



**FEEES  
CAN  
FALL,**

**BUT  
FIRST** ■ ■ ■



South African Institute of Race Relations

*The power of ideas*

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# FEES CAN FALL BUT FIRST ...

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## 1. Introduction

In our politically correct era, we hang on the words and actions of young people with too much knowledge and too little wisdom. The consequence is a society retreating into fear and loathing.

Apartheid's appalling legacy, exacerbated by poor and corrupt governance, is manifest in every sphere of society today and the failing responses to this legacy have endowed us with the nihilism of the #FeesMustFall (FMF) campaign. The costs are amplified by a profoundly mistaken assumption that when the youth make a demand they can pursue it with impunity.

Apologetic parenting, especially since the 1980s, has impelled generations of upper-class parents to retreat to the false refuge of guilt and indulgence. This has become increasingly true of less well-off parents (who can ill afford it) whose indulgence is coupled with fear of the contempt of their better-educated children.

The result is what the Americans and Europeans call "Generation Snowflake" – kids who are genuinely hurt by opinions that differ from their own, and turn to expressing their "pain" through insult, threat and the denunciation of everything they disagree with. This has been aided and abetted by the academic left in universities, including our own.

## 2. Rules of engagement

Before getting into the substance of events on South Africa's campuses it is important to be reminded that a stable and democratic society functions effectively only when certain ground rules are adhered to. In such a society it is trite that when a demand is made of anyone – an employee or a boss, a student or university management, a citizen or a government – the following must apply:

1. The demand must be capable of being met by the person to whom it is made. If it is not, negotiations become dysfunctional;
2. No matter how worthy a demand is, if the process for pressing it is unlawful, there can be no entitlement that the demand be considered let alone met;
3. Those making a demand must be mandated to make it on behalf of all they purport to speak for, otherwise the demanders speak only for themselves.

In the context of FMF these rules have been jettisoned:

1. Because only the government, and not the universities, can meet their demand, negotiations became dysfunctional from the start. No university, public or private, can afford to operate without fees. While a university can be brought to its institutional knees in the attempt to pressurise the government to pay for education, if the government doesn't agree to the demand, there is absolutely nothing the university can do except, ultimately, close down;
2. Students may legitimately make demands, but not by disrupting classes, forming illegal gatherings or intimidating anyone in any manner;
3. At Wits, 36,000 students were polled over whether to resume classes. Of the 27,000 who participated, 77% (more than 21,000) supported the resumption of lectures. The leaders of FMF have ignored this mandate and therefore represent no-one but themselves.

### 3. Rights and obligations of protest

The rules of engagement go hand in hand with the right to make demands and to protest when they are not met. Section 17 of the Constitution gives every citizen the right to protest, whether the objective of the protest is reasonable or ridiculous. The right to protest is central to every free and open society and yet it is a right that is being abused in the most egregious manner.

In the current context, no one may interrupt or disrupt a lecture in support of the cause. No one may ignore a police order. No one may organise a gathering contrary to legislation. No property may be damaged and no person may be threatened, injured or killed. No one may threaten or cajole anyone into joining a demonstration.

Protesters have no right to throw faeces around university property. They have no right to invade residences and steal food. They have no right to destroy rare, valuable or irreplaceable books. They have no right to pull paintings off walls and burn them. They have no right to burn university cars or buses. They have no right to try to burn a university bus while female students and the bus driver are still in it. They have no right to raze an auditorium worth R150 million.

Every society entails at some level a competition for scarce resources. A person may try to persuade another to support his or her cause, but if the argument is not persuasive, that is the end of it. It matters not what the cause is or how strongly it is felt. The cause is irrelevant, however worthy. When those who do not get what they demand turn to violence and intimidation they threaten the functioning and stability of that society.

### 4. Institutional responsibility

Every functional institution is one in which management takes full responsibility for decisions. Ultimately a single leader must take responsibility. In the case of the universities that single person is the Vice-Chancellor. Compare a university to a company: the managing director has overall responsibility. He or she designates specific responsibilities downwards to appropriate levels to ensure that the institution functions. The managing director cannot do everything, but carries final responsibility.

No institution can be run as a collective with every decision being subjected to a vote. Stasis will result. In part, our country's governance is dire because, although functions are devolved to different ministers and their departments, the president shows no leadership, takes no individual responsibility and doesn't discipline poor performance. We are now living with the consequences of this style of governance.

Performance management is complex but includes a system of discipline and punishment, on the one hand, and reward on the other. The failure to discipline and punish results in good people becoming demotivated because nothing improves, with the likelihood of the organisation becoming mediocre at best, or failing altogether. Success certainly cannot be achieved by appeasing the bad.

In the case of the FMF protests there are fora for consulting with student representatives. Students have the right to be heard and to have their views considered, but only the executive of the university has the power and authority to make decisions. The students have no right to have their demands met. Whether management agrees to the terms depends entirely on its perception of the feasibility of meeting those demands in the overall context of the wider university purpose.



For example, the website of the University of Cape Town (UCT) says the following about the responsibility of its Council:

*"Its [the Council's] responsibilities include determining the mission, objectives, goals, strategies and policies for the progress of the institution. It must also ensure an environment conducive to efficient, effective, economical and ethical attainment of these goals.*

*In addition, it has the responsibility of maintaining and ensuring a financially secure, healthy and viable environment and accounting for all decisions taken at UCT, including the submission of the required reports and documents to the Minister of Education.*

*It has the responsibility of maintaining and ensuring a financially secure, healthy and viable environment and accounting for all decisions taken at UCT, including the submission of the required reports and documents to the Minister of Education."*

Students are not mandated to make and execute decisions. They are not even the clients of the university. The people and organisations which pay fees or give donations or grants are the clients of the university. The students are merely recipients in terms of contractual relationships. Students don't have decision-making authority – that authority has to rest entirely with the management of the universities if they are to function as successful institutions of higher learning.

When, out of a sense of complete disempowerment, the management of the University of the Witwatersrand (Wits) held a referendum by SMS to ascertain how many students wanted lectures to resume, the leaders of FMF launched an urgent application in the South Gauteng High Court to stop it. FMF tried to stop Wits from asking its students a question it shouldn't have had to ask.

Busisiwe Seabe, a leader of FMF, displays the attitude of those who arrogate to themselves the right to determine for others what to think and do without being mandated to do so. In the article "What do the students want?" (*City Press*, 2 October 2016) Seabe opines that to ask students whether they want to continue attending classes is wrong. According to Seabe, the right course of action would have been to convene a student assembly – mass meetings and dialogues at residences, communicating what the shutdown was about. Seabe doesn't grasp that university authorities can choose to approach students in any way they like. It is neither for her nor FMF to determine how a university chooses to engage with students.

## **5. Obligation to discipline**

Not only must decision-making rest with university management structures, but those structures in addition have a responsibility to safeguard the university and protect it from harm. In this respect universities are obliged to discipline any student or employee (academic or support) who commits misconduct. The management is duty-bound to every other stakeholder to discipline such misconduct. The student or employee charged with misconduct has no preferential rights other than the right to be disciplined for a good reason in terms of a fair procedure.

This means that any student against whom there is evidence that he or she has committed misconduct or criminal behaviour during the FMF protests must face discipline. If a student is found guilty of misconduct in terms of the university's rules, the student must receive the punishment appropriate for the misconduct. This may vary from a verbal warning to expulsion, depending on the misconduct, taking into account the previous disciplinary record of the student and any mitigating factors. A university's Code of Conduct may in addition make it obligatory for management to lay criminal charges if it becomes aware of criminal conduct. The two processes are not mutually exclusive, nor are they interlinked. The onus of proof is not the same for both processes. In the case of misconduct guilt need only be proved on a balance of probabilities; in the criminal law guilt has to be proved beyond reasonable doubt. Thus behaviour which is both misconduct and a crime may result justifiably in expulsion but not conviction.

The university must not wait for the state to decide whether or not to pursue a criminal case before taking disciplinary action. The university must embark on implementing disciplinary action irrespective of what the state is or is not doing. If the university fails in this responsibility any affected member of the public may lay criminal charges against a student whose conduct is criminal.

## **6. No laws of convenience**

There has been much appalling behaviour by the government in recent years. It has taken opposition parties, the media and civil society years of advocacy to strike down laws or to force corrupt officials to abide by the law. The process of challenging the government is often slow and doesn't always produce the desired results. However, none of this entitles the citizenry to use illegitimate means to press demands. The political system may be performing poorly, but unlike apartheid, it is not illegitimate. Every adult of voting age, including the protesters of FMF, may exercise his or her right to vote the government out of power.

Polls suggest that very few people have confidence in the leadership of President Jacob Zuma. Many people would no doubt be delighted were he to step down. Such stepping down would undoubtedly be good for society and the economy. But none of this permits the use of illegitimate means, or ignoring of the law, to have him ejected.

If a point is reached where an element of society says it will no longer comply with certain laws because these stand in the way of their demands then what is to stop other elements of society from doing the same? The result undermines the rule of law and the very foundation of South Africa's democracy.

## **7. What the police must do**

President Zuma was quite correct when he instructed the justice, crime prevention and security cluster to "deal with the mayhem that is destroying our institutions of higher learning", in the words of Minister in the Presidency Jeff Radebe. The Criminal Procedure Act obliges a police officer to arrest any person who commits or attempts to commit a "Schedule 1" offence in his presence. Such offences include: public violence, culpable homicide, assault when a dangerous wound is inflicted, arson, malicious damage to property, breaking into premises intending to commit an offence and theft.

There has been much comment in the media from experts about allegedly innumerable incidents of police brutality. But a lot of this commentary ignored the fact that police officers and other individuals had come under attack by students armed with rocks, petrol bombs, and other weapons. There is little evidence of police officers initiating conflict with protesting students. Apparently forceful arrests also occurred in the face of protesters resisting arrest, but resisting arrest is illegal and the police may use necessary force to effect an arrest. In much of the criticism of the police, activists have suggested a moral equivalence between students carrying rocks and other weapons and the police using rubber bullets and stun grenades to restore law and order. There is no such equivalence and the police are obliged to uphold law and order.

## 8. What universities must do

The important role played by the police does not detract from the fact that the universities are ultimately responsible for maintaining academic and other standards. University management structures owe it to their staff, students, and financiers – including taxpayers – and to society at large to ensure that South Africa's universities are able to shoulder the educational burden they are having to take on. By seeming to be helpless and cowed by unlawful behaviour South Africa's universities run the risk of becoming academic shells. It is paramount for universities to regain the confidence of the majority of students and staff who have had to sit quietly by while a minority dictates terms.

University management structures can restore public confidence in higher learning institutions if they commit to the following five principles of action:

1. They must bring appropriate numbers of police and security officers onto campuses and keep them there even in the face of public criticism;
2. They must not negotiate on (let alone accede to) demands they cannot meet. Universities can consult over the demands and what they can, if anything, do about them – for example to take the demands to the appropriate government department. But if they cannot meet the demand then they must not agree to meet it. Related to this point is, obviously, that they must not enter into negotiations with amorphous groups of students who hold no elected or otherwise demonstrable mandate;
3. They must not capitulate to threats and intimidation, or offer amnesties and the like to violent students, in the hope of achieving peace. Indulging and appeasing violent behaviour is likely only to encourage more violence, is disrespectful to the vast majority of students and staff, and risks denuding the university management of any future authority. Lecturers and students alike have complained that they are afraid. Some have described being locked in offices and lecture rooms as marauding thugs walked the corridors. Others have spoken of being locked in their dorm rooms, too afraid to come out;
4. They must use interdicts as an entirely legitimate, non-violent response to criminal action that has threatened lives and property, and
5. They must hold disciplinary hearings that accord with university procedure against any student or staff member whose behaviour has breached a university's disciplinary policy.

Universities need to take an especially strong stance when their own academic staff are implicated in indulging in and even inspiring violent actions. In the article "Profs lecture Protest 101" (*Mail & Guardian*, September 30 to October 6 2016), Prega Govender quotes University of Kwazulu-Natal (UKZN) sources as stating: "They [academics] are part of the problem. They are definitely assisting students to destabilise the institution."



A number of academics have said that teaching and other activities on campuses need to be brought to a halt until the FMF demands are resolved. Others have suggested that students should resist the deployment of police and security officers on campuses. Academics are entitled to hold their own views of FMF's demands, but if they disagree with the universities' handling of the protests, this does not entitle them to act contrary to their employers' demands of them.

## 9. The costs

The physical costs of damage to 18 universities is currently estimated to be in the region R1 billion.

Some of those costs will be met by insurance, but not all. With such damage occurring numerous times within a year, insurance premiums are likely to increase significantly – if insurance companies will even continue covering university property at all in the future. Taxpayers will become responsible for the money to repair damage not covered by insurance companies.

A greater cost than repairing the physical damage will be paid in universities being unable to complete the academic year. Students will not graduate. Those who have jobs promised to them will not be able to take up those positions. Those who are on bursaries, particularly from the private sector, are unlikely to receive further funding and thus may not be able to complete their degrees. Families who may be dependent on these future incomes suddenly have no promise of support. Hospitals will lose a year of community service staff. Legal and accounting articles, which are often extremely difficult to come by, will be lost and may never be regained, and on it goes. The 2017 first year intake will be compromised.

The greatest cost of all will be paid in the reputational damage to South Africa's universities. The value of degrees held by past and future graduates will be eroded. Paying students will leave for the private sector. The best academics will leave or relocate abroad. Donors will desert the public higher education sector. While the upper middle classes are likely to find new higher education opportunities, prospective students from poorer backgrounds will be left without opportunities to get a good degree – which will in turn slow the growth of the middle class.

## 10. What is really at issue?

The manner in which the protests have evolved suggests strongly that they are not about fees or access to higher education. The protests started with complaints about Cecil Rhodes and went on to accumulate complaints about issues ranging from artworks, the curriculum and outsourcing of staff to student accommodation and a dearth of black academic staff. Each time universities looked set to accede to students' demands, new demands were added. Each time a concession has been made new demands have taken its place and new excuses are found to destroy property and shut down campuses.

Where universities made genuine attempts to engage with protesters, such attempts were rebuffed or sabotaged. Academics who in all likelihood would side with students on the question of fees have been attacked and denounced. There can be no doubt that the Vice Chancellor of the University of Cape Town, Dr Max Price, supports many of the students' demands yet his office has been firebombed, he has been assaulted, and is regularly derided as a racist opponent by the leaders of the student movement. This is not the behavior one would expect of a movement that was sincere about having its demands addressed.

Considering what has transpired during the FMF protests, two themes stand out.

The first is that racism and the sowing of hate emerges as a clear pillar of the FMF movement. White students and lecturers have been racially abused in public. Black students and academics who have sought to continue with academic programmes have been ridiculed and described as collaborators and worse. What has been described as a 'white' or Western curriculum has come in for criticism – silly as it is, given that knowledge is universal and does not have a race, and, in addition, that there is consensus on the importance of developing a rich African academic tradition.

The second is that violence has become a defining feature of the FMF movement. On campuses, thugs, sometimes wearing balaclavas, have walked into lecture theatres and offices and physically assaulted students and staff. Weapons have been smuggled onto campuses, including petrol bombs that have been used to set buildings alight. A student was hit with a sjambok in a law lecture. Other students were assaulted in a dining room. Women have been sexually harassed and intimidated. Calls have been made to attack the police. Private security officers and police officers have been attacked and seriously injured. A warning went out at Wits that the killing of a white student would get the authorities' attention.

These two points suggest that the FMF movement has morphed into a violent anarchist movement that is using racial incitement to provoke conflict and division in our society. Acting Police Commissioner Kgomotso Phahlane says FMF protests have been infiltrated by certain elements with an agenda to destabilize the country, and believes the students are not acting alone.

Too little is at present known about who the FMF movement is. Who does it actually represent? Who is funding it and giving it direction? What is the extent of political-party involvement in the movement? Are any South African or foreign groups funding or otherwise acting in support of the movement? The media and the broader commentariat have a very important role to play in seeking answers to all these questions.

## 11. The solutions

Our assessment of the situation on campuses suggests that the long-term standing of South Africa's institutions of higher learning can be secured if the following steps are taken:

1. Cease negotiations with unrepresentative groups and those without clear mandates. Certainly do not accede to demands made by such groups and do not indulge them with offers of amnesty and the like;
2. Deploy the police and the defence force to all universities for six months to keep them open. Securitisation can only end when law and order returns;
3. Special teams of prosecutors and detectives must comb through video and photo records to identify violent protesters, trace them, and arrest them in the dead of night;
4. University authorities must use whatever evidence they adduce to hold disciplinary inquiries against students and staff. They must hold these inquiries as soon as the evidence is collated. They must not wait for the outcome of any criminal action;
5. Disciplinary hearings should be chaired by qualified independent outsiders with suitable knowledge and experience who must apply the rules that govern university discipline;
6. Intelligence resources must be used to identify protesters who have planned or instigated violence and those who fund and support them, and have them arrested and prosecuted for any breaches of the criminal law;

7. The mandates of the SRCs must be examined to determine whether their support and leading of the protests is within their mandate;
8. Journalists, academics, civil society groups, and politicians who have fomented the violence must be arrested and charged with sedition;
9. Staff who have in anyway supported or assisted illegal protest must face disciplinary action. Any staff members who have refused to do any aspect of their job in support of FMF must face disciplinary action for refusing to obey lawful instructions and breaching the relationship of trust between them and their employers;
10. Universities must keep students, staff, parents, donors and bursary providers apprised of the disciplinary and court outcomes. Part of the rationale for resorting to legal processes is to provide a salutary lesson for anyone who may want to press a demand unlawfully in the future. The stakeholders also need to be reassured that the university management is being assertive and supportive of those whose behaviour has remained lawful and whose rights have to be considered;
11. Vice-Chancellors or other persons who have been defamed by FMF leaders or protesters should lay charges of *crimen injuria* and initiate claims for defamation. The importance of these processes cannot be overstated;
12. A thorough analysis must be made of those disciplines that teach Marxist-Leninist philosophies and systems disproportionately to other philosophies and theories that promote a more tolerant and classically liberal philosophy. Jargon-filled left wing philosophies have proved to be spectacularly unsuccessful in their application and have failed to achieve social justice. Whether they are unduly emphasised must be critically examined by the universities. The issue is not whether they are being taught, but how, and whether with appropriate emphasis, compared to other more tolerant and democratic philosophies.

If these points are strictly adhered to it should be possible to complete the 2016 academic year and start the 2017 year on time and therefore to put the higher education system back on a stable course.

## 12. The question of fees and access to higher education

Once law and order has be re-established and universities are functioning in a stable manner it will become possible to address the question of access to higher education for poor students.

A suggestion repeatedly made by protesters and others has been that “rich” parents, and/or households that earn over R600 000 per annum, pay more. This is not only discriminatory, but also impossible to determine. No account is taken, for instance, of how many people – including children, or disabled or elderly parents – in the household in question need support. This is not a call for the government to make. Equally, unlike school children who are minors and whose parents are obliged to support them, university students are majors and society cannot expect or demand that their parents support them financially at university.

Some students have proposed a wealth tax (“Free Education is a possibility”, *City Press*, 2 October 2016). However South Africa’s tax-to-GDP take is already very high. They also give no consideration as to why taxes should go to their education rather than a host of other competing and, arguably, more compelling causes.

However we think the following could be done to provide for “debt free” – rather than “free” – tertiary education:

1. Work towards scrapping the current NSFAS scheme and replacing it with a new scheme funded through cuts in the civil-service wage bill and subsidies to state-owned and other companies. It would have to be administered with the sort of efficiency one associates with the South African Revenue Service (SARS);
2. The fund will make financing available to students who qualify for tertiary study against a more demanding set of qualifying criteria than those presently employed;
3. Funded students should repay these grants through a unique income tax number that will see them paying slightly higher levels of income tax until the value of the debt is paid off.

This approach will resolve the immediate funding shortfall facing universities, provide a sustainable long-term funding model, reduce wastage through underprepared students entering universities but not completing their degrees, and avoid lumbering new graduates with high levels of debt.

### **13. The future (Concluding remark)**

IRR policy fellow Gwen Ngwenya writes that “(s)oft sympathy is the patronizing appeasement of every whinge and is more about assuaging one’s guilt than a concern for equal opportunity”.

We think this perfectly sums up what has been allowed to happen on South Africa’s campuses. It is time for a new approach that seeks to restore order to safeguard the future of South Africa’s universities from those who would do them harm. If that battle is lost, the prospects for future generations of poor young South Africans will be very bleak indeed.