

**ROOM FOR IMPROVEMENT:
SCORING AOTEAROA NEW
ZEALAND
A RESPONSE TO BEITER, KARRAN
AND APPIAGYEI-ATUA'S
RETROGRESSION IN THE LEGAL
PROTECTION OF THE RIGHT TO
ACADEMIC FREEDOM IN EUROPE**

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Academic freedom in Europe, while still formally valued, appears to be suffering some erosion, though not in consistently patterned ways. The overall result of Klaus Beiter, Terence Karran and Kwadwo Appiagyei-Atua's research is a ranked list of the European Union states. However, due in part at least to the large and complex data set upon which the rankings rest, it is hard to produce a coherent explanation for why the rankings have the order they have. The research itself is painstaking and ambitious; it represents an important attempt to chart the fortunes of academic freedom at a historic moment in which real dangers lurk. (Although there has probably never been a period when they have not!) The framework derived from UNESCO's 1997 *Recommendation on the status of higher-education teaching personnel* is a useful one, because it reaches beyond the narrow definition of academic freedom as freedoms of teaching and research into wider contexts of institutional autonomy, self-government and tenure – all of which provide the ground of security and responsibility that make academic freedom most fully meaningful and realisable.

Reading Beiter and colleagues' paper piqued my interest in the situation vis-à-vis academic freedom here in Aotearoa New Zealand (NZ): how would we score on the standard measures used in this study (and, indeed, how easy are they to use)? In this commentary, I follow that interest. My effort may perhaps lack the rigour of theirs as I found elements within some indicators difficult to figure out from the level of detail provided in the paper and, also, I was wanting of a fellow researcher to make an independent assessment that could

inform mine. Moreover, given that NZ is not a member of the EU or any comparable regional union, some analytical elements were not relevant. However, I have been as transparent as possible for the score I have given on each of the five indicators, providing local details to this end.

On the first indicator, the ratification of international agreements and constitutional protection: NZ has signed and ratified the UN's 1966 *International Covenant on Civil and Political Rights* as well as the *First Optional Protocol to the International Covenant on Civil and Political Rights*, which establishes an individual complaint mechanism for the *Covenant*. NZ has also signed and ratified the 1966 *International Covenant on Economic, Social and Cultural Rights* but not the more recent (2008) *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, which likewise establishes complaint and inquiry mechanisms for the *Covenant*. Like the UK, NZ does not have a formal written constitution but it does have a Bill of Rights (1990), which includes rights to freedom of thought, conscience and religion (§13), and of expression (§14), that are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, there is no mention in the Bill of any more specific rights relevant to academics and/or academic institutions such as academic freedom, academic self-governance or institutional autonomy. With an overall score of 11.5/20,¹ NZ does not offer a picture of a state that "accept[s]

¹ In the absence of a regional-level convention, I have allocated 4/4 for this dimension to avoid unduly disadvantaging the score relative to others in Beiter et al.

obligations of ‘superior normative force’”, which is the standard Beiter and colleagues hold up.

On the second indicator, the express protection of academic freedom in HE legislation, NZ has a stronger showing. The *1989 Education Act* expressly protects academic freedom for all tertiary institutions,² under §161:

- (1) It is declared to be the intention of Parliament in enacting the provisions of this Act relating to institutions that academic freedom and the autonomy of institutions are to be preserved and enhanced.
- (2) For the purposes of this section, *academic freedom*, in relation to an institution, means –
 - (a) the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions:
 - (b) the freedom of academic staff and students to engage in research:
 - (c) the freedom of the institution and its staff to regulate the subject matter of courses taught at the institution:

² In NZ, we commonly talk about ‘tertiary education’, which refers to a broad post-compulsory education sector that includes eight (publicly funded) universities, 18 polytechs, three wānanga, over 600 private training establishments (PTEs) and 12 industry training organisations (ITOs).

- (d) the freedom of the institution and its staff to teach and assess students in the manner they consider best promotes learning;
- (e) the freedom of the institution through its chief executive to appoint its own staff.

Section 161 was a late addition, inserted almost 12 months after the Act was passed into law in response to high levels of criticism, from universities in particular, at the infringements of institutional autonomy arising from changes brought in by the Act. Many aspects of the Act were modeled on the UK Thatcher Government's *1988 Education Reform Act* – the language around academic freedom, for example, is an almost verbatim version of the UK text.³

In addition to this protection, the Act *requires* that universities alone accept a defining role as critic and conscience of society. Under a section entitled *Establishment of institutions*, the Act specifies “that universities have all the following characteristics”:

- i. they are primarily concerned with more advanced learning, the principal aim being to develop intellectual independence:

³ There is a painful irony in the fact that a Labour (left-wing) government in NZ should follow the same path as the right-wing Tory government of Margaret Thatcher. As has been commented on elsewhere (J. Kelsey, *The New Zealand experiment: A world model for structural adjustment?* Wellington: Bridget Williams Books, 1997; B. Jesson, *Only their purpose is mad: The money men take over NZ*. Palmerston North: Dunmore Press, 1999), the Fourth Labour Government was the Trojan horse for a thorough-going penetration of neo-liberal principles throughout all aspects of NZ's public sector. At the time, the right-wing Opposition Spokesman for Education regularly suggested that a kind of fascism motivated the Labour Government's desire to pass the legislation and the Universities of Auckland and Canterbury initiated legal proceedings against the Government because of the perceived attack on university autonomy.

- ii. their research and teaching are closely interdependent and most of their teaching is done by people who are active in advancing knowledge:
- iii. they meet international standards of research and teaching:
- iv. they are a repository of knowledge and expertise:
- v. they accept a role as critic and conscience of society.
(Act, §162[4])

The critic and conscience function may be unique to NZ legislation, although it is suggestive of the role of public intellectual. The function contrasts with the more general grounds of academic freedom in that it specifies an active – and critical – role for the university, and its member academics, in and towards the wider society. The clause offers protection under the law to both the institution of the university (which has a legal personality) and its members in the carrying out of this function, although to date there are no legal precedents and there is, as there is for academic freedom, an inherent ambiguity about whether or not an academic must enact the role only on the basis of relevant academic expertise or whether there is a broader basis for it (as the term ‘conscience’ seems to imply). For the strength of these intentions, but the accompanying absence of a wider sense that academic freedom is a guiding principle of higher education (in terms of protecting academic tenure, for example), NZ gets 15/20.

On the third indicator, the protection of institutional autonomy in HE legislation: despite its protestation that “the intention of Parliament in enacting the provisions of this Act relating to

institutions that academic freedom and the autonomy of institutions are to be preserved and enhanced” (Act, §161[1]), and despite significant resistance from universities, the *1989 Education Act* indeed removed several safeguards of institutional autonomy from government interference: it abolished the University Grants Committee, long an intermediary funding body between the universities and the government; it enforced the creation of university charters, which required ministerial approval (now replaced by three-year ‘Investment Plans’); it installed CEOs/Vice-Chancellors as the employers of university staff (Act, §198[1]); and it gave the Minister of Education the power to approve the members of university councils and for the number of academics on those councils to be limited.

The Act established a Tertiary Education Commission, which was given powers to implement the tertiary education strategy, prepared by the Ministry of Education (most recently co-authored with the Ministry of Business, Innovation and Employment, whose Minister also holds the portfolio of Minister of Tertiary Education, Skills and Employment). The strategy “sets out the Government’s long-term strategic direction for tertiary education; and the Government’s current and medium-term priorities” (Act, §159AA[1 & 2]). In order to receive funding, universities must frame what they do, as expressed in mandatory Investment Plans, in relation to that “strategic direction” and those “priorities”, which means government has a powerful vehicle for steering universities. Moreover, the tertiary strategy is also a vehicle for expressing party ideologies and so has been replaced

with unseemly frequency (given the size and complexity of the systems it is trying to steer).

There is some autonomy to determine the Vice-Chancellor, although this autonomy does not lie in the hands of the academic community: the decision is made by Council (Act, §180[1a]), which includes a significant number of ministerial appointees. At the same time, universities have autonomy to determine internal structures, an autonomy that has become a kind of sandbox in which institutional managers love to play. Restructuring is ubiquitous and, for those on the ground, exhausting and morale-destroying. Still its autonomy and perhaps one must appreciate that!

Importantly, NZ universities maintain autonomy over defining academic positions, over recruiting and promoting academic staff. However, as Nick Lewis and Cris Shore point out (this volume), the apparent subservience of NZ universities to government ideology is reflected in recent developments around hiring, in which traditional practices that reflected disciplinary autonomy are being replaced by institution-wide hiring freezes accompanied by commercially driven strategic – or “exceptional” – hires. The processes used for the latter often cut across the public service employment standards that apply for “normal academic recruitment” and can produce divisive and resented appointments.

NZ universities also maintain autonomy over the selection criteria for bachelors degrees and, under the Act, over determining all university degree and sub-degree accreditation through the

Committee on University Academic Programmes, a sub-committee of the New Zealand Vice-Chancellors' Committee (also known as Universities NZ). I confess this is not an exhaustive assessment of the autonomy of NZ universities according to Beiter and colleagues' standard, mainly because elements of this standard were unclear to me. Provisional score for a mixed bag: 11.5/20.

On the fourth indicator, the protection of academic self-governance in HE legislation: NZ's legislation provides no such protection. Indeed the limit on the number of academics on university councils set in the *1989 Act* has recently been increased, as was foreshadowed by the National Government's Tertiary White Paper in 1998, subsequently shelved by the change of government in late 1999.⁴ The revived proposal once again faced much opposition – ultimately unsuccessful – from Universities NZ: from early 2016, the size of university councils has reduced from 12-20 to 8-12, with a larger proportion of positions reserved for ministerial appointments, and the requirement for representative membership (for example, of students, staff and unions as had previously been the case) definitively removed. At the University of Auckland, for example, there is now only one elected academic staff member on council, along with one each of an elected administrative staff and student member (although

⁴ M. Olssen, *The neo-liberal appropriation of tertiary education policy in New Zealand: Accountability, research and academic freedom*. Wellington: NZARE, 2002.

we might congratulate the University in that it is not required to have any such members).

Within NZ universities, senates are still common. Taking the case of the University of Auckland, membership of the Senate is by right for all full professors and divisional leaders, and there are places for just over 20 elected academic members and up to six elected student members. Alongside the University-wide committee structure that reliably includes elected academic members, Faculties typically have parallel committees, membership of which is more likely to be on the basis of position. For example, as the Chair of my School's Postgraduate Committee, I sit on the Faculty Postgraduate Committee, the chair of which sits on the University's Board of Graduate Studies. This cascading representation is a common structure in NZ universities. Limited rights to self-governance also materialise in union-negotiated academic collective agreements via phrases such as "academic staff have the right and are required to participate in the formulation of academic policy through their schools, institutes and faculties".⁵ Lastly, while Vice-Chancellors are typically doctoral-holding academics, they are not usually appointed from within the institution's academic community, and that community has limited, if any, input into their appointment or its extension, and no power to remove her/him. Score: 11.5/20.

⁵ *Victoria University of Wellington Academic Staff Collective Agreement 01 July 2014–30 June 2016*, p. 23

On the fifth indicator, the protection of job security (including “tenure”) in relevant legislation: again the Act does not provide any such protection. Indeed NZ has never provided tenure to academics, although there was a long period in which security of employment was taken for granted. Not so now – in the past ten years or so, we have seen many redundancies in the sector, mostly justified by arguments based on falling student numbers and/or the redirection of student interests away from particular fields, or (less often) overall budget pressures. So the un-ideal “dismissals on operational grounds” that Beiter and colleagues describe do take place, often enough that there is now a climate of insecurity in universities. At the same time, we have a national union of university and other tertiary sector staff, which negotiates site-based academic (and professional staff) collective agreements, including provisions for terms of appointment. This provides a, perhaps weak, form of regulatory framework but, in practice, NZ’s academic workforce is nowhere near as casualised as our much larger neighbor, Australia’s. This may, in part, be a rational and pragmatic response to the difficulty NZ universities have in attracting and holding academic staff, largely because of lower wages and high costs of living alongside limited access to research funding.

The norm for academic appointments is a ‘permanent’ (or ‘continuing’) position via, in some but not all universities, a probationary period of three or four years. Where a staff member is appointed to a fixed-term position, some site-based collective contracts require they must be provided with a reason for such an appointment (although this could be as vague as to provide for

“flexibility in staffing to meet changing student numbers, research funding, etc” [UoA Academic Staff Collective Agreement, 18 Dec 2015–30 June 2016]).⁶ Promotion criteria are covered in the collective agreements, such that Beiter and colleagues’ “prospect of advancement based on objective assessment of competencies” criterion is well catered to both in policy and, drawing on my experience as a long-serving academic at the University of Auckland, in practice. Overall score: 10/20.

So what of NZ’s scorecard overall and what company would we keep in the ranks of EU states? A total of 59.5 puts us at the top of the D-grade group, on a par with Lithuania. Given the overall picture of the EU, it’s a reasonably good showing (although, as per the methodological reservations noted in the opening paragraph, I would be more confident of this score if I’d had another independent scorer). But there’s undoubtedly room for improvement, especially around matters of self-government and tenure. Are we, though, in a period of retrogression that Beiter and colleagues describe of the EU?

To answer that question here in NZ, we might look to history. In a chapter entitled *Academic freedom: The college in the depression, 1930-5*, Keith Sinclair outlines some of the struggles over academic freedom in the history of the University of Auckland (formerly the Auckland University College). They were considerable and impassioned. The College council, its management, members of the

⁶ Common university management practice is to award the same terms and conditions contained in the collective agreement to non-unionised staff (and thus, you might argue, undermine the benefits of belonging to the union).

professorial board and even students were embroiled in actions to prevent students and academic staff from presenting unpopular views – not only in favour of communism and socialism but also in support of more liberal sexual mores – within and without the College. Academics lost their jobs; students were denied opportunities. One such attack on academic freedom of speech “brought the College to international notice”.⁷ There was pressure from Government on all four university colleges to “suppress or punish radical statements”⁸ by their members and, in Sinclair’s view, only one college, Otago, effectively resisted this pressure. The turbulence described of the period feels foreign to me, as an academic over the past 30 years. So, when thinking retrogression, we might also think what period we are considering. In a thoughtfully turned lecture at the University of Cape Town in the dying years of apartheid, Edward Saïd makes this crucial point:

So whereas it is universally true that contemporary societies treat the academy with seriousness and respect, each community of academics, intellectuals, and students must wrestle with the problem of what academic freedom in that society at that time actually is and should be.⁹

In thoughts offered to an audience far from his base in the US, one in the midst of radical and unpredictable social upheaval, Saïd reminds us that academic freedom is a complex issue requiring

⁷ K. Sinclair, *A history of the University of Auckland 1883-1983*. Auckland: Auckland University Press & Oxford University Press, 1983, p. 145.

⁸ *Ibid.*, p. 150.

⁹ E. W. Saïd, *Identity, authority and freedom: The potentate and the traveler*. T.B. Davie Academic Freedom Lecture, University of Cape Town, May 22, 1991, p. 6.

situational attention and sensitivity of judgment, especially when we are looking into the academic backyards of other states.

So what of our own backyards? Academic freedom pertains not only to wider social issues – the outrageous advocacy of communism and “companionate marriage”¹⁰ of NZ’s 1930s – but also to the places in which we dwell as academics and it is there that we might think about exercising this freedom. There is no doubt that the reforms embedded in the 1989 Education Act compromised the autonomy of NZ’s universities in ways ongoing that impinge on the possibilities for academic freedom.¹¹ More generally, modern western universities are buffeted by chilly winds that appear to threaten our survival, at least as places of education, of learning, valued beyond the vocationally useful or the fiscally profitable. Yet, concerted voices of protest are largely absent, not only here in NZ, but elsewhere as well.¹² Exercising academic freedom to speak up against the depredations of neoliberal ideology in higher education is difficult. In writing about the challenge of speaking up against endlessly proliferating forms of academic management speak that produce “unanalyzable nonsense”¹³, such as “good practice”¹⁴, Marilyn

¹⁰ Sinclair, p. 150.

¹¹ Olssen.

¹² See, for example, B. Davies, “Death to critique and dissent? The policies and practices of new managerialism and of ‘evidence-based practice’” *Gender and Education*, 15(1), 91–103 and S. Ryan, “Academic zombies: A failure of resistance or a means of survival?” *Australian Universities Review*, 54(2), 3–11.

¹³ Marilyn Strathern, “Bullet-proofing: A tale from the United Kingdom,” in A. Riles (Ed.), *Documents: Artifacts of modern knowledge* (Ann Arbor: University of Michigan Press, 2006), p.196.

¹⁴ *Ibid*, p. 181.

Strathern says:

Part of the problem is how to complain, how to criticize good practice and still appear moral, credible, and public spirited, and thus offer a critique that is edifying.¹⁵

As an academic with a commitment to making tiny acts of resistance towards the madness of modern higher education, I find myself daily facing the dilemma Strathern describes. Courage is required, and a kind of moderate steadiness. Even more, we need *hope* of a kind that Isabelle Stengers¹⁶ writes about, premised on an understanding that “life is always lurking in the interstices, in what usually escapes description because our words refer to stabilised identities and functioning”¹⁷. For Stengers, hope is more likely to be realised in what people are able to do together – where we are “stronger, more free than [we] would be alone”:¹⁸ what a reviving imaginative contrast to the stereotype of the lone-wolf academic speaking up for what he or she sees as the truth!

In closing, I want to draw attention to one set of present dangers for academic freedom not explicitly canvassed in the analysis offered by Beiter and colleagues. More than from any other one quarter right now, dangers lie in the increasing dependence of public universities on private sources for research (and other) funding. Stories emerge of suppression clauses in research contracts taken up by academics,

¹⁵ Ibid, p. 199.

¹⁶ Isabelle Stengers and M. Zournazi, “A ‘cosmo-politics’: Risk, hope, change,” in M. Zournazi (Ed.), *Hope: New philosophies for change* (Annandale: Pluto Press, 2002), pp. 244–272.

¹⁷ Ibid, p. 245.

¹⁸ Ibid, p. 257.

including in government contracts: see, for example, the critical work of Kypros Kypri,¹⁹ who gives evidence of suppression clauses being invoked in relation to intellectual property, publication and termination for convenience. There are also stories of research findings being suppressed after the fact because funders – or affected organisations with often undisclosed ‘relationships’ with universities (or university managers) – do not want the findings made public: a recent (but not unique) case involving the University of Queensland was reported in *The Conversation* a few months ago.²⁰

Academic freedom is a precious and necessary condition of academic work. In time and place, its fortunes wax and wane. Yet the flame must be kept alive because, as many writers have pointed out, the very meaning of what makes universities distinctive is entangled with this shining idea. Moreover, its survival largely depends on the actions of academics – us – in the present.

¹⁹ Kypros Kypri, “Suppression clauses in university health research: Case study of an Australian government contract negotiation,” *Medical Journal of Australia*, 203(2), pp. 72–74.

²⁰ The Conversation: <https://theconversation.com/the-public-should-be-concerned-when-academics-must-battle-bureaucrats-for-academic-freedom-54039> (accessed 13 July 2016).

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