organisational actors emerged, and new actors came to occupy dominant positions in this regulatory space. Alongside the shift in key decisional fora, a new dispersal of resources emerged. In this chapter, I focus on the resources of authority and organisational capacity.

As the Fees Must Fall protests unfolded, protestors’ demands shifted: from fees decreasing, to various forms of free higher education. Accompanying these shifting

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<sup>666</sup> George Orwell, ‘Inside the Wale’, in *George Orwell: Essays* (Penguin Books, 1994), 123 – 124.

demands, the boundaries of this and other regulatory spaces were altered. Actors and issues were organised into and out of this and cognate spaces. I argue that these disruptions culminated in key relationships in the regulatory space of tuition fee decisions becoming more contested and fractious. This change in how the main actors interacted further undermined the already fragile calibrations which had been regulating tuition fee decisions.

I build my argument over three sections. First, I analyse the new actors and fora which influenced how tuition fee decisions were being made during the interregnum. New interventions in how tuition fee decisions were made ranged from the external and explicit overruling of prior fee decisions (e.g. president Zuma's announcement in October 2015); to more subtle, internal shifts (such as contestation over SRCs' role in tuition fee decisions). Analysing these interventions reveals how both previous and more recent *dramatis personae* were gaining (or losing) prominence. It also provides an indication of how authority and organisational capacity were being dispersed and deployed, and of how this dispersal and deployment affected fee decisions.

Second, I show that new timelines exercised increasing sway over how tuition fee decisions were made. Heightened party politicisation contributed to fee decisions becoming caught up in South Africa's broader political contestations. As one interviewee commented about a key announcement:

*‘when it’s used so overtly as a political football, by Zuma on his way out [in December 2017], you understand...that this has got bugger all to do with students. This is just ANC politics’.*<sup>667</sup>

I explore the growing relevance of government and political party election cycles to tuition fee decisions. Concurrently, spiralling factionalisation within key groups of actors spoke to an increasingly furious play of power at the centre of this regulatory space.<sup>668</sup>

Third, I discuss how the disruptions and the attempts to settle them cascaded through the regulatory space of tuition fee decisions and the cognate spaces with which it overlaps. I use a new paradigm –victims versus agents – to unpack the shifting boundaries of the regulatory space of tuition fee decisions. I analyse the growing administrative complexity which emerged, especially for university managers and administrators. Lastly, I show that the national government’s policies were redirected – a topic I develop further in chapter nine.

## **1. Fragmenting authority**

Under the perpetual disequilibrium, university councils made tuition fee decisions subject to a series of fraying calibrations. These calibrations brought together students, university managers, and the national government. The 2015 to 2017 Fees Must Fall protests and their attempted settlements substantially disrupted this. Student voices were, at times, substantially more powerful. Those voices were also subject to more

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<sup>667</sup> Interviewee 2 (Johannesburg, 13 March 2018).

<sup>668</sup> Hancher and Moran (fn 3) 277.

overt contestation over who could speak on whose behalf. University managers were more prominent and active, while they and their councils were also subjected to more pronounced constraints.

I analyse these disruptions by exploring how authority beyond formal state laws was contested within universities, and councils, during the interregnum. I then turn to the proliferation of external fora which exercised a growing influence over tuition fee decisions. Throughout, I am interested in the interplay between an expanding cast of *dramatis personae*, and the resources of authority and organisational capacity. I am also interested in the ways in which the shifting dispersal of these resources altered how the interactions between the evolving cast of *dramatis personae* were calibrated.

### **1.1. Within universities – more forceful student voices**

One example of increased power for student voices is how certain fee decisions were overturned during the Fees Must Fall protests. A few examples of enhanced student power can be gleaned from events which took place at Wits during October 2015, and from subsequent events during the Fees Must Fall protests.

Around 2 October 2015, the Wits SRC was outvoted at a council meeting on the proposed fee increase for 2016.<sup>669</sup> By 16 October 2015, protests at Wits had escalated to the extent that a meeting of Wits' councils' executive committee ('Exco')

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<sup>669</sup> Booyesen, with Kuda (fn 20) 320.

was taking place. Importantly, this was ‘*the first time an Exco meeting [took] place in front of students*’.<sup>670</sup> Student protests had therefore contributed to a meeting of the Exco being called, about fee decisions (inter alia), after council had voted on a fee decision.

Furthermore, this meeting occurred both in front of students; and in front of more students than would ordinarily attend a council meeting (viz. representatives from the SRC). This shift suggests that the protests at Wits had shifted how accountability for tuition fee decisions operated. The pressure for this kind of meeting stemmed partly from broader demands for ‘*accountable transparency*’. Such transparency could be counterposed with ‘*processes and people sit[ting] and discuss[ing] things behind closed doors*’.<sup>671</sup> Part of the anger which contributed to the outbreak of the Fees Must Fall protests was the view that key decisions (such as tuition fee decisions) were taken with limited accountability (‘*behind closed doors*’).

Accompanying the demand for accountable transparency was an insistence that senior university managers cease presiding over or above students; and rather ‘*come down to the people and be accountable*’.<sup>672</sup> This demand was symbolically enacted through requiring university managers to ‘*sit down [so as to] change these power relations [and] talk to [students] as equals*’.<sup>673</sup>

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<sup>670</sup> Ibid 321.

<sup>671</sup> Interviewee 48 (Johannesburg, 20 March 2017).

<sup>672</sup> Ibid.

<sup>673</sup> Interviewee 9 (Johannesburg, 5 April 2018).

Some figures – e.g. Adam Habib, Wits’ vice chancellor – complied with this demand. Other university managers and council members were less compliant:

*‘I was met in the parking lot by students...they tried all the things. Like you must sit on the floor...I wasn’t going to allow that. So they arranged a table’.*<sup>674</sup>

This demand was also made to senior political figures. When students marched on the ANC’s Johannesburg headquarters, Luthuli House, on 22 October 2015, some students attempted

*‘to get Gwede [Mantashe, then Secretary-General of the ANC] to sit down on the pavement, as they[‘d] done with many [vice chancellors]’.*<sup>675</sup>

The demand to sit down was a challenge to authority. The authority being challenged could be authority over tuition fee decisions, as in the case of demanding that vice chancellors and Exco members sit down in front of students. It could extend to the overarching governance structures of the university. For instance, a ‘*General Assembly of*’ Wits was scheduled to take place on 7 October 2016, during a particularly fraught period. This was an exceptional governance event:

*‘the last one...had [taken place] when Dave Webster was murdered [under Apartheid. In October 2016, one student organisation was] planning to take [Wits’ Chancellor] out of his seat [at the General Assembly] and put [their leader] in his seat. And say: we are now in control of the university’.*<sup>676</sup>

Who made the demand to sit down, and how the authority figure responded to

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<sup>674</sup> Interviewee 10 (Pretoria, 10 April 2018).

<sup>675</sup> Interviewee 48.

<sup>676</sup> Interviewee 2 (Johannesburg, 13 March 2018).

it, shed light on how the play of power at the centre of this regulatory space was unfolding during the interregnum:

*‘in anticipation of the [march on Luthuli House] a stage...had been set up by the ANC...As students demanded that Mantashe leave the stage and address them on ground, Mantashe stood firm...not because he was afraid of the protestors; it was a flexing of political strength’.*<sup>677</sup>

Concomitant with this ‘flexing’ was increasingly virulent conflict over who could speak on whose behalf. I briefly outline two layers to this. First, SRCs’ authority to represent students was contested. Second, broader questions of what constituted legitimate democratic engagement with students were raised.

The contestation of SRCs’ authority to represent students occurred against the backdrop of what could be fiercely contested and fractured student politics, even during the state of perpetual disequilibrium:

*‘One thing that you always have to read in student politics... you have to watch the balance of power within student groups on campus. In every campus’.*<sup>678</sup>

Aspects of how the balance of power was contested could be complex. For example, student organisations subscribing to a similar mission might nonetheless contest elections against each other, rather than standing together:

*‘I...ended up at Wits last year, and got to attend some of those meetings. It was the first time in my life we had a meeting of the ANC[Youth League (‘ANCYL’), SASCO...and [Young Communists’ League (‘YCL’)]...at UCT, the ANCYL wouldn’t run [for SRC] but they would support [SASCO]...Wits [had] that system that encourages you to sign for all organisations [SASCO, ANCYL, YCL]. When they run for SRC, they run as [the Progressive Youth Alliance].*

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<sup>677</sup> Chikane (fn 2) 182 – 183.

<sup>678</sup> Interviewee 9.

*On the complete other end of the spectrum, you get the [University of Fort Hare]. Where ANCYL and SASCO challenge each other for the SRC, because they just can't talk to each other'.<sup>679</sup>*

The emergence of movements such as Rhodes Must Fall ('RMF') at UCT in early 2015 added new dynamics to this contestation. RMF captured this sense of intra-organisational split and disconnection:

*'RMF [was basically] three different groups...[each] doing three very different initiatives to highlight [the statue of Cecil John Rhodes at UCT. One of these groups] included some members of [another group,] Aluta; who weren't part of [Aluta in] the SRC because they didn't agree with Aluta in the SRC'.<sup>680</sup>*

Within this organisational mix, there were several levels of contestation over who could speak for whom. One important moment early on in RMF was the raising of a question which spoke to a fundamental challenge to authority raised by RMF:

*' "Who are you [as a white person] to talk about the lived experience of black bodies on campus?" ...Rejecting the white student's authority or right to talk about the black experience provided a new avenue for challenging [the standard operating procedures] of the university'.<sup>681</sup>*

RMF and other organisations also began challenging and 'delegitimising' SRCs:

*'Everyone comes out and says: we are practising horizontal leadership...It's really a rhetorical device...a way of creating an alternative leadership system*

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<sup>679</sup> Interviewee 60 (Oxford, 3 May 2017).

<sup>680</sup> Ibid.

<sup>681</sup> Chikane (fn 2), pp 58 and 103.

*to the SRC. And a horizontal leadership system seems a lot more inclusive than the old, traditional, hierarchical...doesn't represent you [model]'.<sup>682</sup>*

One dilemma this delegitimisation raised was that SRCs were the organisations with which university managers were legally required to engage; these newer organisations were not.

At UCT, for instance, this created a series of problems that spilt over into Fees

Must Fall:

*'The SRC that was elected in September 2015...lacked legitimacy...there wasn't the support of significant political groups [such as] the RMF group; and other, more militant groups...Whenever [the SRC] had meetings, the meetings were invaded and disrupted by these other groups. This was not about fees yet...it was the RMF group...throughout October and...November, we actually didn't have an SRC...We didn't really have negotiating partners...We had people who had been elected, but they hadn't been able to form the SRC. They only were able to do that in early December [2015]'.<sup>683</sup>*

This lack of negotiating partners could be exacerbated by organisations such as RMF practising horizontal leadership through, for instance, never having the same group of individuals negotiating with university managers. Instead,

*'anyone could...have a meeting with the VC. Anyone could be seen as a leader at any one point'.<sup>684</sup>*

University managers could find themselves in a bind here. Students were raising various issues, including through disruptive protests. By October 2015, these issues included student dissatisfaction with tuition fee decisions. In responding, university

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<sup>682</sup> Interview 60.

<sup>683</sup> Interviewee 57 (Cape Town, 13 April 2017).

<sup>684</sup> Interviewee 60.

managers had to make difficult choices about with whom to negotiate – assuming negotiating partners could be found.

The national government faced a similar bind. Where SRCs were the legally mandated organisations at campus level, the South African Union of Students ('SAUS') acted as '*the elected representative of all students in the country*';<sup>685</sup> '*theoretically...the SAUS is supposed to represent all SRCs*'.<sup>686</sup> This representation extended to SAUS being entitled to nominate three of the 13 members of the board of the NSFAS.<sup>687</sup> Organisations such as RMF existed outside SAUS. But as their power and prominence grew, it became increasingly difficult to exclude them from negotiations and engagements even though they lacked the same legal status as SRCs and the SAUS.

Alongside this contestation over who could speak for whom, and who controlled which large organisational actors, was a broader debate about what constituted legitimate democratic engagement. This debate linked to who should be consulted regarding specific matters (e.g. recommending classes) and in what way. One way of analysing some of the rhetoric of movements such as RMF is that they were positioning themselves as more participatory and democratic than existing decision-making structures.

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<sup>685</sup> Interview 30 (Johannesburg, 14 May 2018).

<sup>686</sup> Interviewee 37 (Pretoria, 23 May 2018).

<sup>687</sup> Section 5(1)(a)(iv) of the National Student Financial Aid Scheme Act 1999.

Yet to some extent, this rhetoric was arguably more proxy- than broad-based. This links back to the question of who can speak on whose behalf:

*‘who were these students who seemed to believe they could speak on behalf of all students? Why should the frustration of the few affect the many? I think the answer doesn’t reside in trying to find a democratic aspect of the [early RMF] protests because [RMF] was far from democratic. Rather...it is better to understand why the protestors were motivated by the belief that they were acting as the proxy voice for all black students on campus’.*<sup>688</sup>

This highlights how the contestation over authority extended to the processes through which key decisions (especially around institutional culture, and later on tuition fee increases) were taken. Debating what was democratically acceptable challenged not only how a decision had been taken, but also which conception of democracy provided the standard for assessing the legitimacy of the decision process. It had implications for the contestation between student movements, and for how university managers attempted to settle the ensuing disruptions.

The contestation between student movements meant that university managers were confronted with a broadening array of students demanding to be directly consulted. How university managers responded could exacerbate the furious play of power at the centre of this regulatory space. One university manager described how ‘the code’, or previous standard operating procedures, fundamentally changed in the interregnum:

*‘[student organisations outside those represented on the SRC] have a constituency [on campus]. And can...shut down the university...To...say: no,...we’re only going*

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<sup>688</sup> Chikane (fn 2) 105.

*to speak to the SRC. Is politically probably not...wise...Now, I as [a university manager] should probably be saying (and maybe this is also how the code has changed): [university managers have] to ensure that there is good order and good governance and the rules are followed. Part of that...is that there's an SRC that gets elected by the student body...But at the same time, the code has changed to the point where...politically, that...is not sustainable.*

*The activists, who are not in the SRC structures...may say: the SRC gets elected by maybe 25% of all registered students. Are we saying (rhetorical question) that such a low poll gives the SRC and that system of electing the SRC a legitimacy that is any more profound and greater than the legitimacy of another student formation, political organisation? That may not have tested its support through a ballot. But...has a constituency. And is...able to organise and engage in...activism and...in...protests'.<sup>689</sup>*

More generally, university managers could find themselves increasingly caught between different groupings (of students and staff) calling for opposing actions (e.g. keeping the university shut / returning to class). One response was for university managers to attempt to canvas and communicate with students more directly:

*'We've tried to mitigate [the effects of these contestations] by increasing our communication to students in general...But it's a...fine-tune. Because then the SRC will...say we're undermining them. So we have to balance it...and...[acknowledge] that they are the recognised statutory body'.<sup>690</sup>*

Protesting students were the other party to this balancing act. They could insist that they were the main constituents with whom university managers engage to resolve the protests, regardless of those students' political affiliation or membership of prescribed organisations (e.g. the SRC).

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<sup>689</sup> Interviewee 19 (Cape Town, 23 April 2018).

<sup>690</sup> Interviewee 1 (Johannesburg, 12 March 2018).

This could lead to a multipronged stalemate, as happened at Wits shortly after president Zuma's announcement on 23 October 2015 that there would be no fee increase in 2016. SRCs dominated by ANC-affiliated student groupings (such as SASCO) faced a conundrum:

*'SASCO...because it wants to toe the party line which...president [Zuma] has...made...exits the protest en masse....[But] the students still want to protest'.<sup>691</sup>*

On the Monday after president Zuma's October 2015 announcement, university managers at Wits *'wanted to declare the university open'* again.<sup>692</sup> One complaint was that this was done *'without coming back and consulting'*, because Wits' *'SRC presidents never went to the meeting with Zuma'* which preceded president Zuma's October 2015 announcement.<sup>693</sup> While SASCO may have exited the protests, other students and student organisations decided to continue protesting. The ensuing argument about whether Wits should re-open recapitulates the debate about what constitutes legitimate democratic engagement.

On the one hand, university managers conducted

*'a Facebook poll of some sort. About 5 000 reply. [They do] a couple of other things...to make the case that the majority want to go back to university'.<sup>694</sup>*

Part of the response to this was that university managers should be engaging with the protesting students, rather than

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<sup>691</sup> Interviewee 60 (Oxford, 3 May 2017).

<sup>692</sup> Interviewee 48.

<sup>693</sup> Ibid.

<sup>694</sup> Ibid.

*‘making a unilateral decision. Which they claim is not unilateral because of the Facebook poll, and [other discussions] with legitimate student formations [about opening the university]. But the entire point was the people [protesting] were not doing this through legitimate SRC channels’.*<sup>695</sup>

Similar to the question raised about certain of RMF’s protests,

*‘a dominant critique of the protesters...was why 32 000 students and academics should be denied entry into the university by only a couple of hundred protesters...The critique presupposed that the student protesters did not represent the majority’.*<sup>696</sup>

These quotes highlight the differing views even amongst those sympathetic to the protests continuing after president Zuma’s October 2015 announcement. The complexities around determining who could *‘represent the majority’*, and how, are not explicitly addressed. Nor is the question of whether it is the majority’s view (assuming it could be determined) that should carry the day.

Perhaps what this suggests is that during the interregnum, authority was not only re-dispersed and re-deployed. Rather, the resource of authority may at times have been almost obliterated; or alternatively, superseded by questions of political power. Relatedly, accumulating and harnessing organisational capacity could be one means by which actors could enhance their raw political power. Finally, these contestations shifted the boundaries of the regulatory space of tuition fee decisions into cognate and overlapping spaces: of protecting constitutional rights (including freedom of expression and assembly); of public order policing; and so forth.

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<sup>695</sup> Ibid.

<sup>696</sup> Chikane (fn 2), 154.

## 1.2. University managers to the fore?

According to formal state law, university councils remained the bodies authorised to make tuition fee decisions; even during the interregnum. The disruptions emanating from the 2015 to 2017 Fees Must Fall protests, however, elevated the prominence of specific university managers and council members - especially vice chancellors and council chairs, respectively. An example of this is the meeting held by Wits' Exco on 16 October 2015.<sup>697</sup> Key attendees of that meeting included Wits' vice chancellor and chair of council. One avenue for this elevated prominence was through the enhanced role which emerged for representative professional associations. I focus on two such bodies: Universities South Africa ('USAf'), a (by then) voluntary, private organisation which was the national '*forum for university Vice-Chancellors*'; and the University Council Chairs' Forum ('UCCF').<sup>698</sup>

USAf (and its predecessors) had historically been involved in important aspects of higher education.<sup>699</sup> The 2015 to 2017 Fees Must Fall disruptions created new pressures and opportunities for USAf to be more involved in the process through which tuition fee decisions are made. Each of South Africa's 26 public universities is a member of USAf; with USAf's board of directors comprised of '*the 26 Vice-Chancellors of...member universities*'.<sup>700</sup> Vice chancellors also head the executives

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<sup>697</sup> See the discussion under section 1.1 of this chapter.

<sup>698</sup> Report of the Heher Commission (fn 29) paragraph 2.

<sup>699</sup> Interviewee 17 (Cape Town, 19 April 2018).

<sup>700</sup> 'Universities South Africa Board of Directors | Universities South Africa' <<https://www.usaf.ac.za/universities-south-africa-board-of-directors/>> accessed 7 April 2021.

which governed these universities. Thus vice chancellors could (and often did) have a more prominent profile and position compared to other university managers. Similarly, council chairs are likely to have presided over the council meetings at which fees were debated. They may also have been members of UCCF.

Legally, key decisions (such as tuition fee increases) still had to be taken by university councils. Even so, several moments during the disruptions of 2015 to 2017 saw vice chancellors (including through USAf) and university chairs (including through UCCF) taking the lead. One instance was the announcement of a 0% fee increase for 2016. President Zuma made this announcement on 23 October 2015. The morning of that announcement, USAf and the UCCF had caucused before meeting with president Zuma, the MHET and other cabinet officials, and various student groupings.<sup>701</sup> At the meeting, USAf's chair, on behalf of USAf and the UCCF, proposed a 0% fee increase for 2016, together with supplementary funding from the state.<sup>702</sup> Although it was president Zuma who ultimately announced these measures, they appear to have emanated from USAf and the UCCF.

Following the initial disruptions of October 2015, and perhaps because of the ongoing disruptions which ensued, greater co-ordination within USAf continued into 2016. This extended to how USAf fed into the MHET's announcement on 19

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<sup>701</sup> Report of the Heher Commission (fn 29) paragraph 8.

<sup>702</sup> Ibid; interviewee 59 (Johannesburg, 20 April 2017).

September 2016 that *'fee adjustments [for 2017] should not go above 8%'*.<sup>703</sup> What happened was that

*'we worked as USAf, together...we thought that if anyone [made a fee announcement] before the others, this would trigger national protests. And it would have a domino effect across the country. So we tried to coordinate the timing of our release. And...we worked out a national...Higher Education Price Index...We said to government...We want to put up our fees by...8%'*.<sup>704</sup>

And by 14 December 2017, it was USAf which announced that

*'[g]overnment has agreed on an 8% university fee increase for the 2018 academic year'*.<sup>705</sup>

While many other factors also fed into what fee increases were announced, by whom, and when, two points bear special mention. First, vice chancellors and USAf (as well as university council chairs and the UCCF) started to play an increasingly prominent role in tuition fee decisions. Before, these decisions had been the preserve of individual university councils. Admittedly, vice chancellors or other senior university managers tended to play a significant role in the early stages of a tuition fee decision: such as the compilation of a university's budget, and initial consultations with students. Some of these university managers are also likely to have been present at the final council meeting where the tuition fee decision was debated and voted on.

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<sup>703</sup> 'Minister of Higher Education and Training, Dr BE Nzimande's Statement on Government's 207 Fee Support to Students from Poor, Working and Middle Class Families', 19 September 2016, 5; available at 'Department of Higher Education and Training - MediaRelease' <<http://www.dhet.gov.za/SitePages/MediaRelease.aspx>> accessed 19 March 2019.

<sup>704</sup> Interviewee 18 (Cape Town, 20 April 2018).

<sup>705</sup> Msindisi Fengu, '8% – the Increase for University Fees next Year' (*CityPress*, 14 December 2017) <<https://city-press.news24.com/News/8-the-increase-for-university-fees-next-year-20171214>> accessed 19 March 2019.

I have shown, though, that vice chancellors and USAf played a heightened role in tuition fee decisions during the interregnum. Furthermore, this role was played outside of individual university councils - albeit that vice chancellors may well have been engaging with, and updating, their respective university councils along the way. Second, one driver of this shift was the deleterious prospect of subsequent student protests shutting down universities. This reinforces my argument that greater student voice emerged during the interregnum.

### **1.3. Outside universities – increasing external fora**

As the 2015 to 2017 disruptions unfolded, an expanding array of decision fora external to university councils exercised increasing influence over tuition fee decisions. Yet puzzlingly, tuition fee decisions were ultimately taken through and by university councils. At times, explicit efforts were even made to preserve the authority of university councils over tuition fee decisions. I argue that this points to more direct and explicit regulation of tuition fee decisions emerging during the interregnum, compared to the fragile calibrations operating up until this point during the perpetual disequilibrium.

In particular, binding constraints emerged over what tuition fee decisions councils could make. These constraints developed outside of any changes to state law, or to universities' governing statutes. Instead, the politics of the moment curtailed councils' seemingly unfettered discretion. This was aptly captured by two interviewees. One commented that

*‘when the government knows that you can’t easily raise your fees above what it’s recommending it’s willing to pay, in that environment, it’s in effect setting the [fee] increase. It’s regulating the [fee] increase’.*<sup>706</sup>

Similarly, in response to my question about whether their university council could have decided on a tuition fee increase after, and notwithstanding, the 0% announcement in October 2015, another interviewee responded:

*‘Do you think that...council had a real choice in this respect?...Politically, it was not feasible to do anything except 0%’.*<sup>707</sup>

To flesh out how these constraints developed, I analyse five key moments between October 2015 and December 2017.

### **1.3.1. President Zuma’s 0% announcement**

On 23 October 2015, President Zuma announced a 0% fee increase for 2016. The announcement followed, and seemingly overruled, prior fee decisions by university councils for 2016. The proposal of a 0% fee increase coupled with supplementary state funding had been made by USAf and the UCCF:

*‘[it] was not a government decision...rather, the universities put forward the proposal and...the collective meeting agreed on it’.*<sup>708</sup>

This is borne out by the language president Zuma used in the announcement: *‘we agreed that there will be a zero increase of university fees in 2016’.*<sup>709</sup> ‘We’ referred to

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<sup>706</sup> Interviewee 18.

<sup>707</sup> Interviewee 47 (email exchange, April 2017).

<sup>708</sup> Report of the Heher Commission (fn 29) paragraph 10.

<sup>709</sup> ‘Statement by President Jacob Zuma at the conclusion of consultation with representatives of the university community’, 23 October 2015; available at

*‘vice-chancellors, chairpersons of university councils, presidents of [SRCs] and representatives of student organisations nationally [i.e. SAUS]’.*<sup>710</sup>

A number of those mentioned in this list would likely also have attended the council meetings at their respective institutions, at which tuition fee decisions were made. However, those would have been institution-specific decisions rather than national determinations. Moreover, president Zuma, the MHET, and the Minister of Science and Technology were not members of university councils; though they did attend and speak at the meeting on the morning of 23 October 2015.<sup>711</sup> Although the 0% fee decision for 2016 was subsequently taken through university councils, those deliberations were hardly unfettered:

*‘each university had to...go through the farcical situation of determining its fee increase. It was notionally autonomous. But you couldn’t step out of line’.*<sup>712</sup>

### **1.3.2. A commission of inquiry**

A further outcome of the meeting on 23 October 2015 was that president Zuma agreed

*‘the government would lead a process that will look at broader issues affecting the funding of higher education, cognisant of other endeavours in this regard’.*<sup>713</sup>

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<http://www.thepresidency.gov.za/speeches/statement-president-jacob-zuma-conclusion-consultation-representatives-university-community>, accessed 4 October 2017.

<sup>710</sup> Ibid.

<sup>711</sup> Cf. Report of the Heher Commission (fn 29) paragraph 8.

<sup>712</sup> Interviewee 17.

<sup>713</sup> Report of the Heher Commission (fn 29) paragraph 33.

The Commission of Inquiry into Higher Education and Training (‘the Heher Commission’) was subsequently appointed by president Zuma on 14 January 2016.

Crucially, the Heher Commission was tasked with:

*‘enquir[ing] into, mak[ing] findings, report[ing] on and mak[ing] recommendations on...the feasibility of making higher education and training...fee-free in South Africa’.*<sup>714</sup>

The Heher Commission’s hearings were peripatetic, with a wide array of actors involved in higher education invited to attend and present material:

*‘they...heard from everybody who was anybody...if you wanted a body of knowledge about what people thought about how you could fund higher education, then there [it was]’.*<sup>715</sup>

Universities were included in this process, as were multiple other actors. The Heher Commission received submissions from (inter alia): 12 public universities; 4 TVETs; 6 student organisations (including SASCO and SAUS); USAf; the CHE; two trade unions; and hundreds of individuals.<sup>716</sup>

There were delays in the commencement of these hearings.<sup>717</sup> The delays, together with the broad mandate of the Heher Commission and the wide variety of actors who participated in its hearings, compounded the uncertainty of the interregnum. One difficulty the delays presented was that it was challenging for universities (or

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<sup>714</sup> Ibid.

<sup>715</sup> Interviewee 23 (Pretoria, 7 May 2018).

<sup>716</sup> ‘Fees Commission 2016’ <<https://www.justice.gov.za/commissions/FeesHET/submissions.html>> accessed 9 April 2021.

<sup>717</sup> Report of the Heher Commission (fn 29) paragraphs 34 to 35.

anyone else) to make fee decisions before the Heher Commission had completed its hearings and submitted its report:

*‘[the Commission] was originally meant to report in June 2016...in June 2016, they said they needed another year...that in itself triggered some unhappiness. But the main concern was that no one wanted to announce fee increases. And the government didn’t want to get involved in that’.*<sup>718</sup>

I argue this looming uncertainty further constrained tuition fee decisions during the interregnum. It was compounded by the other fora which were also looking into how higher education was funded.

### 1.3.3. A Ministerial Task Team

In April 2016, the MHET

*‘established a Ministerial Task Team “with a mandate to determine and advise on alternative financing and operating models for funding poor and ‘missing middle’ students”’.*<sup>719</sup>

As I showed in my analysis of the perpetual disequilibrium, *‘financing and operating models’* are intimately connected to how fee decisions are made. Moreover, the Ministerial task team

*‘had two mandates. First, decide what we do for [tuition fees] for 2017. Then, develop a plan on whether the [MHET] should be capping fees’.*<sup>720</sup>

The second mandate – *‘whether the [MHET] should...cap...fees’* – enhanced the spectre of fee regulation.

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<sup>718</sup> Interviewee 18.

<sup>719</sup> Williams (fn 6) 113; citing ‘Report of the Ministerial Task Team to develop a Support and Funding Model for Poor and “Missing Middle” students’ (14 November 2016), 30.

<sup>720</sup> Interviewee 43 (Skype, 6 June 2018).

### 1.3.4. The MHET's announcement

On 19 September 2016, the MHET announced that *'fee adjustments [for 2017] should not go above 8%'*.<sup>721</sup> In reaching this decision, a different *'we'* had been consulted compared to those who had met with president Zuma almost a year earlier. This time, the list of consultees encompassed:

*'university vice-chancellors and council chairs, various student organisations, organised labour, faith communities, political organisations and government'*.<sup>722</sup>

In addition, the CHE had advised the MHET regarding this decision.

Another striking feature of this announcement was that it was phrased explicitly as a recommendation rather than a directive. An effort was being made to preserve the authority of university councils – to channel the various disruptions emanating from Fees Must Fall back into the prevailing regulatory architecture. Relatedly, some differentiation was preserved through the MHET's dismissal of a *'national approach'* to making tuition fee decisions:

*'the authority for determining fee adjustments resides with University Councils. The CHE has suggested...that the system will be best served by a national approach. However...we...recognise the differentiated nature of the system and that a one-size fits all approach may not lead to sustainability in the system over the long run'*.<sup>723</sup>

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<sup>721</sup> 'Minister of Higher Education and Training, Dr BE Nzimande's Statement on Government's 207 Fee Support to Students from Poor, Working and Middle Class Families', 19 September 2016, 5; available at 'Department of Higher Education and Training - MediaRelease' (n 42).

<sup>722</sup> Ibid 4.

<sup>723</sup> Ibid.

Even so, the recommended ceiling of 8% for tuition fee decisions was applicable to all public universities in South Africa.

The MHET's announcement also spoke of supplementary state funding being made available, including to support various categories of students. One interviewee highlighted, though, how the response to the MHET's announcement reinforces the conclusion that Fees Must Fall became about a lot more than specific tuition fee increases:

*'[the] announcement was well worded and well phrased. But it wasn't heard...[It] just didn't succeed in the communication...protests erupted anyway. So that must raise a question about: were the protests really about the fees?'*<sup>724</sup>

It also provides insight into how the Fees Must Fall protests evolved as they unfolded.

This evolution is important, because it speaks to increasingly virulent contestation over an expanding, and increasingly politicised, range of issues. In a broad sense:

*'2015 was largely a spontaneous protest. That surprised even the leadership of the students...And at least until the [0%] decision was made, it was largely peaceful; largely multi-racial; and it was multi-class. [But then] political parties begin to intervene in trying to control the protests. And from 2016, it's much more party-factionalised. Much more zero-sum-game...meaning it had shifted from fee increase, to free education. And there was...a faction that was taking the view: if there's no free education, there shall be no education at all...it [also] became more racialised'*<sup>725</sup>

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<sup>724</sup> Interviewee 18.

<sup>725</sup> Interviewee 43.

The increasing politicisation and factionalisation suggests increasing dispersal (if not disintegration) of authority:

*‘there [were] multiple bodies of students. Deeply divided. The more political they are, the more divided they are...the politics of the moment...obscures what may be a rational student position. But I think there are as many rational positions as there are student organisations’.*<sup>726</sup>

### 1.3.5. The ‘free higher education and training’ announcement

On 16 December 2017, president Zuma announced that

*‘as a result of [the] substantial increase in subsidy to universities, there will be no tuition fee increment for students [in a certain category] during the 2018 academic year’.*

President Zuma also stated that there would be

*‘fully subsidised free higher education and training for poor and working class South African undergraduate students, starting in 2018 with students in their first year of study’.*<sup>727</sup>

This announcement was puzzling in multiple respects, two of which are pertinent. First, president Zuma’s December 2017 announcement hardly mentions university fees. While it indicates that one category of students will receive ‘*fully subsidised free higher education and training*’; and another category will face ‘*no fee increment*’ because of the ‘*substantial increase in subsidy to universities*’; it does not

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<sup>726</sup> Interviewee 50 (Johannesburg, 23 March 2017).

<sup>727</sup> ‘The President’s Response to the Heher Commission of Inquiry into Higher Education and Training | The Presidency’ </press-statements/president%E2%80%99s-response-heher-commission-inquiry-higher-education-and-training> accessed 20 March 2019.

clarify what fee increases universities could or would be charging. Very little information is provided about what tuition fees will be, or how they will be decided.

Second, and relatedly, I indicated in section 1.2 of this chapter that USAf had on 14 December 2017 – two days before president Zuma’s December 2017 announcement – announced that ‘[g]overnment has agreed on an 8% university fee increase for the 2018 academic year’.<sup>728</sup> USAf had engaged in ‘very constructive’ discussions with the MHET prior to making this announcement, and noted that the MHET

*‘agreed to make a formal announcement about the decisions of the national government in this regard’.*<sup>729</sup>

Yet it was president Zuma who made the 16 December 2017 announcement; making no mention of either USAf’s 14 December 2017 announcement of an 8% fee increase for 2018, or the announcement the MHET had apparently agreed would be forthcoming.

This suggests that the disruptions unleashed by the Fees Must Fall protests avalanched into an interregnum. Harnessing organisational capacity could disrupt, or even disintegrate, established dispersals of authority. Furthermore, two broader themes emerge from my analysis of the new decision makers which came to the fore during the interregnum. First, actors and issues were being organised into and out of this regulatory space frenetically. This reorganisation occurred in a concentrated timespan

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<sup>728</sup> See fn 705.

<sup>729</sup> Ibid.

(just over two years), and at a significantly accelerated rate compared to the perpetual disequilibrium. Second, and relatedly, this reorganisation cascaded through multiple physical sites. Key facets of tuition fee decisions and the delicate calibrations which had been regulating them moved well outside of the chambers in which university councils had previously made such decisions.

These shifts are captured in two comments about who made, and who should have made, tuition fee decisions during the interregnum. One university manager, speaking about the 0% fee increase for 2016, commented that it was president Zuma who had

*'handled the negotiations...and brought [fee increases] down to zero...[President] Zuma did the negotiation and declared a zero [percent fee increase]...all of us with whatever negotiating skills, in the end we did not decide this'.<sup>730</sup>*

University managers and council members may have been intimately involved in negotiations to resolve residual issues. But on this reading, tuition fee increases for 2016 were negotiated and ultimately announced by president Zuma.

In a similar vein, president Zuma's October 2015 and December 2017 announcements fundamentally changed how tuition fee decisions were made and responded to:

*'what [the Fees Must Fall protests] did is that [they] lifted decision-making from a registrar, from a VC. Even beyond the [MHET]. To a state president. That was the...major difference...the autonomy of [specific university council members], their ability to have a final word over higher education funding*

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<sup>730</sup> Interviewee 3 (Johannesburg, 14 March 2018).

*policy. Was challenged in a significant manner. By the fact that Fees Must Fall didn't go to [the DHET's buildings]. It went to the Union Buildings...university management was forced...to respond to the presidential declaration'.<sup>731</sup>*

Another way this shift was analysed acknowledges both the enhanced role played by specific university managers and council members during the interregnum, and how key decisions by those actors diminished university councils' discretion regarding tuition fee decisions:

*'the blind-spot which came out of the opportunism of university councillors. Or university managers. Was that when the Fees Must Fall protests were too hot on campus, they...pointed to the president...the question becomes: who took the power away from management to determine the financing of universities? That's a classic example of an elite vice chancellor...delegating responsibility...to the state. And by so doing, handing over their ability to determine...higher education funding policy...to the...state president'.<sup>732</sup>*

## **2. Factionalising organisational capacity**

The interplay between the resources of organisational capacity and authority during the interregnum created a specific dynamic in this regulatory space. Where sufficient organisational capacity could be harnessed, established dispersals of authority could be broken. However, the emerging dispersals of organisational capacity were themselves fragmented. For instance, larger groupings of students initially coming together to protest one set of issues could fragment into multiple smaller groupings of students over time. This had a bearing on who the main dramatis personae in this regulatory space were, and on how the boundaries of this regulatory space were drawn. The

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<sup>731</sup> Interviewee 33 (Johannesburg, 18 May 2018).

<sup>732</sup> Ibid.

process through which tuition fee decisions were made became highly politicised and factionalised, and was subjected to new timelines.

### **2.1. Splintering students' organisational capacity**

Multiple fissures occurred within a student movement which, at its height, had been a formidable and broad mobilisational force. Several fissures were evident as early as October 2015. They centred on: '*whether female protestors should be more prominent and in more leadership positions*' within the movement; '*party-political roles in the movement, and party-politicisation*'; and whether protests should continue after president Zuma's October 2015 announcement.<sup>733</sup> On top of those fissures was the contestation I discussed in section 1.1 of this chapter: between students within SRCs, and those challenging the legitimacy of SRCs; and even within particular student organisations represented on SRCs.

Party-politicisation could exacerbate what were already fractious interactions. At a general level, being seen as sufficiently radical was one way in which different student organisations competed with each other. This competition undermined any possibility of negotiating a broad settlement with a range of student movements. A specific organisation might be loath to agree to a settlement if doing so could compromise its 'radical' credentials. Alternatively, branding those that did agree to a settlement as 'sell outs' could enhance an organisation's stature.<sup>734</sup>

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<sup>733</sup> Williams (fn 6) 87 – 88.

<sup>734</sup> Ibid 102 – 103.

The involvement of political-party affiliated student movements could exacerbate this combustible mix. One example is the pressure to retain ‘*control of the narrative of the protest[s]*’.<sup>735</sup> Retaining this control could be as much about jockeying between student organisations, as it was about contestation between their parent political parties. Jockeying between student movements could result in compromises around how protests were mobilised and led. In one case, there was a

*‘deliberate sharing of leadership responsibilities with [individuals] who were not on the SRC...we felt if we didn’t allow for that, it would’ve been more destructive...[key groups of actors] would not allow things to go forward if they didn’t see [these individuals] at the front...That was...not a battle we needed to fight. And we wouldn’t have won it’.*<sup>736</sup>

I cite this example because it reinforces the complexity to the debates I discussed in section 1.1 of this chapter about who could speak on whose behalf, especially for students. It also rebuts the idea that leadership of the Fees Must Fall protests, at least once they gained pace, could be simplistically attributed to a specific organisation.<sup>737</sup>

Contestation between parent political parties also played out within the Fees Must Fall protests. One major rift was between SASCO, which aligned and affiliated with the ANC (though it might disagree with ANC in certain respects); and the Economic Freedom Fighters (‘EFF’) Student Command (‘EFFSC’).<sup>738</sup> The EFF was

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<sup>735</sup> Interviewee 60.

<sup>736</sup> Interviewee 5 (Johannesburg, 28 March 2018).

<sup>737</sup> Cf. Chikane (fn 2) 154.

<sup>738</sup> Ibid 138 – 139.

established following the disbanding of the ANCYL in March 2013.<sup>739</sup> Several of the EFF's initial senior members had been members of the ANCYL. The EFFSC was '[f]ormed alongside its mother body...in 2013'.<sup>740</sup>

Over time, the EFFSC successfully contested SASCO's dominance in SRCs on certain campuses.<sup>741</sup> Students' march on Luthuli House on 22 October 2015 provides some insight into how party-political jostling intertwined with the Fees Must Fall protests. An underlying tension behind this march was

*'the idea [that] if you [as the PYA] don't do this, the EFF is going to do it anyway...There is that pressure that...if you allow the EFF to control the narrative of the protest, you as an SRC are delegitimised. Because PYA is part of the SRC'.<sup>742</sup>*

The invidious position of ANC-affiliated student organisations came to a head in the build up to the march:

*'The ANC had been protected because SASCO and the PYA had protected it...As more and more students found consensus on marching on Luthuli House, the PYA...became more hesitant'.<sup>743</sup>*

These tensions were on display during the march, too; especially when the ANC's Secretary General, Gwede Mantashe, refused to sit down:

*'What began as murmurs soon became heckles as a small chorus began to demand that Mantashe sit down. For students...the ANC was not going to be immune to the*

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<sup>739</sup> Ibid 42.

<sup>740</sup> Ibid 139.

<sup>741</sup> Chikane (fn 2) 139 – 140.

<sup>742</sup> Interviewee 60.

<sup>743</sup> Chikane (fn 2), 180.

*politics of humiliation imposed on those who claimed authority...the PYA's worst fears began to play out...[when an EFFSC leader] proclaimed [that] students had agreed that they would make power, regardless of its form, sit down on the floor when in the presence of students'.<sup>744</sup>*

As these kinds of tensions evolved, and as party-political interventions in the process increased, it becomes steadily more difficult to answer the question: '*what [political] games are being played here*'?<sup>745</sup> These party-political machinations added another dimension to how the resources of organisational capacity and authority were being re-dispersed and redeployed during the interregnum. They also shifted the timelines which had previously applied to tuition fee decisions.

## **2.2. Politicised timelines**

I discussed the typical university budgeting cycle in chapter six. A university's budget had to be approved by the last council meeting of the preceding year. A key component of university budgets during the perpetual disequilibrium was tuition fees. Two important political processes in addition to the Fees Must Fall protests shifted the dynamics during the interregnum: South Africa's local and municipal elections in August 2016; and the ANC's elective conference in December 2017.

These processes meant that university's reliance on stable annual budgeting processes was partially subjugated to broader political demands. Two indicators of this

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<sup>744</sup> Ibid 184.

<sup>745</sup> Interviewee 2.

were how certain political-party-affiliated student organisations engaged in protests in 2016; and the delays around president Zuma's release of, and engagement with, the report of the Heher Commission.

Fees Must Fall began as a response by students to a number of issues. The most immediate of these issues was the prospect many students face of financial exclusion – a prospect which increased as tuition fees increased. Party-politicisation also came to play a role as the protests progressed. The power and successes of Fees Must Fall contributed to it being an appealing avenue for various party-political actors to pursue party-political ends. One example of this was the suggestion by some interviewees that the EFF saw an opportunity in Fees Must Fall, particularly going into local and municipal elections in 2016:

*'Sloganeering and the politics...mushroomed...[an EFFSC leader is quoted as saying:] "Wits has fallen. Now it's time for the State"...In 2015, student leaders...were political but not party political. By 2016, they're party political'.<sup>746</sup>*

Disrupting universities, on this reading, becomes one means of contesting South Africa's balance of political power; including through embarrassing the ruling party.

It meant havoc for university budgets, though. The pressures of being in an electoral cycle - whether local and municipal, or internal party-political – shifts priorities and willingness to engage with the disruptions universities faced in trying to make tuition fee decisions. Moreover, universities could become staging grounds for political

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<sup>746</sup> Interviewee 50.

manoeuvring aimed at objectives significantly beyond fees falling, or even free higher education.

The political manoeuvrings around the publication of, and engagement with, the report of the Heher commission reinforce how universities and tuition fee decisions were being subjected to heightened party politics. President Zuma received the Heher Commission's final report on 30 August 2017. A Sunday paper leaked the report on 29 October 2017. This suggests that political considerations were percolating around the report's contents and what the official response to it would be.<sup>747</sup> Only on 13 November 2017 did president Zuma officially release this report.<sup>748</sup>

However, president Zuma gave no public indication of how he intended responding to the report of the Heher Commission. The date president Zuma chose to make an announcement (16 December 2017) was the day on which the ANC's elective conference in Nasrec was commencing: a conference in which president Zuma, as then president of the ANC, arguably had a keen interest.

This was

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<sup>747</sup> 'EXCLUSIVE: Fees Won't Fall' (*News24*, 29 October 2017) <<https://www.news24.com/SouthAfrica/News/exclusive-fees-wont-fall-20171029-2>> accessed 20 March 2019.

<sup>748</sup> 'Release of the Report of Commission of Inquiry into the Feasibility of Making High Education and Training Fee-Free in South Africa | The Presidency' </press-statements/release-report-commission-inquiry-feasibility-making-high-education-and-training> accessed 20 March 2019.

*‘a moment of incredible instability...the sense was very clearly that everything hinged on the ANC conference’.*<sup>749</sup>

The overarching political turmoil took a considerable toll on university budgets. HA/WIs were probably more able to muddle through, partly by kicking the can down the road:

*‘we went to council, which is meant to sign off our budget, and they couldn’t. Because how could you?...I still have not got my final budget [three months into the new academic year]...Because we’re paying for the increase with cuts...where are the cuts coming? No one has asked me yet. Because we haven’t yet factored all the numbers through’.*<sup>750</sup>

For at least one HD/BI, though, the university’s financial position in 2018 was dire:

*‘NSFAS releases some money, but then they expect us to pay...meal allowances for students to be able to eat. Which is a...challenge. Other universities, who are more affluent, they have been able to pay students their meal allowances from February. We could only do so...in April...We had a Hobson’s choice in March. Do we pay salaries, or do we pay our suppliers?...we had to delay paying our suppliers so that we could pay salaries. That’s really where we are’.*<sup>751</sup>

Parallel to university councils, the NSFAS also faced havoc given how late USAf and president Zuma made their announcements regarding the 2018 academic year.

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<sup>749</sup> Interviewee 2.

<sup>750</sup> Ibid.

<sup>751</sup> Interviewee 13 (12 April 2018).

### 3. Dominant Occupants

There are many interconnected and competing factors which fed into the Fees Must Fall protests. One side of the story is the ongoing immiseration of poorer students facing crushing student debt and degrading living conditions - including sleeping in libraries and often going hungry. Another side is that Fees Must Fall was very successful at lobbying for substantial policy change, partly by politically connected organisations.

The puzzle this presents is of students being both the victims of a perverse and degrading rationing of access to higher education; and the beneficiaries of a significant policy shift, and of the new standard operating procedures which emerged within universities. I argue this shows that certain student organisations were able to occupy a dominant position in this regulatory space. I explore this dominant occupation through the paradigm of victims and agents, and by analysing how universities standard operating procedures were altered by the disruptions of Fees Must Fall.

#### 3.1. Victims and agents

I have previously argued that

*‘[p]art of the paradox of these protests was that some of those deleteriously affected by...alienation and exclusion, were able to leverage it to lobby for a more inclusive regulatory regime. Professor Everatt pointed out in an interview how these disruptive protests were an attempt to reclaim, and an affirmation of, agency:*

*You have discontent growing some way before 2015...The whole movement emerging around blacks can only be victims, blacks can't be racist. We're disempowered...That all began to pick up speed 2014,*

*2015 in particular. Rhodes Must Fall comes out of this...with people trying to reclaim agency. And many are just replete with agency. They are the best educated, most empowered young generation that we've ever produced, of any race'.<sup>752</sup>*

A further indication of how some of the protesters were empowered was that, compared to

*'earlier student protests, including at historically black institutions: "[t]his time they use social media. There's something to say about the symbolism of it. Because it means they have access to resources."'.<sup>753</sup>*

The level of attention RMF and Fees Must Fall received; together with the responses they were able to force; was linked by several interviewees to the fact that these protests took place at HA/WIs rather than HD/BIs.

Comparing protests at an HD/BI during the 1990s to the emergence of Fees Must Fall, an interviewee observed that

*'it's when something that's been happening for a very long time in historically black and working-class universities, mostly; arrives at Wits and UCT, that it suddenly becomes a big national issue. So there was no sense that people could change national policy. Because although these struggles were happening in [HD/BIs]; they were isolated and fragmented. They just didn't have that kind of power. So it was intense, but also intensely site specific'.<sup>754</sup>*

Another way this critique was framed was that fallism, the '*ideological framework*' which emerged during RMF and partly carried over to Fees Must Fall,

*'privileged the notion of black consciousness on campus without having to ask*

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<sup>752</sup> Williams (fn 6) 66 – 67.

<sup>753</sup> Ibid 61.

<sup>754</sup> Interviewee 6 (Johannesburg, 29 March 2018).

*itself the class question’.*<sup>755</sup>

The use of social media and the privileging of some categories (e.g. race) but not others (e.g. class) contributed to Fees Must Fall cascading through a complex array of physical and online spaces. As much as pan-Africanism and decolonisation became part of the ideological milieu of RMF and potentially Fees Must Fall, the

*‘Pan-African leanings [in RMF] should not be misinterpreted as a pro-African approach. For #RMF, it was South Africans first, African-Americans second and Africans at large third’.*<sup>756</sup>

Furthermore, unique places of spaces remained important:

*‘it wasn’t the same everywhere...it wasn’t monolithic...There were commonalities...it had that Occupy stuff...[it] was linked to Black Lives Matter in the US. There’s not doubt about that. A lot of the language...came from that as well’.*<sup>757</sup>

The focus on some places (South Africa, then the US) at the expense of others (the rest of the African continent) pointed to a pitfall:

*‘not at the level of rhetoric and gesture; but...substantively, I think there’s been quite a remarkable...lack of interest [in experiences elsewhere on the African continent]...what was happening in the US, for instance, around Black Lives Matter, was much more attractive to many students than...[e.g.] the experience of [the University of Zimbabwe] in Harare...I think there was a systemic lack of interest in it...that was strategically dangerous. Because [there was] the possibility of that same kind of stalemate reproducing itself’.*<sup>758</sup>

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<sup>755</sup> Chikane (fn 2) 118.

<sup>756</sup> Ibid 117.

<sup>757</sup> Interviewee 6.

<sup>758</sup> Ibid.

Under the stalemate, universities end up constantly making do with less; while facing mounting pressures to expand access.<sup>759</sup>

### 3.2. Successful lobbyists

Another way of unpacking the dominant position occupied by certain student organisations is to consider what was won, and how. Considering just the 2015 settlement:

‘ “[The South African government] *has faced genuinely moral, large, constituency-based, popular-based coalitions and organisations. And has said: go to hell, we won’t budge. The students, the government blinked. Said: you can have 0%* ” ’.<sup>760</sup>

By the 2017 settlement, how higher education was funded in South Africa had changed significantly. Lobbying by students had substantially driven these changes. They came, though, at the expense of the ‘*other pressing social needs*’ which higher education policy had, since the mid-1990s, tried to keep ‘*in perspective*’.<sup>761</sup>

I showed in sections 1.1 and 2.1 of this chapter that a plethora of overlapping and competing voices fed into the movement which brought about these changes. This indicates a further change from how protests around access to higher education had played out during the perpetual disequilibrium:

*‘in the past, it was largely...ANC-aligned student movements protesting and demanding that the ANC delivers...the difference [in 2015] is the multi-partisan...character of Fees Must Fall...it was everybody else. Which...meant*

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<sup>759</sup> Interviewee 13.

<sup>760</sup> Williams (fn 6) 84, citing Professor David Everatt.

<sup>761</sup> EWP 3 (fn 13) paragraph 3.34 ; Interviewee 52 (Johannesburg, 31 March 2017).

*that those who are protesting don't have any emotional attachment to the ruling party. But also, the accumulation of all those [preceding] protests led to this one'.<sup>762</sup>*

I find this interviewee's analysis helpful because it highlights the combination of factors which led to Fees Must Fall driving the settlements which ultimately emerged. It highlights the important role played by non-politically affiliated actors. That is a limitation on my analysis of the dominant position occupied by politically-affiliated actors.

In analysing partisan-protestors and their agency, I am particularly interested in those student organisations which were affiliated to the ANC. This is because substantial lobbying for free education occurred within the ANC, during the perpetual disequilibrium. One significant moment of this lobbying was the ANC's elective conference at Polokwane in 2007. At that conference, SASCO:

*'lent its support to President Zuma as it sought to gain enough favour in the party to establish free education as a formal ANC policy'.<sup>763</sup>*

The reference to supporting Zuma is a reference to supporting Zuma's bid to become president of the ANC. It was as president of the ANC that Zuma subsequently became president of South Africa in 2009. More generally, for all the protests during the perpetual disequilibrium at HD/BIs and HA/WIs around free education:

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<sup>762</sup> Interviewee 33.

<sup>763</sup> Chikane (fn 2) 132.

*‘I often wondered why, if SASCO’s national officers were located in the ANC’s headquarters in Luthuli House, they didn’t simply take the elevator up and demand the party place pressure on the state for free education’.*<sup>764</sup>

Even the distinction between party and state was not clear cut, since the ANC was the ruling party for almost all of the perpetual disequilibrium.

President Zuma, in his December 2017 announcement, stated that the Polokwane conference

*‘resolved that “the ANC Government must progressively introduce free higher education for the poor until undergraduate level”’.*<sup>765</sup>

Several changes were made to the NSFAS, following that resolution:

*‘there was the bursary component: 40/60. And the final year programme: 100%...there was the 0% fee increase. And then there was the historic debt allocation...But the fundamental thing was that there was just not enough money to fund all this.’*<sup>766</sup>

The *‘historic debt allocation’* referred to

*‘[a]n amount of R2.5 billion in 2016/17 [being] transferred [by the state] to the [NSFAS] to clear the debt of 71 753 students for the 2013 to 2015 academic years’.*<sup>767</sup>

Pressure on the ANC by affiliated student organisations was not limited to the support they gave to president Zuma in 2007. The resolution at Polokwane in 2007 *‘formed the basis of what becomes the Mangaung resolution’.*<sup>768</sup> Mangaung was where

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<sup>764</sup> Ibid.

<sup>765</sup> Ibid fn 727.

<sup>766</sup> Interviewee 40 (Pretoria, 30 May 2018).

<sup>767</sup> National Treasury’s Budget Review 2016 (24 February 2016), p 65.

<sup>768</sup> Interviewee 33.

the ANC's 2012 elective conference was held; and at which president Zuma was re-elected president of the ANC. In terms of pushing free education forward,

*'the Mangaung resolution...gives the ruling party deadlines...Finalise the policy by 2013. Implement by 2014'.<sup>769</sup>*

In December 2017, president Zuma indicated that the Mangaung conference

*'resolved that "the policy for free higher education to all undergraduate students from poor and working-class communities will be finalized for adoption before the end of 2013" and that "a newly structured [NSFAS] must be introduced to enable fee-free education from 2014 onwards"'.<sup>770</sup>*

Two ANC conferences in 2017 took the politicking around free education further. First, the ANC's policy conference at Nasrec in June 2017

*'was another pillar of [President Zuma's December 2017 announcement]. Because you had a policy conference...saying:...you have not implemented Mangaung resolutions. You have not implemented Polokwane resolutions. And now we have [a] crisis'.<sup>771</sup>*

In his December 2017 announcement, President Zuma noted that the Nasrec policy conference

*'further emphasized that "in line with the [Polokwane and Mangaung resolutions], the ANC government accelerates the implementation of a new financial support model to ensure that academically capable poor, working class and middle strata students are supported to access higher education, and receive fully subsidised free higher education and training by 2018"'.<sup>772</sup>*

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<sup>769</sup> Ibid.

<sup>770</sup> Ibid fn 727.

<sup>771</sup> Interviewee 33.

<sup>772</sup> Ibid fn 727.

Second, it was on the first day of the ANC's 2017 elective conference at Nasrec that president Zuma announced free higher education and training for the poor and working class. In a sense, this was the apogee of the lobbying around free education.

This is because

*'the biggest bridge which was crossed...was translating ANC policy into government policy...in the main, if you look at...ANC policies, they are extremely radical. You look at ANC-led government policy...it's a lukewarm version...But this time, the bridge which was crossed...was...having a very strong translation; an almost identical translation; of ANC policy into ANC government policy and practice'.<sup>773</sup>*

To draw out the contrast and highlight the significance of this, the Congress of South African Trade Unions was affiliated with the ANC in a manner similar to SASCO. Yet the ANC-led government's response during the perpetual disequilibrium to the Basic Income Coalition, which had been led by COSATU, had been: ' "go to hell, we won't budge" '.<sup>774</sup>

It is important to analyse one final set of twists to this politicking. I have argued that the ANC-affiliated student organisations occupied a dominant, if contested, position in this regulatory space. That dominance was enhanced by the fact that

*'SAUS [was] essentially SASCO...all the people elected on SAUS are...SASCO-affiliated...it's because SASCO doesn't get a seat on legislative...or governmental bodies. But SAUS does...as an elected representative of all students in the country...that's why SASCO tries to control it'.<sup>775</sup>*

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<sup>773</sup> Interviewee 33.

<sup>774</sup> Williams (fn 6) 84, citing Professor David Everatt.

<sup>775</sup> Interviewee 30.

This dominance was not comprehensive, though. For instance, one critique of how the SRC operated at one HA/WI, even during the perpetual disequilibrium, was that

*‘many of our students...feel that they’re disengaged from student politics. Because they feel that it is so politically driven. And there are many students who feel strongly that there must be a political agenda. But it’s not the only agenda. So their needs and interests...are actually not looked after. Because the SRC is just wearing its political party allegiance’.*<sup>776</sup>

Some of these students could have been the non-partisan protestors during Fees Must Fall.

Furthermore, although the dominant position was premised on privileged access to lobbying those in power, party-affiliation guaranteed neither that such access would always be forthcoming; nor that it would result in favourable treatment. One interviewee described how, during the interregnum,

*‘you had a political situation...which was responded to as a security threat...there were claims that [student protestors] are a third force that seeks to overthrow the government...from that particular sensitivity and insecurity, there’s no room for engagement...there’s no bona fide in any negotiation’.*<sup>777</sup>

The successful mobilisation underpinning Fees Must Fall presented a significant challenge to a president who was already in a precarious position:

*‘all you needed was a hop, skip and a jump to move from Fees Must Fall, to Zuma Must Fall’.*<sup>778</sup>

However, ‘Zuma must fall’ did not take off as a rallying cry during the interregnum. Rather, one interviewee wryly compared president Zuma’s announcement

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<sup>776</sup> Interviewee 1.

<sup>777</sup> Interviewee 35 (Pretoria, 21 May 2018).

<sup>778</sup> Interviewee 27 (Cape Town, 10 May 2018).

in December 2017 to how the stalemate around access to higher education in other African countries had been handled:

*‘something that has happened throughout Africa...it’s the same leader that steals the money, who offers...free education. That’s what Zuma did...they...use it to buy off the political support...free education...is done under political pressure’.*<sup>779</sup>

How far this is an accurate characterisation of the experience of other African countries extends beyond the scope of my thesis. My argument is that the fact that president Zuma’s December 2017 announcement took place at the beginning of the ANC’s elective conference points to a political game at play. This game extends far beyond a specific university fee decision made within the confines of a particular university council. My argument is bolstered by the intimate, if increasingly fraught, interconnection between certain politically affiliated student organisations (e.g. SASCO) and the ruling party whose elective conference was the backdrop for president Zuma’s December 2017 announcement.

### **3.3. A new code**

In addition to impacting on how university fee decisions were generally regulated, the interplay I have outlined between authority and organisational capacity affected the day-to-day operations of universities. This could prove especially challenging for university managers. One interviewee at an HA/WI aptly captured this by describing

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<sup>779</sup> Interviewee 24 (Cape Town, 9 May 2018).

how their university's standard operating procedures were fundamentally disrupted during the interregnum:

*'in terms of running the affairs of the university: whether it is ensuring that the fee system runs, the finance policy runs, the academic admin runs...etc. In many ways, there was a code that applied in the past. That code has...been fundamentally shaken'.<sup>780</sup>*

A primary driver of this shift was the enhanced student voice I discussed in section 1.1 of this chapter.

Shaking the code changed multiple aspects of how universities were run. Pertinent to my thesis is the change to how fee decisions could be implemented. In chapter seven, I discussed how one major sting to a tuition fee decision was the prospect of financial exclusion for those who could not afford it. Enforcing fee decisions required universities to monitor which students owed what. At times, it also transformed universities into financial institutions: such as when students were able to delay paying fees up until their graduation.

Towards the end of, and then after, the interregnum, enforcing fee decisions became even more complex for university managers:

*'today there's a much greater tolerance of fee debt...there's a much greater tolerance of student's having...further flexibility in terms of academic continuation dispensation'.<sup>781</sup>*

At another HA/WI, an interviewee made a similar observation:

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<sup>780</sup> Interviewee 19.

<sup>781</sup> Ibid.

*‘there...has been a lot more awareness...that we as an institution can’t just make a decision and say: well, that’s it. Ten years ago, universities’ fees were set and that’s it. You didn’t question them. That’s what they are, full stop. Whereas now, there’s a lot more collaboration; a lot more effort is put into consultation’.*<sup>782</sup>

This extended to university managers facing greater administrative complexity in managing their institutions. This complexity stemmed partly from increasing flexibility in how rules were applied. For example, regarding the rules around whether a student could graduate with fee debts still outstanding:

*‘we’ve still got that rule there. We haven’t taken it away. We’ve just said we’ve got the discretion to decide how we apply it’.*<sup>783</sup>

Another consequence was that university managers had to enhance their capacity to collect debts:

*‘our debt collection; which, in the past, relied on...administrative rules within the university; has had to change. We’ve had to be a lot more proactive...to follow through and go after people who are not paying fees’.*<sup>784</sup>

In turn, this has made it more burdensome to ensure that rules were implemented in a consistent and standardised manner:

*‘it has [placed] an enormous...administrative load on...staff. Because...a lot of the processes have had to be manual work-arounds. In the past, you had automatic rules that said: right, fees outstanding, you can’t graduate...you can’t register. Now, you have to look at things on a case-by-case basis...And because it’s a manual [work-around]...the margin for errors have increased’.*<sup>785</sup>

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<sup>782</sup> Interviewee 1.

<sup>783</sup> Ibid.

<sup>784</sup> Ibid.

<sup>785</sup> Ibid.

Two final points show just how far the interregnum shifted the delicate calibration which had regulated tuition fee decisions during the perpetual disequilibrium. At the height of the interregnum, trying to run a fee decision process could become almost impossible:

*‘it’s become...a lot more difficult to make an assumption regarding fees [for the university’s budget]...because of the protests, we now need some guidance from the [MHET]...And the sensitivities regarding fees mean that you don’t even know whether to call it a fee increase...[In 2017]...we almost had to re-word our documents...So that if somebody looks at those documents, they don’t say the university has already made a [fee] decision’.*<sup>786</sup>

Even if fee decisions could be made, several interviewees were sceptical about whether president Zuma’s December 2017 announcement had settled the issues which had driven the 2015 to 2017 Fees Must Fall protests. One particular concern was that the wording and the implementation of President Zuma’s December 2017 announcement focused on *‘students in their first year of study’, ‘starting in 2018’.*<sup>787</sup>

By definition, that cohort would not have been students protesting against the financial exclusions, because they would not yet have begun their studies. One anomaly this created was that a student who had participated in the protests which culminated in this settlement, would not qualify for free higher education; even if they were from a poor and working-class family:

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<sup>786</sup> Interviewee 11 (Johannesburg, 11 April 2018).

<sup>787</sup> See fn 727.

*‘we thought...there would be a...lot of protest from students who are in second or third year. Who [fall within this category]...What I think is...going to happen is that people are just not going to pay. And...the universities at the end of [2018] will be faced with...quite significant bad debt from those students’.*<sup>788</sup>

## **Conclusion**

The interregnum saw the fragmenting of authority and the splintering of organisational capacity, with successful mobilisation by protesting students changing how tuition fee decisions were made. That mobilisation, though, could disintegrate over time. This mobilisation and disintegration heightened the pervasive uncertainty of the interregnum, particularly as the regulatory space of tuition fee decisions became increasingly party-politicised.

An expanding array of actors and issues were also being organised into and out of this space. These reorganisations shifted how the boundaries of the space were drawn – most notably through trespassing into cognate spaces. Furthermore, the reorganisations largely evicted tuition fee decisions from the confines of the chambers in which university councils usually met. In the next chapter, I expand my analysis of the interregnum by exploring the disruptive interplay between the resources of wealth, organisational capacity, and authority.

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<sup>788</sup> Interviewee 18.

## CHAPTER 9

### Redistributing state funds

*‘Left governments almost invariably disappoint their supporters because, even when the prosperity which they have promised is achievable, there is always need of an uncomfortable transition period about which little has been said beforehand.’<sup>789</sup>*

The increasingly disruptive interplay between the resources of authority and organisational capacity was one reason the interregnum emerged between October 2015 and December 2017. In this chapter, I analyse how the uncertainty over who was authorised to make tuition fee decisions was heightened by a disruptive interplay between the resources of wealth, organisational capacity, and authority. Central to my analysis is the way in which increasingly contentious redistributions of state funds cascaded through multiple overlapping spaces.

One unique feature of the interregnum was that substantial policy changes and redistributions of state funds followed president Zuma’s announcements in October 2015 and December 2017. Moreover, president Zuma’s announcements were made regardless of previous policies and processes. Two aspects of this are pertinent. First, several interviewees stressed that these announcements had significant effects on higher education policy; even though they were merely announcements, rather than policy statements.

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<sup>789</sup> George Orwell, ‘Writers and Leviathan’, in *George Orwell: Essays* (Penguin Books, 1994) 453, 456.

Second, president Zuma's announcements disrupted how the South African state conducted its annual budgeting process. Speaking about the aftermath of the December 2017 announcement, one interviewee stated that they were

*'loathe to even talk about that. Because I think that was...a complete and utter anomaly...The budget process meant nothing...How do you...wake up in the morning and think it's a good idea to just announce [free education]?...We still...don't...know the unintended consequences of that announcement'.<sup>790</sup>*

The net effect was that any consistent and stable administration of universities was made very difficult, particularly when it came to tuition fee decisions. Student protests, or the threat of protests, substantially frayed the already fragile calibrations which had regulated tuition fee decisions during the perpetual disequilibrium. The Fees Must Fall protests, and the attempts to settle them, contributed to the ever-greater cannibalisation of the paradigm of responsible budgeting by the paradigm of social activism.

One outcome was that public universities became more beholden to the state. Public universities placed increasing reliance on intervention by the state to resolve the protests: most notably through providing increased funding. The state's provision of greater funding to public universities raised the spectre of more direct and overt fee regulation, given the increased financial burden the state was assuming. That spectre, in turn, impacted on university's institutional autonomy; as well as on the contestation within higher education between forces of standardisation of university education, and

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<sup>790</sup> Interviewee 23 (Pretoria, 7 May 2018).

attempts to differentiate. Who could make and implement tuition fee decisions, and how, was subjected to new uncertainties and tensions.

I build my argument about how the interplay between wealth, organisational capacity, and authority fostered the interregnum over three sections. First, I unpack what the increasingly prominent fight for free education meant for tuition fee decisions. I explore how certain advocates in this fight sought to redefine higher education as exclusively a public good. This redefinition contested the understanding outlined in policy documents that higher education was a mixed (i.e. public and private) good, whose costs should be shared between the state and students. The attempts to redefine the nature of higher education exemplified how protest-driven social activism could cannibalise responsible budgeting.

Second, I interrogate whether, by the end of the interregnum, each public university was making its own, individual fee decision. Three factors suggest that making a single tuition fee decision was likely to be more fraught after the interregnum than it had been during the perpetual disequilibrium. Several new categories of students deserving financial assistance (e.g. the ‘missing middle’) emerged during the interregnum, complicating the sources from which a student’s fees might be paid. Yet for all the emphasis on expanding access to university education, I argue that it is at best uncertain whether the settlements of the protests addressed the issues which I raised in chapters one and seven of access to, and success at, university. Relatedly, there was still a debate at the end of the interregnum over whether the policy and

funding changes which were being implemented spoke to the actors or issues which had driven the Fees Must Fall protests.

Third, I show that the fragile calibrations which regulated tuition fee decisions during the perpetual disequilibrium were frayed by the protests and settlements. Higher education policy during the perpetual disequilibrium recognised the dangers of expanding access to higher education without concomitantly increasing the resources provided to it. In part, the Fees Must Fall protests were an expression of just this danger.

Settling the protests and shaping policy through ad hoc Presidential announcements introduced further challenges into this regulatory space. These announcements generated systemic knock-on effects for key actors. In particular, the ability of university managers and of those working at the NSFAS to regularise their operations was substantially curtailed. These constraints could easily flow through to how students accessed and experienced higher education; thus creating further possibilities for disruption and instability.

### **1. Free education and tuition fee decisions**

The lobbying for free education neatly captures the interplay between the resources of wealth and authority. The authority to decide how higher education was financed extends beyond formal state law. It encompasses appeals to legitimacy; and to political, rather than policy, documents (such as the Freedom Charter). These appeals were directed at changing state policy, law, and funding distributions. The appeals also

highlighted how wealth, especially state funding, could determine who occupied what position in the regulatory space of tuition fee decisions. With a focus on access to university education (inter alia), the Fees Must Fall protests drew a clear link between who could and could not be a student. And, therefore, who was inside or outside the regulatory space of tuition fee decisions.

Wealth (especially financial means) also cascades into and out of cognate spaces. Advocating that state funding be redistributed thus impinged on multiple overlapping spaces: particularly the ‘*other pressing social needs*’ the national government needed to keep ‘*in perspective*’. This advocacy linked to the resource of authority. Implicit in any call for redistribution was a challenge to the prevailing dispersal of the national government’s and university managers’ authority to appropriate or distribute state funds.

### **1.1. Only a public good?**

Lobbying for free education was at the forefront of certain actors’ agendas during the Fees Must Fall protests. President Zuma’s December 2017 announcement suggests that this lobbying was successful in several important respects. Several interviewees stressed, though, that the fight for free education did not begin when the Fees Must Fall protests started in October 2015:

‘ “*the call for affordable education is as old as...the Freedom Charter...since [19]94, those protests have been [happening]*” ’.<sup>791</sup>

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<sup>791</sup> Williams (fn 6) 47, citing Mr Busani Ngcaweni.

As I argued in chapter one and seven, protests around financial limitations on access to university education occurred fairly regularly during the 2000s at HD/BIs. Several interviewees noted, however, that it was only in 2015 when the protests occurred at HA/WIs that this cause was given substantial media coverage and a national profile.

The appeal to the Freedom Charter is interesting in several respects. I showed in chapter five that the Freedom Charter was not formal state law post-1994. Nor did the Freedom Charter, South Africa's 1996 Constitution, or South Africa's higher education law and policy provide for free education; at least, not in any unqualified sense. Nonetheless, '*free education is [and] had been a goal of SASCO*'.<sup>792</sup> Since SASCO was prominent on SRCs across South Africa in 2015, and participated in the broader Fees Must Fall protests, it is not surprising that the demand for free education gained prominence.

The protests which started at Wits in October 2015 were a response to Wits' proposed fee increase of 10.5% for 2016. By the time of president Zuma's October 2015 announcement, these protests had snowballed into the Fees Must Fall protests - a central demand of which was, on one reading, that fees be decreased. President Zuma's October 2015 announcement attempted to settle these protests through the implementation of a 0% fee increase for 2016. Yet even with the additional state funding associated with the 0% announcement, students would still be paying tuition fees in 2016.

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<sup>792</sup> Interviewee 60 (Oxford, 3 May 2017).

During the interregnum, student protestors' demands and rhetoric were increasingly linked to policy expectations. One example of this is that some student movements advocated explicitly for higher education to be treated exclusively as a public good; and not as a mixed private and public good. This advocacy was partly against the more general privatisation and commodification of higher education.

For instance:

*'[the] SAUS...argued that charging fees is against the spirit of the Freedom Charter of 1955...However, SAUS accepts that free education, where finances are no longer a barrier to access, is a long-term vision, and that a phased model is most likely required. Free education for the poor is the first step towards a progressive higher education system...[the] SAUS explained further that the fight is not just for free education, but for "decolonized free and quality education...a total overhaul of the current system that is inherently exploitative and exclusionary" '.*<sup>793</sup>

The SAUS claimed that the demands underpinning the Fees Must Fall protests were, inter alia, for *'the decolonisation of the education system...and the defeating of institutional autonomy'*.<sup>794</sup> For their part, SASCO *'support[ed] the complete eradication of tuition fees'*.<sup>795</sup>

Part of this argument was that if higher education was exclusively a public good, then it should be fully funded by the state. One counterpoint to this view stemmed

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<sup>793</sup> Report of the Heher Commission (fn 29) paragraphs 15 and 17.

<sup>794</sup> Ibid paragraph 19.

<sup>795</sup> Ibid paragraph 22.

from South Africa's place of space. Alongside several important public benefits provided by higher education,

*'a university degree adds much to people's earning power. In 2010, graduates earned almost two and a half times (240%) as much as matriculants, with similar other attributes (age, gender, race) being the same'.<sup>796</sup>*

Relatedly, only a minority of South Africans access higher education; with an even smaller number succeeding in higher education:

*'you're looking at a situation where...fewer than 15% of South Africans...have a degree. And even if 2 in 10 of this generation of undergraduates are in university...not all of them are going to finish...[For the] one million people in universities...there's [around] three million people in the 17-24 [age] bracket [in 2014] who are not in training, education, or employment'.<sup>797</sup>*

These dualities were some of the many puzzles presented by the Fees Must Fall protests, and their attempted settlements. Large numbers of students, or potential students, felt financially excluded from higher education. Yet the roughly 20 percent of school leavers (or 12% of an age cohort) who accessed higher education received substantially more funding from the state (even if they paid full university fees) than their peers who were not in education, employment, or training.<sup>798</sup>

Further state funding was available to poorer students. But the poorer students receiving that funding were also more likely to drop out of higher education before

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<sup>796</sup> Servaas van der Berg, 'Funding university studies: Who benefits?', in *Kagisano No. 10 – Student Funding* (CHE, March 2016) 173, 175.

<sup>797</sup> Interviewee 16 (Cape Town, 17 April 2018).

<sup>798</sup> See Figure 2.

completing their qualifications. And finally, to answer the genuine moral arguments presented by the Fees Must Fall protests, significant redistributions of wealth were necessary. However, the difficult moral trade-offs inherent in these redistributions were not addressed by the protests or the attempts to settle them.

## 1.2. Making and avoiding trade-offs

In chapter eight, I discussed how the paradigm of agency and victimhood could be applied to some of the complexities of the Fees Must Fall protests and their attempted settlements. This extends to the lobbying for free education. This lobbying was partly premised on claims of financial victimhood. For example, one of the SAUS' objections to how higher education was provided during the perpetual disequilibrium was that

*“institutions have allowed education and learning to be commodified, meaning that people get the education that they can AFFORD, not the education that they deserve”*.<sup>799</sup>

More generally, several interviewees highlighted concerns around the suitability of the learning environment students were placed in:

*“there’s a lot of sympathy towards the student cause, once the public became aware that these are the desperate conditions under which students are studying. They’re not conducive for success [and] for developing someone’s potentials and capability”*.<sup>800</sup>

However, remedying these conditions extends significantly beyond tuition fee decisions – a point perhaps evident in the sprawling demands which emerged during

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<sup>799</sup> Report of the Heher Commission (fn 29) paragraph 18.

<sup>800</sup> Interviewee 8 (Pretoria, 4 April 2018).

the Fees Must Fall protests.

One financial question this raises is: what is included in the demand for free education? For SASCO, free education extended to

*‘ “tuition, accommodation, food, books, other essential study materials or learning resources and travel” ’.*<sup>801</sup>

Both which items should fall within the provision of free education; and what each individual item encompassed; could prove contentious. Moreover, these contestations overlaid earlier contestations which had driven the shift in the NSFAS towards a student-centred model:

*‘they recognised that NSFAS’ responsibility was to receive and assess the person’s application of funding. And if the person was...within the NSFAS needy bracket, to fund [them]...The complications are how they fund that...For persons in institutional housing, how much do you pay to the institution? What do you pay to the individual for transport and living costs? Particularly if they are not in institutional housing’.*<sup>802</sup>

These difficulties carried over to president Zuma’s December 2017 announcement. The *‘fully subsidized free higher education and training’* which *‘poor and working class South African undergraduates’* would receive would

*‘include Tuition Fee[s], Prescribed Study Material, Meals, Accommodation and/or Transport’.*<sup>803</sup>

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<sup>801</sup> Report of the Heher Commission (fn 29) paragraph 21.

<sup>802</sup> Interviewee 17 (Cape Town, 19 April 2018).

<sup>803</sup> ‘Presidency Response on Heher Commission of Inquiry into Higher Education and Training | South African Government’ <<https://www.gov.za/speeches/presidency-response-heher-commission-inquiry-higher-education-and-training-16-dec-2017-0000#>> accessed 16 April 2021.

The NSFAS was tasked with administering this.<sup>804</sup> Just on transport, though:

*‘NSFAS has said up until now: transport means the cost of transport from where you live, to the town in which your institution is based. In other words, to get you to residence. Students are saying: my daily transport costs need to be covered...And those are as long as a piece of string’.*<sup>805</sup>

The bigger each individual item becomes, though; and the larger the number of items included; the greater the cost of providing free education. And therefore, the more trade-offs which would need to be made in raising and allocating the requisite state funds.

These difficulties potentially accelerated another facet of South Africa’s place of space: what Jonathan Jansen refers to as *‘the welfarisation of South African universities’*.<sup>806</sup> In chapter seven, I analysed how public universities started acting as financial institutions; at least insofar as students delayed paying their debts to a university until they could graduate. The welfarisation Jansen refers to added another function that universities were increasingly expected to perform. It included meeting all those needs deemed necessary for fostering a conducive learning environment.

However, which needs fell within this bracket; what needs within this bracket encompassed; and how this was all to be funded; had been historically contentious. In addition, the publicly funded welfare services demanded of universities were far less

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<sup>804</sup> Ibid.

<sup>805</sup> Interviewee 17.

<sup>806</sup> Jonathan Jansen, *As by Fire: The end of the South African university* (Tafelberg, 2017), 9 – 10 and 172 – 193.

available outside of universities to non-students. Put differently: there was little to no provision by the state for transport and meals, and very limited provision for accommodation, for the roughly three times as many 17- to 24-year-old South Africans who were not in employment, education or training.

Several interviewees highlighted the following bind which emerged from how president Zuma's December 2017 announcement was budgeted for. That announcement did address some of the issues underpinning the protests. Most notably, it meant that significant additional state money flowed to public universities starting from the national government's 2018 budget. However:

*'there's big questions about whether [this is] sustainable. It primarily depends on economic growth in [South Africa]'*.<sup>807</sup>

I showed in chapter seven that South Africa's economic performance had been fairly dismal from 2007 onwards. Yet the national government's primary macroeconomic policies remained premised on economic growth rates South Africa had hardly ever achieved post-1994. That alone raised serious sustainability concerns for free higher education. These concerns were amplified by two further, interrelated factors.

The first factor was the '*other pressing social needs*' which public expenditure in South Africa had to meet.<sup>808</sup> Allocation of funding to these needs or to higher

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<sup>807</sup> Interviewee 18 (Cape Town, 20 April 2018).

<sup>808</sup> EWP 3 (fn 13) paragraph 4.3.

education was a zero-sum-game, absent economic growth raising public revenue. Since South Africa's growth had been anaemic at best, increasing funding to higher education was likely diminish funding provided to the '*other pressing social needs*' in cognate and overlapping spaces.

The necessity of redistributing from other pressing social needs to higher education was the second factor which amplified the sustainability concerns:

*'you'll find some radicals who always seem to think that you can raise revenue somewhere...[But] Treasury [did] a public presentation, I think...in 2014. Sort of a fiscal choices document. And they...implied...you can either increase higher education funding, or you have [National Health Insurance], or you can increase social grants. Maybe you can...have one and a half of these options. But you can't have all three. And now one [option] has...been chosen. By virtue of a combination...of popular pressure from this slightly elite group, and political opportunism...the Basic Income Grant; which people have been lobbying for back into the 2000s...that's definitely off the table.'*<sup>809</sup>

One interviewee captured this point another way, quoting an official in the national budget office as arguing:

*'sure, I can fund your students. Which hospital would you like me to close?'*<sup>810</sup>

The ramifications of these redistributions highlight the interplay between the national government's (and university managers') authority to compile a budget and allocate spending, and the wealth which is subsequently disbursed. They speak to the broader theme I have developed in my thesis: the paradigm of responsible budgeting being cannibalised by protest-driven social activism, and '*political opportunism*'. One

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<sup>809</sup> Interviewee 38 (Johannesburg, 24 May 2018).

<sup>810</sup> Interviewee 50 (Johannesburg, 23 March 2017).

way of achieving responsible budgeting is to work through the difficult trade-offs which redistributions of finite funds impose. Insisting on social activism, however, might override this ‘working through’; instead requiring that the demands presented by the social activists be met (no matter the cost).

One interviewee saw certain social activism in Fees Must Fall as replete with the danger of not working through these trade-offs:

*‘there are too many progressives...who don’t understand trade-offs. Who don’t understand: how do you engage [in] reforms that consolidate towards a broader social justice goal...[Their actions] run the risk of not only undermining [the goal of social justice]; but [also] of creating...perverse outcomes that destroy society’.*<sup>811</sup>

Another way of analysing whether these trade-offs are navigated is to look at how actors combine the resources of organisational capacity, authority, and wealth to advance their objectives in the play of power in this regulatory space. One reading of the Fees Must Fall protests is that the requirement to work through these trade-offs was subjugated to an overarching appeal to the paradigm of social activism. One difficulty with this is that working through trade-offs

*‘is where the rubber hits the road. This is where...economist[s] have to tell people: where does the money come from?...[But analysing these trade-offs] doesn’t feature in the moral logic...these are a politically astute group of students that have a voice...they can...shake the gates of parliament...and then they get allocated R57 billion in the budget...when the child support grant...goes down in real terms, you’re not going to get a group of mothers [protesting]. Even though it affects 14 million kids. As opposed to [several*

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<sup>811</sup> Interviewee 59 (Johannesburg, 20 April 2017).

hundred thousand] *students...a lot of people don't see the trade-off at all. It doesn't feature*'.<sup>812</sup>

Another interviewee made a similar observation:

*'I spoke to a Treasury official before Fees Must Fall really won concessions. And their view was pretty clear...my view [was] that basic education is underfunded. And if anything, resources should go there. They said: sure, you're probably right. But the fact is that university students are better able to mobilise...they're based in cities. And they can disrupt the legislature and so on and so forth. And so, they're gonna get more attention. They'll get the political concessions*'.<sup>813</sup>

The ability to mobilise could trump having to justify the trade-offs imposed by what was being lobbied for; at least insofar as this mobilisation was met with sufficient *'political opportunism'*.

Another reason trade-offs were not explicitly discussed could be that Fees Must Fall was partly a challenge to the perceived paramountcy of responsible budgeting when it came to how public funds were disbursed. One way this was expressed was that financial information should not be the primary indicator of what was possible.<sup>814</sup> Similarly, students were contesting what the national government or university managers presented as the range of feasible options.<sup>815</sup> The way this was pursued, though, presented several difficulties.

One was that the costings of free education were contentious. Another was that

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<sup>812</sup> Interviewee 27 (Cape Town, 10 May 2018).

<sup>813</sup> Interviewee 38.

<sup>814</sup> See Williams (fn 6) 64 – 66.

<sup>815</sup> Ibid 67.

what revenue could be raised to meet these costs was not fleshed out explicitly:

*‘I spent some time reading some of the student proposals...they definitely all have problems...one of the most obvious problems is when it comes to revenue raising. They just say...if you raise VAT by 3%, then you get so much revenue...that’s contestable. But even if you’re right, you haven’t said anything about implications for the economy. You haven’t said anything about opportunity cost, what else this money could be used for...’*<sup>816</sup>

Even referring to certain kinds of revenue raising could be difficult. Speaking about a model that some students worked on during the protests, one interviewee indicated:

*‘I remember one of the things that we fought about is that I said...the only way I can make this [model] sustainable is through a graduate tax. But the word “tax” was offensive [to the political leaders of the protests]. So it had to be called a levy’*<sup>817</sup>

Yet generating revenue through something like a graduate tax was essential; *‘otherwise this model is just not financially sustainable’*<sup>818</sup>

Even more concerning,

*‘[one problem with some of the models was that] they don’t do the numbers. You must do the numbers, then you understand the consequences’*<sup>819</sup>

This was especially important to one interviewee, who argued that

*‘the graduate tax doesn’t come close to doing the arithmetic. The arithmetic doesn’t add up. I agree with the philosophy. But it doesn’t work’*<sup>820</sup>

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<sup>816</sup> Interviewee 38.

<sup>817</sup> Interviewee 36 (Johannesburg, 22 May 2018).

<sup>818</sup> Ibid.

<sup>819</sup> Interviewee 43 (over Skype, 6 June 2018).

<sup>820</sup> Ibid.

Another difficulty was that it was unclear whether those protesting bought into any of the models being presented by students:

*‘there was never really any ownership of those documents [published] by the students. Partly just because of the nature of Fees Must Fall...It was quite anarchic...how would one get ownership of those kinds of documents?’*<sup>821</sup>

Where some students claimed the model they were presenting had significant buy-in, other students might respond that they disagreed with key aspects of it:

*‘I am not sure that this model [carried student consent. Two people say] it does. But [another student leader] says that they [and other student activists] don’t agree with the graduate tax. So...it claims to carry...student support. But not all factions support it’*<sup>822</sup>

These difficulties add to the questions around the sustainability of implementing president Zuma’s December 2017 announcement. In addition, the last-minute nature of president Zuma’s December 2017 announcement further compromised the sustainability of what was subsequently implemented:

*‘The fact that [president Zuma] said it [in mid-December] meant he threw everything out...we had to go back and try and reconstruct a whole range of things...by December, we were finished with the budget process. We had done all our engagements with [government] departments’*<sup>823</sup>

All of those engagements had been completed so that the national government’s budget could be prepared for February 2018. This meant the time for working out what

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<sup>821</sup> Interviewee 38.

<sup>822</sup> Interviewee 43.

<sup>823</sup> Interviewee 23.

was to be cut, and from where, to fund free higher education, was severely truncated.

Moreover, in neither of 2016 or 2017

*‘did parliament; despite the fact that it got many [representations]...about how higher education should get more money. Including [from] the portfolio committee [and] the [DHET]. It did not change the allocation that was made to Higher Education and Training’.*<sup>824</sup>

President Zuma’s December 2017 announcement meant that more money did subsequently flow to DHET. However, the questions around the sustainability of implementing that announcement point to a problem down the line. Should the national government face funding constraints later, a series of damaging trade-offs would emerge.

Most immediately, would the implementation of free education be scaled back in line with what funds were available? Or would further cuts be made to the funding for ‘*other pressing social needs*’ to maintain free education? The former has a high risk of sparking renewed protests by students. The latter would perpetuate the cascade of funds out of cognate spaces, into this regulatory space.

Either way, implementing free education following president Zuma’s December 2017 announcement presented an unjust solution to a problem which protestors had framed in terms of the injustices they were suffering:

*‘[free education] isn’t the simplistic story of a heroic victory...the way it was resolved in that moment is very complicated. And it’s compromised. The single*

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<sup>824</sup> Ibid.

*biggest line of contestation between people and the state in South Africa is over urban land...Housing and urban land are critical questions for millions of people. To cut that budget, not to mention the budget for schools, to fund university education...It's progressive insofar as...access to university is guaranteed for a lot of people...But the way in which it's been done...is really problematic'.<sup>825</sup>*

### **1.3. 'Pushing on doors'**

One interviewee described what happened during Fees Must Fall using this imagery:

*'I've always used [this] allegory because I think it works for the students. They'll try push on the door. If it opens, then they'll march in. If it doesn't, then they stop and they regroup and they try somewhere else'.<sup>826</sup>*

This allegory provides one way of accounting for the growing list of demands which emerged during Fees Must Fall; both on the state, and on universities. I have also argued that the regulatory space of tuition fee decisions overlapped significantly with several other spaces – including basic education, and higher education. Students pushing on a door in the regulatory space of tuition fee decisions could march into a cognate space if that door was opened; in effect, organising actors and issues into and out of two spaces.

One way of illustrating this is by following the funding requirements which attached to any demands which were met. As I showed in section 1.2 of this chapter, meeting students' demands meant redistributing how funds cascaded into and out of cognate spaces. These redistributions had immediate and longer-term impacts:

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<sup>825</sup> Interviewee 6 (Johannesburg, 29 March 2018).

<sup>826</sup> Interviewee 2 (Johannesburg, 13 March 2018).

*‘how do you start a new budget process, when you’ve got a claim [viz. free education] already on any resources that might be available?’<sup>827</sup>*

I outline three redistributions as examples of this.

Lobbying for free education by politically affiliated student organisations, including at ANC elective and policy conferences, resulted in a series of changes to how students were funded. These included increasing the portion of funding that was made available by the NSFAS as a bursary rather than a loan; and creating the option for students’ final year of study to be funded entirely as a bursary. To fund this progressive realisation of free education,

*‘Treasury gave the [NSFAS around an additional] R1.6 billion [in 2009]...But Treasury had to take that R1.6 billion...from somewhere...It came from the school nutrition fund’.<sup>828</sup>*

The school nutrition fund had been launched post-1994, and was supposed to ensure that school children, particularly from poorer backgrounds, were given meals at school. Lobbying for free education, though, contributed to a door being pushed open for university students. This door connected the regulatory spaces of tuition fee decisions, higher education, and basic education.

Similarly, the additional funding which followed president Zuma’s 0% announcement in October 2015 cascaded into the regulatory space of tuition fee

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<sup>827</sup> Interviewee 23.

<sup>828</sup> Interviewee 40 (Pretoria, 30 May 2018).

decisions from cognate spaces. The National Skills Fund (‘NSF’) had been established in South Africa in 1999, under the Skills Development Act 1998.<sup>829</sup> Its purpose was

*‘to fund skills development...when we think of skills development, we think of TVETS...you think of artisans...of internships, learnerships; those types of things. Not universities’.*<sup>830</sup>

From 2009, though, the skills development function (including the NSF) was shifted from South Africa’s Department of Labour, to the DHET. To cover the 0% announcement, *‘a lot of th[e NSF’s] money was funnelled into universities’.*<sup>831</sup> A door between public universities and the rest of the higher education sector had therefore been pushed open.

Finally, to fund president Zuma’s December 2017 announcement, new revenues were raised and large amounts of revenue were redistributed. South Africa’s VAT rate was increased by 1% in the 2018 budget. This potentially opened a door between how consumption was taxed in South Africa, and how universities were funded - although this link was not made in the national government’s budget documents.

Similarly, the 2018 budget documents noted cuts to funding in other spaces without explicitly linking those cuts to funding free education. However, the links could be made, suggesting several doors were pushed open:

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<sup>829</sup> ‘Department of Higher Education and Training - NSF’ <<https://www.dhet.gov.za/SitePages/NSF.aspx>> accessed 19 May 2021.

<sup>830</sup> Interviewee 39 (Pretoria, 25 May 2018).

<sup>831</sup> Ibid.

*‘Transfers to the South African National Roads Agency Limited, the South African Revenue Service, the Passenger Rail Agency of South Africa and the four water boards were cut. Large provincial...grants such as the school infrastructure backlog grant, the education infrastructure grant, the human settlements development grant and the provincial roads maintenance grant were reduced. Similar cuts were made to local government grants, including the municipal infrastructure grant, the integrated national electrification programme grant, and the public transport network grant. These cuts will delay the completion of a number of infrastructure projects’.*<sup>832</sup>

Even with all of these doors ajar, the main issue for public universities and for the NSFAS continued from the perpetual disequilibrium, into and after the interregnum: *‘there was not enough money to fund all’* the demands being made, including for free education.<sup>833</sup> Without substantial economic growth, further funding for universities and for free education could be acquired only through continuing to push doors open. This might result in more money flowing to higher education; but at the cost of there being less money made available to *‘other pressing social needs’*.

## **2. One fee decision?**

I showed in chapter six that tuition fee decisions announced what the aggregate fee increase for the following year would be. I argued that these decisions were regulated by a fragile web of calibrations during the perpetual disequilibrium. This web was disrupted by the Fees Must Fall protests and the attempts to settle the ensuing disturbances. New categories of students deemed deserving of public support emerged, affecting who paid what fees.

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<sup>832</sup> National Treasury, Republic of South Africa, *Budget Review 2018*, 53.

<sup>833</sup> Interviewee 40.

I will answer three questions which arose. First, following the emergence of new categories of deserving students, was it still the case that a single tuition fee decision was being made and implemented? Second, did the attempted settlements change how tuition fee decisions interacted with issues of access to, and success in, higher education? Third, and relatedly, did the attempted settlements – especially the implementation of free education – deal with what had driven the Fees Must Fall protests? Answering these questions fleshes out further the question of sustainability which I discussed in section 1.2 of this chapter. It also provides initial insight into how the interregnum might evolve.

### **2.1. New categories of financial desert**

While universities announced one tuition fee decision, even during the interregnum, implementing that decision raised questions of who paid tuition fees, and how. The expansion of the NSFAS during the perpetual disequilibrium meant that a growing number of poorer students accessed higher education. Albeit with the challenges I outlined in chapter seven: a portion of financial aid was provided as a loan; average, not full, cost of study was covered; and so forth.

A primary category of financial desert during the perpetual disequilibrium was the mythical NSFAS cut-off of family income up to R122,000.00 per annum. How the NSFAS' funds were disbursed during the perpetual disequilibrium meant that tuition fee decisions tied together university managers, the NSFAS, the national government, and poorer students. Several factors rendered these interactions increasingly fractious.

The main issue was that the funds available to the NSFAS were perennially insufficient to cover all eligible students. Furthermore, the mythical cut-off of R122,000.00 did not keep pace with inflation. These and other issues contributed to the shift in the NSFAS to a student-centred model. That, too, encountered several difficulties; partly because of the very short time frame in which the shift took place.

The failure to address all of these issues became increasingly combustible, partly contributing to the outbreak of Fees Must Fall protests in October 2015. Insufficient financial aid meant that making and implementing a tuition fee decision became increasingly likely to trigger student protests. The likelihood of students protesting was also enhanced by the fact that large fee increases, particularly at HA/WIs, placed growing pressure on an additional category of students: those who were too rich to qualify for financial aid, but too poor to continue paying ever increasing tuition fees.

Two new categories of financial desert emerged during the interregnum, partly in response to these issues. These categories highlighted various attempts to tailor how publicly funded student financial aid was distributed. Perhaps surprisingly, the first major attempted settlement of the Fees Must Fall protests was untailored. President Zuma's October 2015 announcement of a 0% fee increase for 2016 applied to all students, regardless of whether they had been experiencing financial difficulties in paying tuition fees. Subsequent interventions began fleshing out cut-off points for further public funding of student financial aid.

The first category to emerge was students who would receive ‘gap’ funding. Some of the students in this category were referred to as the ‘missing middle’:

*‘students whose families earn above the NSFAS threshold but who are unable to support their children to access higher education’.*<sup>834</sup>

The MHET’s September 2016 announcement set out who fell within this category:

*‘children of all poor, working and middle class families – those with a household income of up to R600 000 per annum’.*<sup>835</sup>

None of those falling within this category would pay a tuition fee increase in 2017.

This had several implications. Universities could make and implement tuition fee decisions for 2017, and students would be expected to pay tuition fees in 2017. Gap funding would be available to all the NSFAS and missing middle students, so these students would not pay any fee increase in 2017. Missing middle students would, though, have to pay the same tuition fees that they had paid in 2015 and 2016. This was because the 0% announcement had held in place 2015 fee levels, for 2016. The gap funding made available to the missing middle was only in respect of fee increases above 2015 and 2016 fees. The NSFAS students would have all of their fees covered through a combination of gap funding and the funding they typically received from the NSFAS; subject to the prevailing issues with NSFAS.

In making fee determinations, missing middle students were, therefore, another major actor added to the mix of university managers, the NSFAS, the national

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<sup>834</sup> MHET, Dr BE Nzimande, ‘Statement on 2017 Fee Support to Students from Poor, Working and Middle Class Families’ (Pretoria, 19 September 2016), 5.

<sup>835</sup> Ibid.

government, and poorer students. There was an application and certification process through which gap funding was accessed. Gap funding was also a new item appended to the planning and funding framework.

The second category emerged in president Zuma's December 2017 announcement. This announcement reinforces the arguments I made in sections 1.2 and 1.3 of this chapter about trade-offs and pushing on doors. All of the ensuing funding commitments which stemmed from president Zuma's December 2017 announcement were to be covered by '*increas[ing] subsidies to universities from 0.68% to 1% of the GDP over the next five years*'.<sup>836</sup> Because this increase is expressed as an increased percentage of GDP, the additional funding flowing to universities could only be a zero-sum-game for '*other pressing social needs*'.

President Zuma's December 2017 announcement extended the provision of gap funding:

*'As a result of th[e] substantial increase in subsidy to universities, there will be no tuition fee increment for [missing middle] students...during the 2018 academic year'*.<sup>837</sup>

Thus missing middle students would pay 2015 tuition fees in 2015, 2016, 2017, and 2018; with public funds covering any tuition fee increases for this group in 2017 and 2018.

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<sup>836</sup> Ibid fn 803.

<sup>837</sup> Ibid.

More radical was president Zuma's determination of the threshold for who would qualify for free education. Where the MHET had in 2016 sought to aid children from poor, working and middle-class families, President Zuma focused in 2017 on '*Poor and Working Class Students*'. President Zuma defined these as

*'currently enrolled TVET Colleges or University students from South African households with a combined annual income of up to R350 000" by 2018 academic year'.<sup>838</sup>*

Students in this category who were also '*in their first year of study*' in 2018 would receive '*fully subsidised free higher education and training*'.

This had multiple implications. The funding these students received would be entirely in the form of a bursary, rather than a loan. It would cover the full, not average, cost of study (including the contentious items I discussed in section 1.2 of this chapter). In addition,

*'NSFAS packages already allocated to existing NSFAS students in their further years of study will be converted from loans to 100% grants effective immediately'.<sup>839</sup>*

However, those packages would have been offered and governed under the pre-December 2017 dispensation.

Alongside the addition of gap funding, the NSFAS, national government, and university managers would have to deal with two categories of NSFAS students: those who were already students, funded at average cost of study and falling under the

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<sup>838</sup> Ibid.

<sup>839</sup> Ibid.

R122 0000 cut-off; and from 2018, new students who fell under the R350 000 threshold and therefore qualified for '*fully subsidised free higher education and training*'. By the end of the interregnum, the fragile calibrations regulating tuition fee decisions had therefore become substantially more convoluted.

## **2.2. Revisiting university access and success**

One of the major uncertainties throughout the interregnum was the ad hoc and short-term nature of each attempted settlement. In each year of the interregnum, key facets of how tuition fee decisions could be made, implemented, and paid were contested. Each year saw public announcements by prominent actors other than university councils; with each announcement attempting to settle at least some of the issues raised by the Fees Must Fall protests.

President Zuma's December 2017 announcement potentially provided a more durable settlement; particularly since it was implemented in the national government's 2018 budget. Moreover, its generous promise might resolve some of the issues around financial exclusions which had contributed to Fees Must Fall. The announcement proclaimed that

*'[t]his policy intervention will enable government to extend fully subsidised free higher education to youth from well over 90% of South African households...from 2018 onwards, eligible South African children of the unemployed, social grant recipients, South Africans earning below a minimum wage, domestic workers, farm workers, mine workers and entry level civil servants such as teachers, nurses, policemen, municipal workers, security*

*guards, refuse collectors and informal traders amongst others will now access public universities...for free’.*<sup>840</sup>

In light of what I outlined in chapter one about university access and success, how plausible is this proclamation? A part of the answer to this question extends beyond the scope of my thesis, primarily because it would require data from after the interregnum. There is some earlier data, though, which can be drawn on. I argue that this earlier data suggests this proclamation borders on being disingenuous.

The announcement’s core claim was that ‘*well over 90% of South African households*’ fall within this definition of ‘poor and working class’. One interviewee outlined one set of arguments for why this categorisation was justifiable:

*‘the income and expenditure household survey, Statistics South Africa’s data. SARS income tax tables data. [And] pronouncements by National Treasury...will tell you...that 95% of South African wealth...is in the hands of the top 10% of South Africans. By earnings. Higher education data will tell you that...children of families in the bottom 90% of South African families constitute about 40% of the student population...there’s a gross underrepresentation of children of the bottom 90% of South African families. And a gross overrepresentation of...elite children of the top 10%’.*<sup>841</sup>

Yet there are several difficulties in using these figures to justify the claim that ‘*90% of South African households*’ would be able to access free higher education and training; rather than just falling within that sector of the income distribution to whom the policy had been extended. First, as I argued in chapter one, only 12% of the entire

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<sup>840</sup> Ibid.

<sup>841</sup> Interviewee 33 (Johannesburg, 18 May 2018).

age cohort who could have left school in 2008, accessed university education between 2009 and 2014. This low number stemmed partly from the fact that only 60% of the cohort who started school together went on to write the school-leaving exam. It also arose from the fact that fewer than 22% of those who wrote the school-leaving exam ultimately enrolled in university.<sup>842</sup> Put differently, 88% of the age cohort could not have benefited from the December 2017 announcement, because they lacked the academic qualifications necessary to get into university.

Second, and relatedly, I noted that passing the school-leaving exam and going on to access university education was substantially skewed in favour of students who had attended schools in wealthier areas. Arguably, the *'overrepresentation of...elite children'* from South Africa's wealthiest families traced back to outcomes from schools. This is why several interviewees argued that basic education was the sector which should be getting greater support, including more government funding; if the goal is to address these inequalities.

Third, the threshold set for who qualified as poor and working class was contentious:

*'the national poverty line is probably a bit higher now because of inflation. [It] was R55 000.00 a year, household income...and more than 50% of South Africans were living below that national poverty line. So when you talk about poor and working class up to R350 000, who are you talking about?...the distributional implications...mean...it's actually regressive. You're funding people who are much better off than the vast majority of South Africans'*.<sup>843</sup>

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<sup>842</sup> See fns 33.

<sup>843</sup> Interviewee 38.

Cumulatively, these difficulties suggest that it is unlikely that president Zuma's December 2017 announcement would benefit 'well over 90% of South African households'. Whether the announcement changed university success rates is a question only future data could answer.

For all the storm and stress of the 2015 to 2017 Fees Must Fall protests, it seems that a fundamental tenet of higher education policy from the beginning of the perpetual disequilibrium had not been adequately rebutted (or perhaps even engaged with):

*'fee-free higher education for students is not an affordable or sustainable option for South Africa. The knowledge and skills acquired in the course of achieving...qualifications generate significant lifetime private benefits for successful students as well as long-range social benefits for the public at large. Although higher education institutions admit an increasingly large portion of students from poor families, students from middle-class and wealthy families still tend to be disproportionately well-represented. For all these reasons, the costs of higher education should be shared equitably between public and private beneficiaries.'*<sup>844</sup>

### **2.3. A lasting settlement?**

If president Zuma's December 2017 announcement did not significantly change university access and success, then it seems unlikely that the settlement it sought to impose would last. This suggests that the final attempted settlement of the Fees Must Fall protests suffered from major sustainability concerns. These concerns suggest that while president Zuma's December 2017 announcement may have shifted certain dynamics operating in the interregnum, it did not replace the interregnum with a new equilibrium. Three further points reinforce this conclusion, bolstering the view that this

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<sup>844</sup> EWP 3 (fn 13) paragraph 4.7.

regulatory space was likely to remain unstable and volatile. These points provide partial answers to the question: did president Zuma's December 2017 announcement address the underlying drivers of the Fees Must Fall protests?

First, the demand that fees fall encompassed a sprawling array of issues. These ranged from the cost of university education; to institutional culture, and more general frustrations within and with South African society. One announcement could not address all of these issues. It could promise to redistribute wealth towards certain actors. But any redistributed wealth had to be taken from, and doors pushed open into, cognate spaces.

Second, president Zuma's December 2017 announcement was explicitly focused on '*poor and working class South African undergraduate students, starting in 2018 with students in their first year of study*'. Noticeably excluded from this are all students in their second year of study and up; as well as postgraduate students. Yet students participating in the 2015 to 2017 Fees Must Fall protests would, by virtue of already being students, fall in this excluded group; rather than the group likely to gain most from president Zuma's December 2017 announcement. The NSFAS packages that had previously been allocated to existing students would be converted from loans to bursaries. But that was a notably lesser benefit than '*fully subsidized free higher education and training*'. This suggests that this regulatory space was likely to remain combustible.

Third, several interviewees argued that Fees Must Fall had been driven

predominantly by missing middle, rather than poor and working class, students. One reason given for this view was the fact that the 2015 to 2017 Fees Must Fall protests had begun at HA/WIs. These were universities which, on the whole, had wealthier student cohorts. They also charged significantly higher tuition fees. There is an argument that the 2015 Fees Must Fall protests formed the most recent iteration of a struggle that had been ongoing at HD/BIs during the 2000s. I have two reasons for arguing that this link to struggles at HD/BIs was less than clearly articulated during the 2015 to 2017 Fees Must Fall protests, though.

One reason is that the protests began at Wits, in October 2015; and proceeded from there. There may well have been attempts to acknowledge the historical struggles at HD/BIs. Those attempts, though, do not appear to be the dominant way in which the narrative of Fees Must Fall was publicised:

*‘There’s a couple of people who stress that [Fees Must Fall was] not new. But generally speaking, there was no interest in what had happened before. And a...sense was very strongly cultivated, by some people, not uniform; that this was a new generation with a unique political understanding...I think those struggles that had happened before in working class black spaces in South Africa were often silenced in that movement. They were not taken seriously. They were not acknowledged. There was no attempt to connect to them...[Although] there are most certainly exceptions [to this]’.*<sup>845</sup>

Another reason was that students at HD/BIs faced a different set of issues to some of the demands presented during the Fees Must Fall protests. One interviewee who had worked at an HD/BI described how

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<sup>845</sup> Interviewee 6.

*'the students at [the HD/BI] said to me that the struggle for free education isn't our struggle. It's the struggle of historically white campuses...that doesn't mean that students don't join the struggle...Although there was significant participation at historically black universities, [my guess is that the struggles for free education were] really driven by the agenda set at historically white universities. By the students that were there'.<sup>846</sup>*

In a similar vein, another interviewee who worked at an HD/BI stated that

*'we were still getting NSFAS...and government support. The majority of our students...did not feel the same heat as [those at HA/WIs]. Because...the Fees Must Fall movement was essentially a middle- and upper-class cohort movement. Not a movement of the poor...Look at...who drove it. Look [at] where it originated. Look [at] who the leaders were. Look [at] which universities were involved...You did not get the same impetus, the same vehemence and support for the Fees Must Fall movement at [this HD/BI] or elsewhere. They were actually bystanders...Their needs were not at the forefront of the movement'.<sup>847</sup>*

Both groups of students – the poor and working class, and the missing middle – had grievances which could ignite subsequent protests. Since it is unlikely that president Zuma's December 2017 announcement addressed both sets of grievances, it seems unlikely that this regulatory space would gravitate towards a more stabilised equilibrium over the longer term. Whatever amelioration president Zuma's December 2017 announcement did provide was dependent on increased funding continuing to flow into higher education, and to universities. Moreover, this amelioration was dependent on the NSFAS', university managers', and the national government's capacity to implement the policy shifts which followed the announcement.

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<sup>846</sup> Interviewee 20 (Pretoria, 26 April 2018).

<sup>847</sup> Interviewee 12 (East London, 12 April 2018).

### **3. Destabilised calibrations**

Not only were the attempted settlements unlikely to resolve fully what had led to the 2015 to 2017 Fees Must Fall protests; but these interventions also created new disruptions and further frayed existing calibrations in the regulatory space of tuition fee decisions. They enhanced the uncertainty of the interregnum by introducing the uncertainties inherent in introducing any new policy to a regulatory space that was already replete with tensions and contestation.

#### **3.1. Ad hoc announcements**

In chapters four, I highlighted that South Africa was likely to face biting resource constraints post-1994. It was imperative that the far-reaching social activism pursued by the national government in its policies acknowledge and respond to these constraints. Failing to appreciate these constraints could lead universities specifically, and South Africa more generally, into a stalemate in which key actors found themselves constantly having to make do with less.

I have argued that the protest-driven social activism pursued in higher education increasingly cannibalised responsible budgeting, rather than acknowledging and attempting to avert these dangers. In section 2.2 of this chapter, I gave the example of policy concerns about the sustainability and affordability of fee-free higher education

largely being side-lined.<sup>848</sup> The lobbying for free education and the attempts to settle the Fees Must Fall protests add further poignancy to this regulatory space by disregarding policy warnings from the beginning of the perpetual disequilibrium.

One pertinent warning had been that

*‘[w]hile it is possible to achieve rapid enrolment growth without extra expenditure, the penalties for doing so are harsh’.*<sup>849</sup>

The dire circumstances numerous underfunded students found themselves in at HA/WIs and HD/BIs prior to the Fees Must Fall protests are an example of these *‘harsh penalties’*. Similarly harsh penalties could arise from any deficiencies in the implementation of *‘fully subsidized free higher education and training’*. Furthermore, these penalties could lead to new doors being opened into, and funds flowing out of, cognate spaces.

The likelihood of the implementation of *‘fully subsidized free higher education and training’* falling short of what had been promised was enhanced by how it (and the other attempted settlements of the protests) had redispersed the resources of authority, organisational capacity, and wealth. President Zuma’s October 2015 and December 2017 announcements are clear instances of this. For each announcement, student protests accelerated the timeframe in which free education was to be provided; substantially beyond any progressive realisation of free education through slowly and steadily expanding and enhancing what the NSFAS offered. Each announcement

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<sup>848</sup> See fn 844.

<sup>849</sup> EWP 3 (fn 13) paragraph 4.4.

followed lobbying through protest-driven social activism, combined with political opportunism. Two inter-connected difficulties arose for the implementation of each announcement.

First, the announcements redispersed authority, organisational capacity, and wealth without engaging with the potentially numerous unintended consequences which might follow. In one sense, the Fees Must Fall protests had directly sought a redispersal of these resources. One problem, though, was that this redispersal risked undermining the longer-term capacity of key actors to meet the demands being made. For example, both of president Zuma's announcements appear to ignore the budgeting process which the national government had already followed prior to each announcement. Yet each announcement carried substantial funding implications.

This disruption of established processes risked compromising the capacity of these processes and the actors who participated in them to meet the demands of protesting students. Significant authority had arguably been redispersed to president Zuma; especially the authority to facilitate the overruling of prior tuition fee decisions, and to overrule the national government's budgeting process. Although students initially benefitted from this redispersal, there was no guarantee it would continue operating in their favour. Furthermore, the authority and organisational capacity of university managers and the national government had been diminished in certain respects; even if university managers access to public wealth had increased.

University managers and the national government were key actors in higher education – especially in the regulatory space of tuition fee decisions. Diminished authority and organisational capacity undermined their capacity to run universities and the higher education sector; and, therefore, to contest and implement policy and regulation. Both what redispersals took place, and how, could result in lasting damage to key actors and institutions:

*‘In the absence of moral leadership at the centre of government and through a woeful misreading of the anti-colonial literature, public universities have been made the singular targets of a retaliatory violence for the ills of society and a revolution that never happened. The great irony of this misguided violence is that the blame for the enduring and systemic effects of apartheid has been laid at the doors of the very institutions [- fragile institutions -] that could have been harnessed to overcome them’.*<sup>850</sup>

Second, and relatedly, the crisis-driven acceleration of policy implementation unleashed damaging knock-on effects. The Fees Must Fall protests and their attempted settlements overlaid existing higher education policy implementation and previous pivots. Some of these pivots – the reconfiguration of public universities, shifting the NSFAS to a student-centred model – were still unfolding when the interregnum commenced. The attempted settlements added additional requirements to what actors still grappling with earlier policy changes were expected to do.

### **3.2. Systemic knock-ons**

Two main actors affected by these systemic knock-ons were the NSFAS, and university administrators. The challenge for the NSFAS was that it was placed at the centre of

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<sup>850</sup> Jansen, fn 806, 249.

administering the *'fully subsidized free higher education and training'* announced by president Zuma in December 2017. That announcement was made two months before a new academic year began.

In chapter seven, I discussed the significant financial and administrative issues the NSFAS faced as recently as 2009. In addition to addressing those issues, the NSFAS was tasked with shifting to a student-centred model from October 2013. This shift had started in January 2014 as a pilot. Instead of completing the pilot and working through the issues it presented, *'a lot of political pressures; pressure from students'* was exerted to accelerate and expand the roll-out of the student-centred model:

*'Since the pilot in 2013, 2014...there was a lot of system problems...in terms of implementation...it was a very volatile...period...the decision...at the NSFAS board meeting after the [Higher Education Transformation Summit in October 2015] was based on [students'] call [to] expand [the student-centred model] to all universities... it was a terrible implementation'.<sup>851</sup>*

Barely two years later, president Zuma's December 2017 announcement placed the NSFAS at the centre of an entirely new system of *'fully subsidized free higher education and training'*. At the time of the December 2017 announcement, the NSFAS was still grappling with multiple issues; including resolving how university managers (especially financial aid officers) interfaced with the NSFAS, and how universities' and the NSFAS' IT systems interfaced. These issues were then compounded by practical and administrative oversights of president Zuma's December 2017 announcement:

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<sup>851</sup> Interviewee 40.

*'you had already set up your system, to work on [NSFAS] eligibility of 122. And now you have two funding models – [122 and 350]...you've not built a system to acknowledge two funding models. You have not built an application [process] that acknowledges two funding models. You didn't know that you needed to do that in the first place! In itself, that is a serious departure [for] a big machine. Remember, this is national...It is a lot harder to turn a big system around'.*<sup>852</sup>

University managers were also caught up in these changes, along with the more general changes to the '*codes*' which had governed how universities were governed.<sup>853</sup> Similarly, how tuition fee decisions were made and implemented was altered: including through universities and university managers being expected to allow for higher levels of student indebtedness to institutions.<sup>854</sup>

University managers were therefore confronted with a growing variety of issues, during an increasingly volatile period. These included ancillary matters which arose during the interregnum – such as disciplinary and criminal proceedings involving students. This expansion of responsibilities undermined university managers' capacity to focus on other aspects of maintaining and running their institutions. Adding the implementation of '*fully subsidized free higher education and training*' to these responsibilities, two months before a new academic year began, risked pushing the entire system to breaking point.

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<sup>852</sup> Interviewee 28 (Cape Town, 11 May 2018).

<sup>853</sup> Interviewee 19 (Cape Town, 23 April 2018).

<sup>854</sup> Ibid, and interviewee 1 (Johannesburg, 12 March 2018).

One further concern links back to the questionable sustainability of the free education announced in December 2017. A potentially perverse outcome of that announcement was that other sources of funding which had been available to students dried up:

*‘government...calculated its budget based on how many people need financial aid. But they assumed that all of the financial aid that was currently coming in from corporates and foundations would continue. And even from government departments. Many government departments provide bursaries...Now, those government departments and the corporate sector and foundations are saying: well, government is covering it now. Why should we carry on covering it?’*<sup>855</sup>

There was a more concerning, broader danger that came out of policy shifts being imposed at the last minute:

*‘you can do damage to a sector like this, which you don’t recover from just like that. It’s not just flick...a switch and...we’re all back to normal...the unintended consequences [is that] everything is not fine in the administration of...university[ies]...if everything is not fine, then students will ultimately suffer’*.<sup>856</sup>

The disruptions unleashed during the interregnum destabilised multiple processes: from the governance of universities, to how the national government compiled its budget. For university managers, the spectre of direct fee regulation also came to the fore.

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<sup>855</sup> Interviewee 18.

<sup>856</sup> Interviewee 23.

### 3.3. The spectre of fee regulation

Direct fee regulation became increasingly likely because of both the outbreak of the Fees Must Fall protests, and because of how attempts to settle the protests were implemented. In 2016,

*‘the [MHET] asked for advice from the CHE firstly regarding the fee increases for 2017...the other major piece of advice was on fee regulation, going forward: what type of procedures could be introduced...to regulate fees in the higher education sector?’*<sup>857</sup>

The move towards fee regulation received added impetus from the increased public funds flowing to universities because of the October 2015, September 2016, and December 2017 announcements.

President Zuma’s December 2017 announcement, in particular, shifted how fee regulation was approached:

*‘fee regulation has not been on the table until now. It’s being talked about now. It’s not yet on the table, but it’s inevitable that it’s going to come’*.<sup>858</sup>

This inevitably arose from the increased public funding required to realise *‘fully subsidized free higher education and training’*, and the different fees which universities remained authorised to charge throughout the interregnum:

*‘we’ve now got the free education for the poor and working-class announcement...The government...[is] trying to make it clear that the poor and working class will pay fees. But they’ll get a bursary to cover them...what is the fee they’re going to cover?...It’s open to discretion...[And] that’s simply not sustainable. The R55 billion which has been put in the budget for the three years to pay for the 16<sup>th</sup> of December statements. Is almost certainly not enough to pay the bursaries, under this scheme, at the current fee levels...if you then say:*

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<sup>857</sup> Interviewee 39

<sup>858</sup> Interviewee 17.

*universities are free to set their fees, and...their fees will be covered by a bursary for those who are poor and working class...you have...a blank cheque, which the Minister of Finance has to honour'.<sup>859</sup>*

One possibility mooted by several interviewees was that HD/BIs could, under the new dispensation, significantly raise their fees - with these fees being paid by national government. HD/BIs tended to have poorer student bodies, lower fee bases, and lower fee increases; compared to HA/WIs. One reason for this had been that their poorer student cohorts could not afford higher fees, especially given the NSFAS' funding constraints. If, however, the national government was now promising to pay whatever fees poor and working-class students were charged:

*'the obvious thing to do is...up your fee to the...highest [level]...[most] of your students are covered by the [new] policy. So...you...double your revenue; you have no fee debt; and your fee collection is simply a matter of sending an invoice to the government'.<sup>860</sup>*

The spectre of fee regulation was concerning for university managers, though, on at least two fronts. It could constrain institutional autonomy. And, relatedly, it could shape how universities were able to differentiate themselves and their academic offerings, including by increasing pressures to standardise. More broadly, the spectre of fee regulation shifted which calibrations might regulate tuition fee decisions. Depending on what regulations were promulgated, universities could find their already constrained discretion over tuition fees removed entirely. Or, at least, substantially altered.

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<sup>859</sup> Ibid.

<sup>860</sup> Ibid.

## Conclusion

The 2015 to 2017 Fees Must Fall protests and attempts to settle them pushed open doors between cognate regulatory spaces. Actors and issues were organised into and out of the regulatory space of tuition fee decisions and the spaces with which it overlapped. But the trade-offs inherent in this reorganisation tended to be pushed into the background. This benefited certain categories of students in higher education, at the expense of the '*other pressing social needs*' which needed to be kept '*in perspective*'.

Even with additional wealth cascading into the regulatory space of tuition fee decisions, serious stability and sustainability concerns remained. The fraying calibrations which had regulated tuition fee decisions during the perpetual disequilibrium were fundamentally disrupted. Furthermore, the wealth and organisational capacity of several key actors (the NSFAS, the national government, and university managers) was being sapped. All without fully resolving the issues which had sparked the Fees Must Fall protests. The ramifications of the interregnum enhanced the spectre of more explicit fee regulation. However, there remained a danger that any further interventions would cause lasting damage to the regulatory space of tuition fee decisions and the spaces with which it overlapped.

## CHAPTER 10

### A collapsing space?

*‘...authority is always there to be laughed at. There is always room for one more custard pie’.*<sup>861</sup>

President Zuma’s December 2017 announcement is the last intervention in the time period my thesis focuses on. It could be construed as an attempt to settle the disruptions of the 2015 to 2017 Fees Must Fall protests. Yet it also set in motion multiple new processes, including revising the national government’s budgeting process and changing how the NSFAS operates. These new processes could feed into further disruptions in this regulatory space; stimulating new interactions. How these new interactions were calibrated could bolster the regulation of tuition fee decisions. Alternatively, these new interactions might further fray the fragile calibrations operating in this space.

One important change flowing from president Zuma’s December 2017 announcement was the enhanced spectre of fee regulation. It moved the discussion of regulating fee decisions from being not yet on the table, to *‘inevitable’*.<sup>862</sup> This inevitability arose from a combination of factors specific to the 2015 to 2017 Fees Must Fall protests, and their settlements. That combination of factors combined with earlier impetus to regulate university councils’ fee determinations more directly and explicitly.

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<sup>861</sup> George Orwell, ‘Charles Dickens’ in *George Orwell: Essays* (Penguin Books, 1994) 35, 75.

<sup>862</sup> Interviewee 17 (Cape Town, 19 April 2018).

For instance, the government's need to consider '*ways of controlling fee increases*' was flagged in preliminary government policy documents in 2013.<sup>863</sup> More tellingly, the MHET requested in March 2016 that

*'the [Council on Higher Education ('CHE')] provide "advice on a framework for the regulation of fees in Higher Education".'*<sup>864</sup>

This advice was sought when a ministerial task team was already considering '*financial aid reform and the funding of the "missing middle"*', and the Heher Commission had commenced its inquiry into '*the feasibility of fee-free higher education*'.<sup>865</sup>

On 10 April 2017, the CHE provided the MHET with its advice on '*a framework for the regulation of fees in Higher Education*'. The CHE considered four models for regulating fees: the government (or a regulatory body) capping fees; some determination of the maximum share of university revenue which fees could comprise; setting a fixed fee across the entire system; and a sliding scale model in which differentiated fees are charged.<sup>866</sup> Echoing my emphasis on the centrality of the place of space,

*'the CHE found that the financing of higher education, including models for regulating tuition fees, in any single country, is deeply influenced by particular histories, cultures, and often by the dominant political and ideological currents of the moment'.*<sup>867</sup>

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<sup>863</sup> White Paper for Post-School Education and Training (November 2013), 37.

<sup>864</sup> Report of the Heher Commission (fn 29) para 911.

<sup>865</sup> *Ibid* para 912.

<sup>866</sup> *Ibid* para 919.

<sup>867</sup> *Ibid* para 920.

In making its recommendations, the CHE noted the challenges prospective students faced in accessing and succeeding in higher education in South Africa.<sup>868</sup> It recommended three options:

establishing ‘*a new independent regulatory structure [to] set fees for all universities*’;

having a specialist committee of an existing structure (such as the CHE) ‘*act as a neutral facilitator of annual fee negotiations between the [DHET] and universities*’; or

making ‘*the regulatory framework part of the [DHET’s] enrolment planning process*’.<sup>869</sup>

In addition, the CHE noted (inter alia) that fee regulation:

‘*should be undertaken as a consultative process*’; and

‘*needs to be supported by the relevant parties first before the more technical work of developing guidelines and criteria can be undertaken*’.<sup>870</sup>

As much as the spectre of fee regulation was enhanced, this suggests that implementing a new or amended regulatory regime was some time away. Consultations and buy-in were needed, at least if similar problems to those which had plagued NSFAS’ shift to a student-centred model were to be avoided.<sup>871</sup> At the same time, something had to be done to address the ‘*blank cheque*’ South Africa’s Minister of Finance might otherwise have to honour following president Zuma’s December 2017 announcement.<sup>872</sup>

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<sup>868</sup> Ibid para 922.

<sup>869</sup> Ibid para 924.

<sup>870</sup> Ibid paras 926.3 and 926.4.

<sup>871</sup> Cf. fns 589 - 590.

<sup>872</sup> See fn 859.

Two interviewees captured the added urgency to establish a framework for regulating tuition fee decisions:

*‘the [DHET]...had no advance notice of the 16<sup>th</sup> of December statement...There’s no cash in the 2018/19 budget. And indicative indications in the budgets for the next two years. But there is no policy that guides how this is going to be done...the Department is aiming to draft policy, to publish it for comment, and to promulgate it by, they hope, September [2018];<sup>873</sup> and*

*‘however this thing works, it’s got to look at the whole funding of a differentiated [and] a quality system...it needs to take into account how we will ensure sustainability into the future...I think it’s a very tall order...I’m sure most people you talk to in the system will say: we may have liked having complete autonomy to set our own fees. But the ship has sailed now. We’re not in that situation anymore’.<sup>874</sup>*

I argue that *ways of controlling fee increases*, the recommended *‘framework for the regulation of fees’*, and the government policy necessary to *‘guide’* how fee decisions will be made after December 2017 all speak to changes to an existing regulatory regime; rather than new regulations being applied to previously unregulated activities. I use the conceptual tool of regulatory space analysis to show how tuition fee decisions were already regulated by the calibration of multiple interactions. Furthermore, I apply regulatory space analysis to reveal the regulation (*‘purposive attempts to influence and control economic and social activity’<sup>875</sup>*) to which tuition fee decisions are subject; to shed light on how this regulation is experienced by those participating in and affected by it; and to reiterate the necessity of *‘challenging*

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<sup>873</sup> Interviewee 17.

<sup>874</sup> Interviewee 32 (Pretoria, 15 May 2018).

<sup>875</sup> See fn 5.

*overstated claims for what is possible through regulatory activity*'.<sup>876</sup> In this chapter, I conclude my argument over four sections.

First, I summarise how the regulatory space of tuition fee decisions by public universities in South Africa was substantially re-constituted by the 2015 to 2017 Fees Must Fall protests, and their settlements. I highlight how the fragile calibrations regulating tuition fee decisions were frayed and reconfigured. They were also rendered more unstable by protest-driven social activism, coupled with political opportunism, cannibalising responsible budgeting.

Second, I expand on the likely outcomes of these shifts. I review the insufficient attention paid to explicit warnings in government policy about the '*perverse outcomes*' which can arise when social activism overrides responsible budgeting.<sup>877</sup> Most notably, I discuss the deteriorating stalemate which emerged in this regulatory space.

Third, I summarise the more general lessons from my thesis for regulatory space analysis as a conceptual tool. I underline the benefits of treating regulatory spaces as dynamic, overlapping, and porous. Relatedly, I note how resources may cascade through spaces; alongside actors and issues being organised into, and out of, regulatory arenas. I show the value of analysing interactions within, as well as between, large

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<sup>876</sup> Scott (fn 10) 352 – 353.

<sup>877</sup> Cf. fn 811.

organisational actors. And I discuss the important but complex interplay between the resources of authority, organisational capacity, and wealth in a regulatory space.

Fourth, I delineate the limits of my research. I indicate which perspectives are less represented in my data. I suggest fruitful comparisons which could be developed in later work. Finally, I stress the need to revisit my findings once more information is available on whether and how subsequent developments (especially the implementation of the proposed regulatory framework for fees) shape this regulatory space.

### **1. A substantially re-constituted space**

I argue that tuition fee decisions are regulated in South Africa by the delicate calibration of the interactions between three actors and four income streams. The actors are university managers, students, and the national government. The four income streams are the government subsidy paid to universities; tuition fees; third stream income (including from donations); and the portion universities received of state-funded student financial aid. These calibrations were affected by law, government policy, and universities' statutes and rules; as well as increasing political pressures. Cumulatively, they shape: what is taught or researched, by who, to or for whom; who could learn what, where, and at what cost; and who paid what portion of that cost. They also prescribed the fora in which tuition fee decisions are made, and who participates in those fora.

### 1.1. Frayed calibrations

The 2015 to 2017 Fees Must Fall protests, and their settlements, reshaped the calibrations of the interactions between the three main actors and four primary income streams. They organised new actors and issues into this regulatory space. They also led to wealth cascading into this space from cognate spaces (e.g. basic education). Perhaps most noticeably, the protests triggered national rather than institution-specific fee decisions; with particular university managers (vice chancellors, chairs of council) and government officials (the MHET, president Zuma) playing more prominent roles in fee determinations. On one reading, the announcements in October 2015 and December 2017 (inter alia) went so far as to transfer a significant portion of university council's unfettered prerogative to make fee decisions, to South Africa's president.<sup>878</sup>

These reconfigurations stemmed partly from students exercising increased voice in this space. Student voices became more forceful, but also increasingly splintered and politicised. One instance of this is the changes to the 'codes' (or standard procedures) in terms of which public universities had operated.<sup>879</sup> These changes encompassed alterations in how tuition fee decisions are made and enforced. In addition, the dominant occupation of this space by students opened doors into cognate spaces: including through triggering redistributions of resources from those cognate spaces, into this space. However, the heightened power students exercised was potentially fleeting. It was vulnerable to the internal fragmentation of student

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<sup>878</sup> Cf. fns 730 to 732.

<sup>879</sup> See fns 191 and 689.

movements, and to external pressures (including increased party-politicisation, and state repression).<sup>880</sup>

Another facet of this reconfiguration was that the national government was rendered more central to tuition fee decisions. The spark for the protests was rising fees. In turn, fee increases were justified on the basis of decreases in the subsidy public universities received from the state. As the protests became increasingly disruptive and widespread, there were growing calls for state intervention. These ranged from ‘defeating institutional autonomy’,<sup>881</sup> to restoring order on disrupted campuses. Underlying these calls for state intervention were demands that greater funding flow to public universities. This extended to the increasingly close but fractious link between tuition fee decisions and financial aid for students (particularly that provided by the NSFAS).

## **1.2. Unstable settlements**

The attempted settlements of the protests were also unstable, and exacerbated the uncertainty and instability in this regulatory space. I argue that the political increasingly dominated the technical. Political expediency and pressure trumped deeper engagement with the details and trade-offs inherent in both existing policies, and any proposed changes to those policies. The tinkering with the NSFAS exemplifies this. Repeated, significant changes were made to a beleaguered institution (the NSFAS) in increasingly

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<sup>880</sup> Cf. fn 777.

<sup>881</sup> See fn 794.

short spaces of time. These changes frequently followed intensive political lobbying, including through student protests.

Yet the changes generally failed to address the perennial underfunding of the NSFAS, or the administrative and organisational capacity constraints it faced. Instead, more and more was expected of the NSFAS – especially as it became increasingly central to managing the furious play of power at the centre of this regulatory space. This was a far cry from the expectation that

*‘a realistic fee structure must...go hand-in-hand with a sustainable programme of student financial assistance’.*<sup>882</sup>

It pays scant regard to *‘the limits of affordability and sustainability’*.<sup>883</sup> Moreover, it ignores how ongoing interventions sap the financial and organisational capacities central to the formulation, implementation, and enforcement of regulation.

More generally, the combination of protest-driven social activism and political opportunism cannibalised responsible budgeting. One example of this is the cascade of resources (particularly wealth) into this regulatory space, from cognate spaces. By president Zuma’s December 2017 announcement, the trade-offs inherent in these redistributions did not feature in the moral logic advanced by the coalitions of interest

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<sup>882</sup> EWP 3 (fn 13) para 4.8.

<sup>883</sup> Ibid para 2.6.

groups which coalesced during the protests.<sup>884</sup> Advocacy to look ‘*within the realm of...sociology or politics*’ subjugated questions of economic feasibility.<sup>885</sup>

This subjugation was particularly problematic given South Africa’s macro-economic context of increasingly limited financial resources available to the national government to allocate.<sup>886</sup> Within the regulatory space of tuition fee decisions by South African public universities, these disruptions had mixed effects on the bargaining and interdependence between university managers, the national government, and students which had shaped the negotiated self-regulation of the perpetual disequilibrium.

One vivid shift was the far more furious and open contestation which the protests displayed. Another, though, was that some actors drew closer together and co-ordinated their conduct more. One instance of this co-ordination is the growing prominence of representative professional associations: most notably, USAf and the UCCF. Another is the more carefully choreographed interactions between universities and the MHET in 2016. Albeit that the political machinations around president Zuma’s December 2017 announcement limited the durability of that co-ordination.

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<sup>884</sup> Cf. fns 174 and 812.

<sup>885</sup> See fns 105 to 106.

<sup>886</sup> See Figure 10.

## 2. A deteriorating stalemate?

My analysis contrasts how the 2015 to 2017 Fees Must Fall protests, and their settlements, disrupted the fragile calibrations regulating tuition fee decisions; with the regulation envisioned for those decisions during the perpetual disequilibrium. The departure from *'the limits of affordability and sustainability'* is especially noteworthy. It was associated with explicit warnings in government policy about the likely consequences of such a departure: *'harsh penalties'* would follow *'rapid enrolment growth without extra expenditure'*.<sup>887</sup>

Furthermore, these warnings could be traced to bitter (and lasting) historical experiences:

*'it is imperative to guard against rapid enrolment growth unless it is matched by additional resources. Increasing enrolments without new investment will be detrimental to the long-term stability and sustainability of the higher education system, as well as to the quality of offerings. This is confirmed by the experience of the [HD/BIs], which grew rapidly in the 1980s in response to the demand for access to higher education, which was integral to the struggle against apartheid. The growth...was not matched by additional resources from the apartheid State...contributing, in part, to the instability and financial difficulties that currently bedevil some of these institutions'*.<sup>888</sup>

Moreover, students demanding greater access to higher education, were likely to bear the brunt of the harsh penalties flowing from an unstable and unsustainable expansion of higher education.

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<sup>887</sup> EWP 3 (fn 13) para 4.4.

<sup>888</sup> The National Plan (fn 391) para 2.2.

## 2.1. Making do with less

As part of my initial analysis of South Africa's place of space (i.e. where organised interests are located in key processes), I emphasised Natrass' prescient warning from towards the end of Apartheid education:

*'pains should be taken to stress that things will be difficult, and that resources will be as constrained, if not more so, after apartheid has fallen'*.<sup>889</sup>

I analysed the deteriorating stalemate which could ensue. Student protests might maintain access to education. But declining resources meant universities and university managers find themselves *'constantly mak[ing] do with less'*.<sup>890</sup>

My thesis suggests an alternative trajectory that might arise. Overall, South Africa will continue to face financial constraints unless and until its macroeconomic situation improves. These constraints shape this regulatory space, and cognate spaces. But one key feature of my analysis was that these spaces overlap and have porous boundaries. The regulatory space of tuition fee decisions, then, is neither rigidly nor exclusively bounded; particularly compared to cognate spaces (e.g. basic education). Hence my arguing that actors and issues were organised into and out of this and cognate spaces; and that resources cascaded into this regulatory space from cognate spaces.

In particular, funding was redistributed to this regulatory space from the *'other pressing social needs'* which government policy during the perpetual disequilibrium

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<sup>889</sup> See fn 242.

<sup>890</sup> See fn 554.

attempted to keep in perspective.<sup>891</sup> Similarly, attention, urgency, and the organisational and administrative capacities central to the functioning of cognate spaces were re-directed to (or at least overshadowed by) events in this regulatory space. Both other drivers of poverty in South Africa, and addressing deficiencies in South Africa's schooling system, were relegated in favour of addressing the furious play of power at the centre of the regulatory space of tuition fee decisions.<sup>892</sup>

## **2.2. Government and planning failure**

The re-organisations and redistributions within the regulatory space of tuition fee decisions, which cascaded through cognate spaces, reinforce the limits on what regulation can achieve.<sup>893</sup> They also raise the possibility of government failure, at least in the regulatory space I focus on. During the perpetual disequilibrium, government policy and regulation attempted to foster institutional autonomy within the framework of public accountability. The implementation of this framework evolved during the perpetual disequilibrium (with e.g. the funding framework replacing the SAPSE formula), and was contested. I underline how the melding of institutional autonomy, academic freedom, public accountability, and effectiveness and efficiency in how universities operated proved especially difficult.

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<sup>891</sup> Cf. fns 506 - 507.

<sup>892</sup> Cf. fns 41 - 45.

<sup>893</sup> Cf. fn 876.

One question this difficult melding raises is whether planning failure emerged alongside the possibility of government failure. The framework of public accountability incorporated the triad of planning, funding, and quality control. One factor shaping this framework's design was the '*limits of affordability and sustainability*'. Increasing friction arose from the interplay between expanding enrolments (including through enrolment planning) and the deficits of the funding framework (most notably, the constant lack of sufficient funds). This friction contributed significantly to the emergence of the 2015 to 2017 Fees Must Fall protests. These protests were driven partly by the '*harsh penalties*' many students were suffering.

The interventions which attempted to solve the Fees Must Fall protests did increase the DHET's funding; and the state funding flowing to universities, in particular. However, these interventions created new difficulties. They failed to resolve underlying issues which had contributed to the Fees Must Fall protests, too. Barring a significant change in South Africa's macroeconomic position, the NSFAS and public universities are likely to have won only a temporary reprieve from their funding constraints. In addition, the furious struggle for advantage in this regulatory space could extend to the new categories of deserving students (the poor and working class, the missing middle) which emerged during these attempted settlements.

Two reasons bolster my view that further difficulties lay ahead in this regulatory space. First, the build up to and implementation of president Zuma's December 2017 (and, to a lesser extent, October 2015) announcements entailed radical departures from

established processes (particularly the national government's budgeting process). Those departures created their own frictions; which, in turn, created friction in the interactions between the regulatory spaces affected by the national government's budget. While students might have benefited this time from the overruling of the national government's budgeting process, it is at best unclear whether they would benefit again in the future.

Second, the determination of new categories of deserving students could become as problematic as the NSFAS' mythical threshold of R122,000.00. One reason for this is that inflation would have an impact. One interviewee cited this example regarding missing middle students and gap funding:

*'[2018 is] the third year that [the upper bound of this category of students is] R600,000.00. Which means in reality, people who were at R500,000.00, or R550,000.00, two years ago, will now be out of that [category].'*<sup>894</sup>

This could be a shock for those affected. Where gap funding had previously covered fee increases above 2015 fee levels, they would now have to pay fees that were approximately 16.64% higher than they were in 2015.

Another reason is that

*'[R]350[,000.00] was just one number that had come up through a...political process...there were others. And...there were differing models [of the costing of 'free higher education for the poor and working class']'.<sup>895</sup>*

One difficulty that arose with this (and any other) number is that it is

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<sup>894</sup> Interviewee 18 (Cape Town, 20 April 2018).

<sup>895</sup> Interviewee 32.

*‘very difficult to...accurately estimate what proportion of university students would fit within those income brackets. Because...you know that it’s skewed towards wealthier students...Because of the...educational background of more advantaged students...they’re more likely to get into university’.*<sup>896</sup>

Thus both what president Zuma’s December 2017 announcement would cost, per student; and how many students would fall within the category ‘poor and working class’; were uncertain. This uncertainty undermined the national government’s ability to plan and fund higher education in terms of the framework of public accountability. It could also trigger irritable interactions between this regulatory space and cognate spaces in future, as greater clarity on the true cost of president Zuma’s December 2017 announcement emerges.

### **2.3. A new disequilibrium?**

The way in which the attempted settlements were arrived at is also important. A lack of transparency, legitimacy, and accountability regarding tuition fee decisions fed into the 2015 to 2017 Fees Must Fall protests. For the October 2015 and September 2016 announcements, some attempt was made to engage with a variety of actors. The October 2015 announcement is phrased as the proclamation of an agreement reached at an earlier meeting. The September 2016 announcement both referred to engagements with a wide range of actors, and was phrased as a recommendation rather than a directive. However, protests followed both of those announcements.

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<sup>896</sup> Ibid.

The December 2017 announcement, by contrast, appears disconnected from related processes (e.g. the Ministerial Task Team, the Heher Commission of Inquiry) and consultations (such as USAf's engagements with the DHET). The build up to, and consequences of, the December 2017 announcement were also far more disruptive of the national government's budgeting process. Furthermore, there seems to be even less '*accountable transparency*' in the December 2017 announcement, compared to the fee determinations which had triggered the Fees Must Fall protests.<sup>897</sup> Rather, fee decisions were subjected to the more contentious calibration of a wider variety of interactions.

By December 2017, therefore, the boundaries of this regulatory space had shifted. New actors and issues were organised into this regulatory space as pressure for free education grew. The space became increasingly party-politicised; with the December 2017 announcement being made at the ANC's elective conference, and referencing several ANC policy resolutions. Students played a prominent role in these shifts, as did university managers' representative professional associations (USAf and the UCCF). The MHET and president Zuma were also elevated to play new roles in this space.

The dispersal of the resources of wealth, authority, and organisational capacity was altered. These resources cascaded through this space, to and from cognate spaces. Moreover, new interplays between these resources emerged. Organisational capacity was consolidated through challenging the authority of other actors (including the legitimacy of their conduct), and through appeals to certain paradigms (e.g. victims and

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<sup>897</sup> Cf. fn 671.

agents). However, organisational capacity could also be fragmented by these manoeuvres. Authority could be bolstered or splintered in similar ways. Regarding the resource of wealth, constrained financial means remained a feature of South Africa's place of space. One response was to advocate (including through protest) that social activism trump responsible budgeting.

### **3. Lessons for regulatory space analysis**

My thesis began with the puzzle that tuition fee decisions in South Africa are both unfettered, and subject to multiple constraints. This suggested to me that investigating the regulation of tuition fee decisions entails unpacking who makes fee decisions, and how. Understanding that requires an exploration of which actors interact, and how; in the processes which culminate in a fee decision.

I argue that analysing the calibrations of these interactions between actors sheds light on the constraints affecting tuition fee decisions. And, therefore, how tuition fee decisions are regulated. I use the conceptual tool of regulatory space analysis to corral and interrogate the pertinent interactions between actors, and to see how these interactions are calibrated. The insights this approach revealed into how tuition fee decisions are regulated, reinforce the benefits of my approach. Applying regulatory space analysis to my data also pointed to four modifications to this conceptual tool.

### 3.1. Space, time, and boundaries

First, regulatory space analysis rightly emphasises the place of space. I supplement this spatial emphasis with a focus on time. I justify my supplementation based on the dynamic tension inherent in regulatory space analysis: between determining the boundaries of specific spaces, and the ‘*often ferocious struggle for advantage*’ which those spaces’ occupants are involved in.<sup>898</sup> Furthermore, crises form part of this dynamic tension, given the role they play in the formulation and implementation of regulation.<sup>899</sup>

The interplay of these factors suggests that regulatory spaces are not static, but evolving. My most vivid demonstration of this is the Apartheid and post-1994 states’ continual pursuit of the transformation of South African society. The imperative to transform generated both notable changes and striking continuities. It also highlighted how the dimensions of time and space may dovetail in regulatory space analysis. This occurs, for instance, through dynamic and evolving spaces having overlapping and porous boundaries.

I illustrate this by discussing the shifting location of the regulatory space of tuition fee decisions by South African public universities. Under Apartheid education, this space was multiply (and deliberately) fragmented. Alterations during the perpetual disequilibrium highlight several shifts: including from this space being part of

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<sup>898</sup> Hancher and Moran (fn 3) 277.

<sup>899</sup> Cf. fn 86.

education, generally; to part of higher education and training; and then, to part of post-school education and training. The *'ferocious struggle for advantage'* my thesis focuses on also underlines the trade-offs between this regulatory space and the cognate spaces of *'other pressing social needs'*.

### 3.2. Movements through spaces

Second, another reason I revise how the boundaries of regulatory spaces are drawn is that resources can cascade through spaces – just as actors and issues can be organised into and out of spaces. I link this cascading, and organising into and out of, to how the boundaries of a regulatory space are drawn, because these boundaries are determined *'by the range of regulatory issues subject to public decision'*.<sup>900</sup> The robust cascades and re-organisations my empirical data reveal show how these *'public decisions'* change as the constituents of that *'public'*, and how those constituents interact, change.

My thesis offers two pertinent examples of this. The first example is the question of what constitute 'fees'. This question indicates multiple contending boundaries to this space. These range from questions of transparency and how fees are charged; to what the cost of university education is, and who should pay it. It ripples out into what kind of university education (e.g. free, decolonised, quality education) should be provided.

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<sup>900</sup> Hancher and Moran (fn 3) 277.

The second example is how access to university education was reconstrued as a right. I argue that the 2015 to 2017 Fees Must Fall protests elevated university education to a fundamental right, at least at the level of government policy. This occurred at the expense of existing fundamental rights: most notably, the rights to basic education and adult basic education. It took place without South Africa's constitution being amended; and despite that fact that '*the expression "higher education and training" [does] not [appear] in [South Africa's] Constitution*'.<sup>901</sup>

### 3.3. Actors in space

Third, I build on the acknowledgment in regulatory space analysis that

*'the internal political character of individual firms, though little investigated, is...a crucial variable'*.<sup>902</sup>

I extend this acknowledgement from '*individual firms*' to public universities, the national government (e.g. the differing responses of the MHET and president Zuma), and large student movements (together with representative professional associations such as USAf). I show that building relationships can be a route to occupying (or even dominating) a regulatory space; particularly because of the organisational memberships which those relationships may confer.

Yet those webs of relationships can also include cross-cutting affiliations. For student movements, for instance, an actor might be explicitly affiliated to a political party (e.g. SASCO's affiliation with the ANC) and participate in university-specific

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<sup>901</sup> See fn 201.

<sup>902</sup> See fn 188.

structures (e.g. the SRC, including through being a member of the PYA). Similarly, actors may subscribe to multiple paradigms. Instead of social activism cannibalising responsible budgeting, an actor might pursue responsible social activism.<sup>903</sup> This could entail emphasising the need to pursue equity, while also expressly engaging with the trade-offs that different means of pursuing equity might raise.

These ‘*internal political*’ characteristics reinforce the importance of the place of space. Fee decisions are taken by individual university councils. There are therefore university-specific – if not campus-specific – dynamics to fee determinations. I analysed how one ‘*internal political*’ characteristic of universities generally was the ‘*stakeholderisation*’ of councils. This entailed increasing contestation within university councils, between different actors and groupings of actors. As a counterpoint, though, I highlighted the experience of the University of Venda.<sup>904</sup>

A related facet of the place of space was universities’ contested role in South African society. I argue that this contestation was evident during Apartheid education. It was even more prevalent during the perpetual disequilibrium, when universities were to be both drivers of transformation; and transformed, themselves. This builds on regulatory space analysis in another way. It indicates the breadth of objectives pursued by ‘*regulators...mak[ing] use of the resources of those they regulate to secure compliance*’.<sup>905</sup>

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<sup>903</sup> Cf. fns 235 and 811.

<sup>904</sup> See fn 533.

<sup>905</sup> See fn 189.

Thus *'the resources of those'* targeted in this way are deliberately directed towards

*'priorities identified by the state...[and the] pursuit of those priorities to deliver on the promises [the state] made to its society'*.<sup>906</sup>

My thesis takes this a step further. I argue that specific actors may place similar demands on large organisations. Students, through protest, contributed to the 'welfarisation' of South African universities.<sup>907</sup> In a similar vein, students navigated the financial constraints they faced when attempting to access university education partly by using universities as banks.<sup>908</sup>

### 3.4. Resources

Fourth, my empirical case study reveals that the complex interplay between the resources of authority, organisational capacity, and wealth can be just as important as, - and can shape - how those resources are dispersed. I interrogate how mobilising organisational capacity can foster authority, and vice versa. I also explore how organisational capacity can become factionalised, and authority can become splintered. Such factionalisation and splintering can breakdown the interdependence and bargaining previously operating in a regulatory space. Counterparties can find themselves stranded, lacking negotiating partners – as happened to some university

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<sup>906</sup> See fn 79.

<sup>907</sup> See fn 806.

<sup>908</sup> See section 1.2.2 in chapter seven.

managers and members of the national government when the protests were at their most chaotic and disruptive.<sup>909</sup>

I also analyse the fungibility and fluidity of the resource of wealth. I argue that this resource should encompass financial means, as well as ‘*money*’ and ‘*treasure*’.<sup>910</sup> Extending wealth in this way includes a time dimension to the resource, in line with my dynamic application of regulatory space analysis. This opens lines of enquiry into how legacies of wealth (e.g. at HA/WIs versus HD/BIs) shape actors’ opportunities to implement and contest regulation. Analysing how budgets are compiled, and the associated wealth distributed, can similarly shed light on how the resources of wealth, authority, and organisational capacity interact.

#### **4. Limits and further research**

There are three main limitations to my findings. These are that my data underrepresents the experiences of HD/BIs; that more long-term analysis of the implementation of the settlements of the protests might indicate different ways in which this regulatory space was reconstituted; and that experiences of comparable regulatory interventions might enrich my analysis. I analyse each in turn, suggesting possible lines for future research.

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<sup>909</sup> See fn 683.

<sup>910</sup> See section 2.3.1 of chapter three.

#### 4.1. HD/BIs

Including the experiences of more HD/BIs is important for a fuller account of this regulatory space. One reason for this is that HD/BIs are sites of important experiences of the regulation of tuition fee decisions – including of regulatory and government failure. Two examples I cite in my thesis bear this out. It was the UWC which implemented a 0% fee increase in response to government advocacy to expand access to university education to poorer students.<sup>911</sup> This happened more than 15 years before president Zuma's October 2015 announcement, and had serious consequences for UWC. The University of Venda, by contrast, provides an example of more workable and durable bargaining and interdependence in this regulatory space during the perpetual disequilibrium. Further exploring both these examples could provide valuable insights into how actors in this regulatory space were interacting, and to what effect.

More generally, there are historical biases in favour of HA/WIs in this regulatory space. I have briefly contrasted the outcomes of protests at HD/BIs in the early to mid-2000s; with those of the 2015 to 2017 Fees Must Fall protests, focused predominantly on HA/WIs.<sup>912</sup> There are several problems with these biases, including regarding the inferences which can then be drawn about the regulatory space as a whole.

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<sup>911</sup> See fns 560 - 561.

<sup>912</sup> See e.g. fns 2 and 754.

Writing on a different but informative and relevant topic, Lange and Luescher-Mamashela make two important points:

*‘Too frequently has the analysis and interpretation of governance in higher education [in South Africa] been undertaken through the lens of the experience of [HA/WIs] while the concrete governance experience of these institutions have seldom triggered system-level interventions...’; and*

*‘By the end of th[e] period [1994 to 2000] it had...become clear...that the policy process was not linear; that it could be derailed by political and economic conjunctures, institutional histories and sociological make-up and the role that individuals and interest groups played institutionally, regionally and nationally...Moreover, this period...anticipated what holds, more especially, for the relationships between system and institutional governance in later periods: that system-level interventions and legislative changes tend to be generalised system-wide responses prompted by institution-specific governance and management failures’.*<sup>913</sup>

The Fees Must Fall protests could be read as a shift away from the first point: i.e. that this time, system-level interventions were predicated on crises at HA/WIs. However, the more general issue of framing the entire space in terms of only one set of experiences remains.

## **4.2. Implementation of the settlements**

My thesis focuses on how the 2015 to 2017 Fees Must Fall protests reconstituted the regulatory space of tuition fee decisions by South African public universities. I use data up to June 2018 (viz. South Africa’s 2018 national budget, and interviews conducted in 2018) to suggest possible future developments in this space, including questioning the sustainability of president Zuma’s December 2017 announcement. But the implementation of that announcement will ripple out for some time to come.

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<sup>913</sup> Lange and Luescher-Mamashela (fn 125) 110 and 117.

Assessing whether and how this regulatory space was reconstituted would therefore benefit from subsequent research which incorporated data on the implementation of all the attempted settlements of the protests. My dynamic application of regulatory space analysis underscores the need to consider data from 2018 onwards; in light of which some of my findings might need to be revisited. Data from 2018 onwards could also shed light on how the resources and capacity constraints affecting South Africa generally, and this regulatory space in particular, evolved. Similarly, it could indicate whether the heightened uncertainty of the interregnum remained, or whether it was replaced by a more stable and certain regime.

### **4.3. Other regulatory experiences**

Comparing my findings to accounts of similar events could prove fruitful. One possibility would be to compare my very South Africa specific analysis, to international experiences of how higher education and tuition fees are regulated – especially in light of student protests. Similarly, my analysis could be compared with other experiences of regulatory interventions in response to protests and crises. These could include, for instance, consumer boycotts and protests in response to fare increases.

Comparisons such as these could flesh out when and how protests might act as a regulatory force, and to what effect. They might also provide insight into how crises and regulatory interventions interact. Furthermore, they might indicate how protests and crises affect the evolution of regulatory spaces. Finally, these comparisons could provide further opportunities to assess the extent to which protest- and crisis-driven

regulatory interventions embed regulatory and government failure, through sapping (already constrained) financial and organisational capacities.

## METHODOLOGY APPENDIX

My thesis answers the question:

how did the 2015 to 2017 Fees Must Fall protests, and their settlements, reconstitute the regulatory space of tuition fee decisions by public universities in South Africa?

Fee decisions are only one part of how universities are managed and financed. Although the ultimate decision brings together specific actors in a specific forum (a university's council), fee decisions are the culmination of several interconnected decision-making processes. Moreover, my research question focuses on public universities. These institutions are included in, and engage with, national government processes - including the national government's budgeting process. These interconnections must be accounted for in my investigation.

These interconnections are especially important given the sparse legal provisions in South Africa setting out how tuition fee decisions are to be made.<sup>914</sup> I utilise mainly qualitative data to explore these interconnections and answer my research question. I believe that this is the most fruitful form of data to rely on, because it sheds light on how those participating in and affected by tuition fee decisions interact. In particular, qualitative data provides insight into which actors were subjected to what constraints, and how those constraints were viewed and experienced (including through being mediated by 'paradigms').

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<sup>914</sup> See fn 62.

Furthermore, qualitative data reveals what actors involved in, or affected by, tuition fee decisions viewed as regulatory constraints. It also indicates whether tuition fee decisions were seen as regulated, in light of (or perhaps despite) existing law and policy on higher education. I use quantitative data generated by others to examine (and at times bolster) my analysis: for the most part, to provide context for, and deeper insight into, what I am investigating.

## 1. Background

In October 2017, I completed an MPhil focused on the narrower question: how did the 2015 Fees Must Fall protests, and their settlement, affect the regulation of university fees in South Africa? I utilised

*‘qualitative empirical data obtained from interviewing a range of key actors involved in the protests and their settlement, and from a review of relevant public policy documents’<sup>915</sup>*

to answer that narrower research question. My DPhil builds on and extends the work I did for my MPhil. It is inspired by the same puzzle: that tuition fee decisions appear to be both subject to minimal explicit regulation, and constrained by several interconnected factors.<sup>916</sup> I thought the novel interventions (primarily the presidential and ministerial announcements between 2015 to 2017) which attempted to settle the protests might prove particularly revealing of this puzzle, and how it could be resolved.

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<sup>915</sup> Williams (fn 6) ii.

<sup>916</sup> Cf. Alan Bryman, *Social Research Methods* (Oxford University Press, 2016) 17.

My stance in investigating this puzzle is primarily descriptive and interpretative. A parallel could be drawn between my exploration of how the regulation of tuition fee decisions was affected by the 2015 to 2017 Fees Must Fall protests, and the following example Bryman cites:

*‘Foster (1995) conducted an ethnography [of a housing estate that] had a high level of crime, as indicated by official statistics on crime. However, Foster found that residents did not perceive the estate to be a high-crime area’.*<sup>917</sup>

The parallel would be the potentially puzzling disconnect between one social phenomenon (having high crime statistics, or a plethora of interconnecting constraints on tuition fee decisions) and actors’ perceptions of that phenomenon (not viewing the estate as a high-crime area, or tuition fee decisions as regulated). I believe a descriptive and interpretivist approach is best-suited to exploring this puzzle. Moreover, exploring this puzzle is an opportunity to apply and critique theory – viz. regulatory space analysis.<sup>918</sup>

My MPhil provided me with an informative backdrop from which I could pursue the broader project I undertake in my DPhil. Although some ramifications of the 2015 to 2017 Fees Must Fall protests are still unfolding, the expanded time period I focus on in my DPhil (2015 to 2017) allows for a deeper exploration of a similar question to that explored in my MPhil (which focused solely on 2015). Conducting this research for a DPhil rather than an MPhil also allowed me to pursue a project of greater scope than what I had done for the MPhil.

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<sup>917</sup> Ibid 28.

<sup>918</sup> Ibid 17.

My expansion of scope included a more detailed analysis of the history of how public university education had been financed in South Africa (both under Apartheid and post-1994); and of the interconnected interactions which feed into tuition fee decisions, particularly those concerning student financial aid and how the national government subsidises public universities. I also explore where university education fits within South Africa's broader education sector; how education in South Africa fits with the '*other pressing social needs*' the national government is attempting to meet (housing, water, etc.);<sup>919</sup> and how South Africa's macroeconomic context impacted on the regulatory space of tuition fee decisions.

## **2. Analysing tuition fee decisions**

My research question looks at whether and how university tuition fee decisions are regulated; as well as whether and how the Fees Must Fall protests and their settlement impacted on this regulatory regime. I interrogate whether these impacts reconstituted this regulatory space. I use the notion of 're-constituting' to refer to how the regulatory regime operating in a regulatory space is established, and how it changes. For my DPhil, this encompasses the interactions between key actors involved in making or shaping university fee decisions; and the legal and other factors (including public policy, wealth, authority, and organisational capacity), which underpin the regulation of these decisions.

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<sup>919</sup> See fn 13.

Asking whether a regulatory space was reconstituted suggests a before and after: for my thesis, a comparison of how fee decisions were regulated before and after the 2015 to 2017 Fees Must Fall protests. I break my research question down into two sets of sub-questions, in line with this before and after. My first set of sub-questions focuses on the pre-Fees Must Fall regulation of university tuition fees. They ask:

How were public university tuition fee decisions regulated prior to 2015?

Who made the decisions about the level of tuition fee increases at public universities?

Which key interactions shaped how these decisions were made?

My second set of sub-questions analyses what happened during, and post-, the Fees Must Fall protests and their attempted settlements. They ask:

Did the disruptions of the Fees Must Fall protests alter how tuition fee decisions were regulated?

Which organisational actors and interactions were affected by these protests?

In what way did these protests impact on these actors and interactions?

Were the protests a regulatory force in their own right?

For this later phase, I consider how the Fees Must Fall protests disrupted the prevailing decision-processes by which tuition fee decisions were made. This includes analysing the contrasting and competing settlements which, over time, attempted to resolve the protests.

To answer both sets of sub-questions, I considered whether my unit of analysis should be university fee decisions; or, the regulation of university fee decisions. I concluded that while my research question focuses on the regulation of university fee decisions, my unit of analysis should be the fee decisions themselves. This is because analysing how tuition fee decisions were altered and affected by the Fees Must Fall protests (*inter alia*) is a fruitful mechanism for discerning how the regulation of university fee decisions was shaped by these events.

One pitfall of this approach could be that it conflates alterations to tuition fee decisions with changes to how those decisions are regulated. I tried to avoid this pitfall by focusing on the alterations to tuition fee decisions which are associated with, or linked to, changing constraints on tuition fee decisions. Put differently, I thought that looking at how tuition fee decisions altered could provide insight into how the constraints applicable to those decisions were changing. And that interrogating those constraints, and how they changed, could provide evidence of how the regulation of tuition fee decisions had changed (or not changed).

A further consideration is that the regulation of university tuition fee decisions is best understood as an entire programme or regime. This regime is not well suited, on its own, to being a unit of analysis (at least for my research purposes). This is because it consists of a number of inter-related features. These features include the interactions between universities' income streams, the actors participating (or seeking to participate) in tuition fee decisions, and pertinent legislation and government policy. These constituents are more workably individuated than the regime as a whole, and

therefore better candidates for being units of analysis. Individual fee decisions incorporate these factors, but in a more readily discernible manner than when the focus of attention is on the regulatory regime as a whole. Tuition fee decisions are, therefore, the apt unit of analysis for my DPhil.

### 3. Cases studied and comparisons made

On one level, I conduct a unique, critical case study of the Fees Must Fall protests and their settlements vis-à-vis the regulation of tuition fee decisions. The case is of student protests triggering government intervention in higher education; particularly regarding public universities and how they are financed. I adopted a case study approach for two reasons. First, I am interested in explaining (and, very minimally, evaluating) the regulation of tuition fee decisions.<sup>920</sup> I do so partly through describing and comparing how tuition fee decisions are made by different institutions. I focus on the constraints which may affect, or be seen as affecting, these decisions.

Second, I use exemplifying cases (i.e. those which ‘*provide a good setting for answering my research question*’) – viz. four South African public universities.<sup>921</sup> I believe that exemplifying cases can be used to tease out key features pertinent to my research question. Moreover, I use exemplifying cases as a means of testing the applicability of conclusions drawn in one case, to other cases (e.g. from HA/WIs, to HD/BIs, and vice versa). I also use it to highlight fee decision-makers’ varying

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<sup>920</sup> Cf. Nicholas Walliman, *Social Research Methods* (Sage Publications, 2011) 38 – 41.

<sup>921</sup> Ibid 45.

experiences of the more general constraints on tuition fee decisions. My use of exemplifying cases limits the generalisability of my analysis and findings, though.

### **3.1. Types of case study**

The national dimension to the protests and their settlements, and the involvement of novel actors (such as South Africa's president), are what makes my research design a unique case study of tuition fee decisions. The way in which my DPhil builds on my MPhil - especially through interrogating whether tuition fee decisions were calibrated; and if so, how that calibration was affected by the protests and their settlement - makes it a critical case study, too.

There is also a comparative dimension to my approach, since I investigate four public universities. I consider the values attached to several factors at each institution, including: each institution's reliance on tuition fees, and on grants from the national government (including its subsidisation of public universities); whether and how student protests affect tuition fee decisions at each institution; and the concurrent and resulting changes at each institution to interactions between the national government, and university officials and students from each institution. These seem to fit within Bryman's description of comparative design: looking at two (here four) contrasting cases using the same method.<sup>922</sup> These four public universities reveal different facets of, and experiences within, the regulatory space of tuition fee decisions.

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<sup>922</sup> Bryman (fn 916) 65.

In building this comparative dimension, my preference was for depth over breadth. I chose to focus on getting greater detail about a smaller number of universities, rather than getting a more general view of a larger number of institutions. For example, TVET colleges also make tuition fee decisions, and face comparable pressures to public universities. Furthermore, they are an important component of South Africa's higher education landscape. However, the 2015 to 2017 Fees Must Fall protests began at, and remained focused on, public universities. Albeit that other higher education institutions might also have been included in the ensuing discussions, and were affected by the subsequent disruptions.

Moreover, my research question focuses on public universities. Hence my attempt to compare the cases of four different public universities in South Africa. I could have looked at a larger number of public universities. This breadth would have provided greater variance across key variables: such as a greater variety in institutions' reliance on government subsidies, and on tuition fees. I could even have expanded it to compare a university which adopts primarily a distance-learning model (the University of South Africa), to those focused on contact-learning.

I thought, though, that a richer account of the constraints affecting tuition fee decisions would provide better insight into how the regulation of tuition fee decisions might have been affected by the 2015 to 2017 Fees Must Fall protests. In particular, deeper data about a smaller number of cases could provide a valuable starting point for assessing whether the regulatory space of tuition fee decisions had been reconstituted

by these protests. Subsequently, my analysis and findings could be refined by applying them critically to additional cases.

In terms of the bias / efficiency trade-off, gathering data from a greater variety of sites could decrease the bias emerging from specific sites (e.g. being a research-intensive versus teaching-intensive institution; being historically advantaged versus historically disadvantaged).<sup>923</sup> It could also be more efficient, since including more sites could decrease the variance of certain measures. Although paradoxically, the selection of additional sites is driven by variation on key measures (such as reliance on specific income streams). I was concerned, though, that these potential benefits would come at the expense of subtlety. Moreover, exploring more than four cases might increase any bias in my selection of interviewees, since I would be interviewing fewer people from each institution.

There are two further, more externally focused sets of comparisons I could have made. One would be between the Fees Must Fall protests in South Africa, and how higher education is regulated and financed internationally. Incidences of student protests in other countries could be compared with the Fees Must Fall protests. In a similar (though more conceptual) vein, I could have explored the regulatory effects of political protests in non-university contexts (bus boycotts, consumer boycotts and buycotts, etc.). Both of these comparisons could provide useful insights into how an

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<sup>923</sup> Cf. Gary King, Robert Keohane and Sidney Verba, *Designing Social Inquiry* (Princeton University Press, 1994) 66 – 69 and 74.

expansive array of interactions may calibrate social behaviour, thereby constraining such behaviour and potentially regulating it.

However, I felt that including these comparisons would change the nature of the investigation I was conducting in my DPhil. My view was that the first step was to build a detailed account of the regulatory space of tuition fee decisions by public universities in South Africa. This account could then be bolstered by critiquing it in light of these further contrasts and comparisons.

### **3.2. Selecting specific cases**

I focused on four public universities in South Africa when I did my fieldwork. Two of these (TUT and WSU) were HD/BIs, and two (Wits and UCT) were HA/WIs. I considered several factors in my selection of public universities. My main goal was to obtain perspectives from people involved with institutions from across the spectrum. The bulk of my university-specific interviews, though, centred on Wits and UCT.

Several factors influenced the four universities I chose to focus on. My starting point was the substantial discrepancies between the financial resources available to public universities in South Africa. I wanted to gather data on institutions with varying financial resources. The data underpinning my selection of public universities was taken from a presentation by Dr Pali Lehohla, South Africa's Statistician-General, to

the Portfolio Committee on Higher Education, on 16 November 2016.<sup>924</sup> The presentation included information around how each of South Africa's 26 public universities were financed in 2015; in both percentage, and absolute Rand value, terms. I tabulate below the varying financial resources of the four public universities I chose to focus on:

<b>University</b>	<b>Total<sup>925</sup></b>	<b>Grants</b>	<b>Tuition</b>	<b>Other<sup>926</sup></b>	<b>Donations<sup>927</sup></b>
Wits	R5.285 bn	R2.256 bn	R1.797 bn	R1.232 bn	R0.161 bn
UCT	R5.19 bn	R1.625 bn	R1.505 bn	R2.06 bn	R0.449 bn
TUT	R2.894 bn	R1.45 bn	R1.013 bn	R0.431 bn	R0.26 bn
WSU	R1.444 bn	R0.834 bn	R0.391 bn	R.0219 bn	-

**Figure 11: University revenues in 2015<sup>928</sup>**

The variables in terms of which these four universities were selected, in order of importance, were: first, their funding distribution, focusing on reliance on tuition fees and government grants; second, that two are HA/WIs and two are HD/BIs. In addition, both TUT and WSU are much younger institutions. They emerged from South Africa's amalgamation of higher education institutions between 2001 and 2005. Moreover, WSU could be described as a comprehensive university; while TUT is a university of technology. WSU emerged from the merger of a university with two

<sup>924</sup> <https://pmg.org.za/committee-meeting/23682/>, accessed 31 January 2018.

<sup>925</sup> Calculated on the basis of totals provided for 'Grants' and 'Tuition', and the percentage breakdown of institutions' revenue across these two categories and the 'Other' category. See Lehohla (fn 21) slides 21, 22, and 24.

<sup>926</sup> Calculated in the same way as 'Total' was calculated (ibid). 'Other' was defined as including 'sales of goods and services, research contracts, interest and donations' (ibid slide 21).

<sup>927</sup> Donations were part of the 'Other' Category (ibid).

<sup>928</sup> Based on ibid, slides 21, 22, 24, and 27.

technikons; while TUT emerged from the merger of three technikons.<sup>929</sup> UCT and Wits, by contrast, had each been operating in South Africa as traditional universities for almost a century.

Four reasons justify focusing on these four universities. First, they cover a range of financing models, as I tabulate below (arranged by reliance on tuition revenue):

<b>University</b>	<b>Total</b>	<b>Tuition</b>	<b>Government</b>	<b>Other<sup>930</sup></b>
WSU	R1.444 bn	27%	58%	15%
UCT	R5.19 bn	29%	32%	39%
Wits	R5.285 bn	34%	43%	23%
<i>For all 26 unis.</i>	<i>R63.1 bn</i>	<i>34.1%</i>	<i>42.6%</i>	<i>23.3%</i>
TUT	R2.894 bn	35%	51%	14%

**Figure 12: University revenues by percentage<sup>931</sup>**

Reliance on government grants from the national government, as a percentage of total institutional receipts, ranges from 32% at UCT to 58% at WSU. Similarly, though more narrowly, reliance on tuition fees ranges from 27% at WSU to 35% at TUT. Investigating these four institutions therefore provides insight into a range of different financing models; and a diversity of interactions between the main income streams on which those universities rely.

<sup>929</sup> See fns 336 and 338.

<sup>930</sup> Calculated in the same way as 'Total' was calculated (ibid). 'Other' was defined as including 'sales of goods and services, research contracts, interest and donations' (ibid slide 21).

<sup>931</sup> Lehohla (fn 21) slides 19 and 21.

This is bolstered by the second reason for selecting these institutions: they provide a (sharply stepped) diversity of overall funding in Rand terms. Wits and UCT had almost equal total receipts in 2015 (c. R5,2 billion). That was approximately four times as much as WSU's total receipts for 2015 (c. R1,4 billion). TUT's total receipts for 2015 (c. R2,9 billion) were roughly half those of Wits or UCT; and twice WSU's total receipts. This adds another element of diversity to the institutions I focus on.

The third reason for selecting these universities is that they were mentioned by my interviewees during my MPhil fieldwork. Wits and UCT had been the focus of the Rhodes Must Fall and initial Fees Must Fall protests in 2015; while historical fee protests at WSU and TUT were compared by several interviewees to how the Fees Must Fall protests at Wits were handled. This suggests that important dynamics, highlighted by a number of my MPhil interviewees, could be tracked through investigating these four universities in more depth.

Fourth, these four universities enrol students from significantly different school catchments. This has a bearing on university access and success. For the 2008 school-leaving cohort, which school learners attended and how they performed in the school-leaving exam ('matric') had a significant association with which universities they attended:

*'universities with relatively high completion rates and low dropout rates tended to have student intakes drawn from the upper end of the matric achievement distribution. The extent of the differences in matric average performance across universities [- of around 25% -] is...remarkable...Insofar as matric average*

*achievement is positively related to the likelihood of university completion, the[se] differences imply that universities do not always compete on an equal footing’.*<sup>932</sup>

I illustrate in Figure 13 the discrepancies across the four universities I focused on:

<b>Ranking</b> <sup>933</sup>	<b>University</b>	<b>Matric Average Achievement</b> <sup>934</sup>
1	UCT	75%
4	Wits	70%
20	TUT	55%
23	WSU	50%

**Figure 13: Matric average achievement for selected universities**

Relatedly, there are substantial differences between university access, completion, and drop-out rates by school quintile. Most alarmingly:

*‘attending a quintile 1 – 3 school largely precludes learners from gaining access to university’.*<sup>935</sup>

Similarly, university access rates, the bachelor pass rate, and *‘the prevailing socio-economic status [of] a school’s immediate surroundings’* were closely associated. Quintile 5 schools had a higher 6-year completion rate, and lower 5-year drop-out rate, than quintile 1 to 4 schools. Yet 82.1% of the entire 2008 cohort came from a quintile 1 to 4 school.<sup>936</sup> This reinforces the interplay between socio-economic background, schooling, and access to and success at university. WSU and TUT drew students from far poorer catchments than UCT and Wits.

<sup>932</sup> Van Broekhuizen et al (fn 22) 24.

<sup>933</sup> Out of 23, with 1 being the highest average and 23 being the lowest average.

<sup>934</sup> Approximately.

<sup>935</sup> Van Broekhuizen et al (fn 22) 66.

<sup>936</sup> Ibid 70 – 71 and 104.

## 4. Data Compilation

The data I compiled for my DPhil was drawn from semi-structured interviews and from public policy documents. I started with the data I had relied on for my MPhil: the 15 semi-structured interviews I had conducted, together with an email exchange with one interviewee; and my review of 20 public policy documents dealing with how higher education in South Africa is financed.<sup>937</sup>

I expanded this dataset for my DPhil by conducting a further 44 semi-structured interviews, and reviewing additional public policy documents. There was a partial iteration between my review of public policy documents, and the questions I asked in my interviews. The work I had done for my MPhil informed the initial questions I asked in my interviews. I supplemented that work with a review of additional public policy documents, especially those mentioned to me during interviews.

### 4.1. Public policy documents

I selected legal and policy documents that I thought would help me build a picture of how tuition fee decisions are made. This included looking at how public universities are financed, how this financing interacted with other of the national government's processes, and the law and policies which dealt with student financial aid. The government-produced public policy documents I reviewed were selected based on their

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<sup>937</sup> Williams (fn 6) 121.

being cornerstones of, or related to, the regulation of higher education in South Africa. They also enriched, and could be compared with, data obtained in my interviews.

My initial focus was on higher education legislation and policies: South Africa's constitution; the Higher Education Act 1997 and Education White Paper 3 (1997); and related law and policy (e.g. the National Qualifications Framework Act 2008). I expanded beyond my initial set of documents by looking at more financially-focused policy documents. These ranged from the National Student Financial Aid Scheme Act 1999; to the national government's Budget Reviews and Estimates of National Expenditure (predominantly for 2015 to 2017). In addition, I considered key shifts in South Africa's macroeconomic policy from 1994 to 2017 (including its National Development Plan 2030, which was published in 2013). I complemented this general financial and economic information, with more targeted information about public universities from University State Budgets and Ministerial Statements on University Funding (both for 2015 to 2017).

I also looked at various reports, statements or announcements, and publications pertinent to universities and higher education. This included the three key statements: President Zuma's October 2015 announcement; the MHET's September 2016 announcement; and President Zuma's December 2017 announcement. In addition, I read the report of the Heher Commission of Inquiry, and extracts from some of the transcripts for the Heher Commission's hearings. Finally, I read the transcript for the 16 November 2016 meeting of the Portfolio Committee on Higher Education (which included Dr Lehohla's presentation on university funding).

As I expanded the number of documents I was reviewing, I tried to balance getting greater detail on specific points with building a coherent understanding of this regulatory space. For example, information on how the national government's subsidisation of public universities is determined and distributed can be gleaned from a variety of sources. I focused on Education White Paper 3, the University State Budgets, and Ministerial Statements on University Funding; together with what my interviewees told me. I aimed to cover sufficiently, but not comprehensively, the law and policy which might have a bearing on how tuition fee decisions were made. The website for the Heher Commission of Inquiry provided a helpful overview of public policy documents relevant to how public university education is funded in South Africa.<sup>938</sup>

## 4.2. Interviews

Building on my MPhil, I chose to use semi-structured interviews for my DPhil. My main reasons for choosing this method of gathering data were its flexibility, and that it would provide me with insights from my interviewees' perspectives on whether and how tuition fee decisions were regulated.<sup>939</sup> Furthermore, conducting a range of interviews would provide me with different perspectives on how tuition fee decisions are made and regulated; drawn from actors who had played different roles in, or were affected in different ways by, tuition fee decisions.

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<sup>938</sup> 'Fees Commission 2016' <<http://www.justice.gov.za/commissions/FeesHET/docs.html>> accessed 20 March 2019.

<sup>939</sup> Cf. Bryman (fn 916) 466 – 67.

I did not consider doing participant observation or an ethnography, because I felt that both were ill-suited to the research question I was trying to answer. I could have tried to sit in on a university council's deliberations regarding a tuition fee decision. However, this would provide much narrower insight into how tuition fee decisions are made and regulated. It would limit my data to one university council. I also felt that it would not provide me with adequate or sufficient data on important external factors which affect how tuition fee decisions are made: such as the national government's budget process, differences between universities (most broadly, being an HA/WI or an HD/BI), and the spill-over from university campuses to South Africa's politics and its political parties.

I obtained research ethics approval through the University of Oxford's Social Sciences and Humanities Interdivisional Research Ethics Committee, under reference number R56470/RE001. As part of my research ethics approval, I shared three documents with individuals who I contacted requesting an interview. The first document was the abstract for my MPhil. I shared this so that potential interviewees could get some idea of what my DPhil was looking at. The second document provided information on what participating in my DPhil would entail: including whether there were any risks in participating, and what would happen with the data my interviewees provided. The third document was a written consent form, which I asked interviewees to sign before I interviewed them.

I prepared an interview guide for my interviews, refining the questions I had asked in the interviews I conducted for my MPhil. The guide's purpose was to help me ensure the interviews I conducted covered questions I needed to answer in order to answer my research question.<sup>940</sup> The questions in my interview guide covered: what my interviewee's role in tuition fee decisions was (or had been); who my interviewee thought was involved in tuition fee decisions, how, and how the Fees Must Fall protests might've changed this; and how poverty was defined, and what role it played, in tuition fee decisions (especially in light of the various categories of students' deserving of financial assistance which emerged between 2015 and 2017). I used the guide loosely rather than rigidly, and tried to ask the questions in an open-ended manner. I also tried to prompt interviewees to say more about what they raised as relevant, even if it did not fit neatly or directly under one of the questions on my guide.

My access to interviewees was enhanced by my having already completed an MPhil. My access to interviewees was also aided by several interviewees putting me in touch with additional people to interview for my DPhil. Nine interviewees were interviewed both for my MPhil and my DPhil; meaning that my total of sixty interviews were with fifty-one different people. While I had hoped for a relatively even spread of interviewees across the four public universities I focused on, I did not achieve this in practice. Eighteen interviewees were directly associated with one HA/WI, and eight were associated with the other. Of those combined twenty-six interviewees, eight could be loosely categorised as students; with the remaining eighteen being members of staff (academic and managerial). By contrast, I interviewed only two members of the

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<sup>940</sup> Ibid 470.

managerial staff at each of the two HD/BIs I looked at. The result is that my data has a significant bias towards HA/WIs.

Thirty-one of my interviewees were most directly associated with a single (but not the same) university (e.g. through being a student or member of staff there). Several interviewees had multiple associations: for instance, having been in a similar managerial role at other universities; or having moved from such a role to working in a statutory body; or working at a university and working on higher education policy outside that university (including in a private capacity).

All of my interviewees had some link to how public universities operated and were financed. Alongside the thirty-one interviewees who were directly associated with a university: seven worked, or had worked, in the DHET; six contributed to public discussions around higher education, including as academics; five worked, or had worked in the government (e.g. the National Treasury) or statutory bodies operating in higher education (e.g. the CHE). Moreover, twenty interviewees had worked in senior managerial roles (e.g. head of school, deputy- or vice-chancellor) at universities (and some at several different universities); and eight were students who had been involved in student movements close to, or during, the 2015 to 2017 Fees Must Fall protests.

I recorded and transcribed my interviews. Quotes from my interviews have been anonymised, even where anonymisation was not requested. I did this to balance my interest in the more general features of this regulatory space, with the importance of paying attention to the place of space: most notably, that tuition fee decisions are

institution-specific. I therefore flag important caveats or distinctions where I think they are necessary. However, my main interest remains in the regulatory space as a whole. My focus is more on how my interviewees' different perspectives flesh out a rich picture of this regulatory space; than on any unique authority a specific interviewee might have by virtue of the position they occupy in this space.

The data I rely on is predominantly qualitative, though I draw on and analyse quantitative data prepared by others. Quantitative data has an important role to play in this topic – especially as a reference point for contextual, policy, and ideological (e.g. what role universities should play in society) facets of how universities are funded. My qualitative data sheds light on whether and how the quantitative data was interpreted by, and impacted on, key actors. The account of regulation I develop is focused primarily on how actors engage with the various processes which have a bearing on how tuition fee decisions are made. Qualitative data is, by necessity, the core of my account; though quantitative data has an enhancing role to play. The quantitative I draw on was compiled predominantly by government sources (e.g. the national treasury; the Statistician-General) and by academics (e.g. the analysis of university access and success in South Africa).

## **5. Coding**

I loaded my sixty interview transcripts into NVivo. I did the same for six of the public policy documents I looked at: the Reconstruction and Development Programme (1994); South Africa's Constitution (focusing on specific sections); the Higher Education Act (1997) (focusing on specific sections); Education White Paper 3 (1997); the National

Plan for Higher Education (2001); and the Higher Education Funding Formula (2003). In my interviews, and when analysing all of my data, my main aim was to build a clear and coherent picture of the space I was analysing.

To do this, I tried to link and compare comments on events and policy; and the policy documents I was reviewing. In some cases (e.g. the October 2015, September 2016, and December 2017 announcements) I also looked at media reports on these events. I collated information in my data that was drawn from different sources (public policy documents, interview transcripts). I used coding in NVivo to help me collate data in this way. My coding was informed by the conceptual lense of regulatory space analysis. In particular, I drew on key concepts from the literature I reviewed in chapters two and three. I developed codes that spoke to my research question, too. In Figure 14 and Figure 15 below, I show my NVivo code book and concept map.

Code	Description	Files	References
Disruption	<p>Unexpected and unsanctioned interruptions of established procedures.</p> <p>The undermining of a prevailing regulatory regime through hindering its constituent processes.</p>	9	16
Cascade through spaces	The movement of regulation through different localities as it is implemented and operationalised, following a crisis. The shift through different places of a crisis and the responses to it.	26	63
Crisis	A challenge to, or rupture with, the fundamentals of how things have been operating. A tipping point at which intervention is necessitated, especially regulatory reform or regime change.	17	34

Code	Description	Files	References
FMF	The Fees Must Fall protests: what led or contributed to them; how they unfolded; what they were about.	45	210
Rhodes Must Fall	The Rhodes Must Fall protests: build up; occurrence of protests, and drivers of movement and protests.	15	32
Paradigms	A model that shapes how actors engage with each other, and with the roles they are assigned or seek to fulfil.	6	13
Agency / victimhood	Who is able to act and exercise autonomy? Who is a victim? Of the system, generally; and of being excluded from university education, specifically.	12	38
Policy Values	Norms and values set out in policy documents.	15	111

Code	Description	Files	References
Public / private	Whether universities are public or private institutions. Whether university education is a public or a private good.	19	39
Access & Equity	Who is able to access university education. How fair or socially just access to university education is.	38	198
Responsible Budgeting	A paradigm which focuses on long-term financial viability, especially prevailing and enduring budgetary constraints. [Highlights (financial) complexity of managing large organisations.]	36	167
New Public Management	A paradigm which attempts to neutralise or remove more explicit political discussions by framing issues and decisions in technocratic terms.	11	23

Code	Description	Files	References
Social Activism	A paradigm which views actions to advance social justice as imperative. The view that social justice concerns (multiply defined) trump other issues.	28	91
type of society	Separate; or unitary, egalitarian, and democratic? Speaks to paradigm implemented and aspired to by government.	11	30
Interregnum	Uncertainty and variability regarding the regulatory regime, as the protests and settlements unfolded.	34	71
Authority	Legal mandates to make and implement university fee decisions. Legitimacy as a basis for involvement in making and implementing university fee decisions.	47	298

Code	Description	Files	References
Organisational Capacity	Large organisations' operations, constraints, and capacity to influence the regulation of university fee decisions.	52	289
Networks	The relationships on which actors could draw, or were influenced by. A resource underpinning the creation of large(r) organisations and their capacity to influence regulation.	43	185
Organise into, out of	Issues and actors being jostled, and jockeying, within the regulatory space of university fee decisions. Actors and issues moving through (physical and regulatory) spaces.	48	460
Wealth	How wealth was defined and dispersed before, during, and after the protests and their settlements.	43	142
Redistribution	Re-allocations of wealth as a result of the protests and their settlements.	46	316

Code	Description	Files	References
Key Interactions	What are the main interactions which shape university fee decisions? Which actors and issues interact, and how?	23	104
Deciding Fee Increases	How is a fee decision made? Key processes and considerations.	45	256
Dramatis Personae	Who's involved in university fee decisions?	48	213
Law	Key provisions from law and policy documents regarding university fee increases. How university fee decisions are made, what must be considered.	21	67
Adjudicating specific cases	Complications arising from the changed regulatory environment - especially changes to university rules and regulations - following the settlements of the protests.	17	54

Code	Description	Files	References
Financial sustainability	Where and how considerations of long-term viability are included in deciding university fees.	22	79
Student welfare	Students' conditions and quality of life. Whether this featured in fee decisions. Whether it was supposed to feature in fee decisions. How it featured in fee decisions.	19	43
Reactions	Reactions to university fee decisions.	24	40
Fee protests	Student protests focused on university fee increases.	15	26
Financial exclusion protests	Student protests focused on exclusions stemming from historic debt or lack of access to finance (e.g. inadequate NSFAS).	15	26

Code	Description	Files	References
Play of power	Contestation at the heart of this regulatory space. Contestation flowing into this space, and rippling out (e.g. political interference).	31	204
Orchestration	Facilitating collective action to achieve a particular end. Particularly interested in whether there was an orchestration failure / deficit.	22	82
Place of Space	Important theoretical material; background and contextual factors. 'political traditions and legal culture'	47	228
Regulatory Space Analysis	Primary theoretical tool used. How regulation is understood; and how it operates.	5	6
Critique	Suggested modifications to regulatory space analysis. Shortcomings or gaps in regulatory space analysis.	0	0

Code	Description	Files	References
Resources	Developing understanding of resources and how they interact. Which resources were utilised? In what ways? By whom?	6	11
Transformation	Discussions and actions around transformation and decolonisation. Particularly for higher education, but potentially more broadly (e.g. societal transformation). How transformation is perceived and defined by key actors	25	127
Role of Higher Education	Where higher education is positioned in the broader law and policy landscape. The role of higher education in South Africa. How higher education is viewed by key actors.	6	24

**Figure 14: NVivo code book**



There was some reflexivity in how I developed my codes. I began my coding with themes in mind. These themes were drawn from my literature review and from the sub-questions to my research question. My core themes were: ‘key interactions’, ‘place of space’, ‘disruption’, and ‘interregnum’. For instance, ‘key interactions’ covered the interactions which fed into how tuition fee decisions were made. It included who was involved in those interactions. ‘Interregnum’, by contrast, was focused on the resources of organisational capacity, authority, and wealth.

I coded by reviewing the transcripts I had loaded into NVivo. I refined my codes as new ideas emerged from my review of the data. For example, the code ‘adjudicating specific cases’ emerged from some of my interviewees’ observations about how university managers’ application of their university’s rules and regulations was significantly changed by the 2015 to 2017 Fees Must Fall protests. This included changes to the imposition of sanctions for non-payment of fees. The code ‘adjudicating specific cases’ fell under ‘law’; which fell under ‘deciding fee increases’; which fell under the theme ‘key interactions’.

There was also some reflexivity between my writing and coding. As I moved from reviewing my data to planning and drafting chapters, I further refined my coding. One example of this is my drawing a clearer distinction between my codes of ‘organise into, out of’ and of ‘cascade through spaces’. Initially, I had some overlap in how I had applied these codes to my data. As I did more coding, and as I started planning chapters in light of my coding and literature review, I separated these codes better.

I increasingly limited ‘cascade through spaces’ to how regulation flows through spaces, especially during its implementation. I also applied ‘cascade through spaces’ to the different places in which crises and responses to crises unfold. To begin with, I had drawn this code from Haines’ analysis of how regulation cascades through spaces.<sup>941</sup> I refined what data I captured under this code as I reviewed transcripts; extending it from the implementation of regulation, to crises (e.g. disruptive protests) and the responses which attempt to settle them (e.g. president Zuma’s October 2015 announcement). I followed a similar process in developing my code ‘organise into, out of’; which I increasingly limited to actors and issues jostling within, and moving between, regulatory and physical spaces.

## 6. Limitations

The overarching limitation of my DPhil is that tuition fee decisions are institution-specific. I argue for a single, multifaceted, regulatory space; with different institutions being affected by the overarching regulatory constraints in different ways. That argument is still limited, though, by my having gathered data from four out of South Africa’s twenty-six public universities. Alongside this general limitation, there are four further limitations to how I gathered and analysed data.

First, even for the four public universities I considered, there are notable biases in my data. I noted in section 4.2 of this appendix the significant disparity between the number of my interviewees from HA/WIs rather than HD/BIs. I further indicated that

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<sup>941</sup> Cf. fn 14.

only eight of my fifty-one interviewees were students; with thirty-one of my fifty-one interviewees having some university association. Obtaining more perspectives from students might be an important complement to my DPhil. It might, for instance, raise further questions about how far students became dominant occupants of this regulatory space. Doing so might sacrifice some depth for breadth, though; bearing in mind that twenty of my fifty-one interviewees were not directly affiliated with a university.

Obtaining more data from HD/BIs would be an important addition to my data. Exploring alternative accounts to those which were dominant in my data might also prove fruitful. I have cited the example of the different experience of the University of Venda. This was mentioned to me by one interviewee. Gathering further data on the University of Venda might provide important qualifications and adjustments to my more general analysis of this regulatory space.

Second, I have tried to be thorough in my review of relevant public policy documents. My review has not been comprehensive, though. This is a regulatory space with ongoing implementation and development, extending to multiple task teams and the publication of several reports (including by task teams) on interventions (or proposed interventions). I have attempted to capture the key trends and foundational policies, but there are more public policy documents to analyse.

For instance, all of the documents listed on the Heher Commission's website could be analysed. That analysis could be expanded to include all of the transcripts from the Heher Commission's hearings - and even all of the documents submitted to

the Heher Commission. Similarly, all of the transcripts from the Portfolio Committee on Higher Education could be reviewed. This could provide a more fine-grained analysis of how this regulatory space evolved.

Third, my own biases need to be accounted for. My interest in my MPhil and DPhil was sparked by president Zuma's October 2015 announcement. Subsequent interventions by the MHET in September 2016, and president Zuma in October 2017, further stimulated my interest in this topic. I was surprised by these interventions, and sceptical of their legality (particularly president Zuma's October 2015 announcement). The data I compiled and analysed showed me several layers of nuance to each of these interventions.

I also had my own view of South Africa's unfortunate position: being subject to tight economic and capacity constraints, while also needing to implement multiple interventions to ameliorate historic and current inequalities. I completed my undergraduate studies in South Africa, and I think this gave me important contextual insights. These insights, though, need to be critically assessed. I have tried to be critical in my analysis, including in outlining how the tight constraints South Africa faced came to bite in the regulatory space I focus on.

These constraints could be analysed further, including through using a different methodology (e.g. discourse analysis). This could include unpacking how these constraints are socially and politically constructed. For instance, the contestation between university managers, the national government, and students over what is an

acceptable and appropriate measure of higher education inflation could be analysed in some detail. Higher education inflation is a central component of tuition fee decisions. I have focused more on showing its general relevance to tuition fees, and that its compilation was potentially open-ended and contested in practice.

Fourth, my DPhil analyses a regulatory space that was subject to substantial disruption, together with ongoing policy implementation and change. This disruption and change partly inspired my depiction of the 2015 to 2017 Fees Must Fall protests and their settlements as an interregnum. In essence, I am analysing a regulatory space being subjected to dramatic new shifts. These more recent shifts overlay historical shifts. This renders my account more descriptive than causal. Although my argument does include a weak causal claim: that this regulatory space was reconstituted by and during the 2015 to 2017 Fees Must Fall protests, even if other factors also contributed to this reconstitution.

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