Academic Freedom and the Law

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I. Introduction

Academic freedom in an ideal typical sense encompasses 'academic' immunity and the privilege of freedom of expression. It is fundamental to the university's purpose: pursuing knowledge. It is also a self-limiting concept – the immunity and privilege it entails balanced by specific duties. In the legal context, the Education Act 1989 declares parliament's intention to preserve academic freedom,[1] but in effect provides that its preservation is subject to the national interest.[2] One judicial interpretation describes these provisions as 'a parliamentary admonition to ministers and others on the importance of academic freedom and the need for public tertiary institutions to have autonomy'.[3] Yet, the provisions also 'tell institutions how they are to act'.[4] Introducing the relevant Bill to the House, the Minister acknowledged a balance between academic autonomy and accountability was difficult to find.[5] It is precisely the threat of imbalance resulting from the weight of renewed government intervention in the operations of tertiary institutions through the Education (Tertiary Reforms) Amendment Act 2007 that has renewed focus on the legal extent of academic freedom.

While the provisions of the Education Act and the 2007 reforms strongly reflect the state's view of its role in university education in New Zealand, they also provide an internally inconsistent conceptualisation of academic freedom by introducing legal powers that are absent in its ideal sense. In turn, this demonstrates the problem of legislating for fundamental principle as accounted for by Weber's theory of legal-rationality.

II. The Concept of Academic Freedom

A. Preface: Weber's ideal types

First, it is appropriate to establish the concept of academic freedom. Academic freedom is presented here firstly as an ideal type, Weber's methodological device used to objectively analyse human action.[6] They are conceptual models representing an exaggerated picture of reality – emphasising

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1 *Education Act* 1989 s 161(1).

2 *Education Act* 1989 s 160 and s 161(3) respectively provide the qualifiers of 'national interest' and 'proper use of resources'. See below Part IV(D).

3 A*ttorney-General v Unitec Institute of Technology* [2007] 1 NZLR 750, 765 (Court of Appeal).

4 Ibid.

5 New Zealand, *Parliamentary Debates*, House of Representatives, 29 March 1990, 1167 (Phil Goff, Minister of Education).

6 Donald McIntosh 'The Objective Bases of Max Weber's Ideal Types' (1997) 16 *History & Theory* 265.

certain aspects to be used in comparison with observed reality.[7] Here the ideal typical account of academic freedom is constructed from the literature, in order to compare it with the observed reality of government policy on university education.

A. The Literature

Menand dismisses from the outset 'that there exists some unproblematic conception of academic freedom that is philosophically coherent and that will conduce to outcomes in particular cases which all parties will feel to be just and equitable'.[8] However, he seeks to define it by identifying its purpose.[9] It operates both as negative liberty – 'freedom *from* interference in one's pursuits',[10] and as positive liberty – 'freedom *for* a predefined end'.[11] Problematic in this account however, is agreement on what those pursuits are, and what the predefined end might be.

Rorty is more specific, describing academic freedom as the 'customs and traditions [that] insulate colleges and universities from politics and from public opinion'[12] and which 'insulate teachers from pressure from the public bodies or private boards who pay their wages'.[13] Similarly, Dworkin counts 'two levels of insulation'[14] (internal and external to institutions) and notes that financial pressure is a feature of both. But both of these views taken at this point fail to define anything other than a description of what academic freedom is, and don't approach a view of the predefined end for which it is employed. In other words they provide the what, not the why.

Going towards identifying that purpose, these customs and traditions, in Golding's account of the 'Mill-Holmes thesis',[15] are the conditions for the 'marketplace of ideas' or - in the context of the university - the 'advancement and dissemination of knowledge'.[16] However, Golding acknowledges problems in accessing this marketplace, and the forces that prevent truly free discourse (notably academic orthodoxy), accepting the element of truth that such a marketplace is a myth.[17] Rorty, himself a pragmatist, also recognises these practical limits to academic freedom's efficacy, and doubts the possibility of truly objective truth.[18] Nonetheless, Rorty still asserts the value of 'muddling-through' to 'reasonable […] compromise'[19] that academic freedom enables. If it is not to be the truth, then something approaching it will have to do. In these accounts, academic

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7 See generally Tore Lindbekk 'The Weberian Ideal Type: Development and Continuities' (1992) 35 *Acta Sociologica* 285 and Stephen Turner and Regis Factor *Max Weber*. The Lawyer as Social Thinker (1994) 153.

8 Louis Menand 'The Limits of Academic Freedom' in Louis Menand (ed), *The Future of Academic Freedom* (1996), 5.

9 Ibid.

10 Ibid.

11 Ibid (original emphases).

12 Richard Rorty 'Does Academic Freedom Have Philosophical Presuppositions?' in Louis Menand (ed), *The Future of Academic Freedom* (1996) 21.

13 Ibid.

14 Ronald Dworkin 'We need a new interpretation of academic freedom' in Louis Menand (ed), *The Future of Academic Freedom* (1996) 183.

15 Derived from John Stuart Mill's On Liberty, and its application by Justice Holmes in the case of *United States v Schwimmer* 279 US 644 (1929). Discussed in Martin P Golding Free Speech on Campus (2000) 16-17.

16 Golding, ibid 17.

17 Ibid 26-27.

18 Rorty, above n 12.

19 Ibid 38.

freedom is treated primarily as instrumental to academe, but Dworkin also ascribes intrinsic worth to it.[20]

He begins by noting the change over time of the thoughts one associates with the concept of academic freedom.[21] He describes its hey-day where '[w]e thought […] about leftist teachers and McCarthyite legislators and loyalty oaths and courageous and cowardly university presidents'.[22] In the context of American universities, the main controversy in which academic freedom is implicated is the issue of institutional speech codes.[23] Recognising such changes in context, Dworkin argues that the meaning given to academic freedom must also change.[24]

Describing academic freedom as a political value (in agreement with Rorty's denial of any presuppositional value in the concept),[25] Dworkin suggests that a new definition must fulfil two criteria:[26]

> First, it must fit well enough with general understandings of what academic freedom does and does not require so that it can provide a new interpretation of an established value, not a new value altogether. Second, it must justify those general understandings as well as they can be justified; it must show why academic freedom is a value, so that we can judge how important it is, and whether and when it should yield to other, competing values.

In other words, it must explain both its instrumental and normative worth. Although the marketplace of ideas is generally a sufficient defence of the instrumental value of academic freedom, Dworkin argues that it doesn't fully explain the absoluteness of academics' use of it.[27] For example, limited resources might justify a decision not to hire someone whose views are clearly untrue (for instance Holocaust deniers) – it would be a waste of the university's resources to fund their research and teaching on that view.[28] However, if a tenured faculty member took that same view, they would be protected by academic freedom.[29]

Dworkin proposes an 'ethical ground' and a 'culture of independence' to explain our 'emotional' response to issues of academic freedom.[30] The ethical ground is liberal in one sense, and existentialist in another: that we each have a responsibility to make the most of our lives, and that in academics this manifests as a specific responsibility to 'discover and teach what they find to be true'.[31] Justice Hammond similarly recognised this as a 'calling' – quoting Bellah et al – 'constitut[ing] a practical ideal of activity and character that makes a person's work morally inseparable from his or her lifestyle'.[32] Anything that interferes with this 'undiluted responsibility

20 Dworkin, above n 14, 181.

21 Ibid.

22 Ibid.

23 Ibid 182. The relevance to New Zealand of the regulation of 'speech codes' as a curb on academic freedom is highlighted by two controversies at the Universities of Canterbury and Waikato regarding the publication of theses on the Holocaust.

24 Ibid.

25 See Rorty, above n 12.

26 Dworkin, above n 14, 182 (original emphasis).

27 Ibid 186.

28 Ibid.

29 Ibid.

30 Ibid 187-191.

31 The discussion of the ethic takes place at 187-189, the quoted text is at 189.

32 Robert Bellah et al, Habits of the Heart: individualism and commitment in American life (1985) 66.

to the truth' is a therefore a fetter on personal responsibility and a denial of self-actualisation[33] – a kind of externally imposed 'bad-faith'.

Dworkin argues that a culture of independence is pre-requisite to the flourishing of the ethic of individualism.[34] Its opposite is a culture of conformity, the perfect realisation of which is the totalitarian state. Academic institutions are important in staving off the culture of conformity as they can easily themselves become 'engines of conformity'; but also because they can help others to fulfil their own personal responsibility.[35] Finally, academic institutions are also symbolically important, as truth-seeking is an end in itself, and such institutions are perhaps the only ones devoted to that end.[36]

In the New Zealand context, it could be argued that the universities' legislated role as 'critic and conscience of society'[37] reinforces such symbolic importance. Signalling academic freedom's importance in achieving this, a paper published by the New Zealand Universities Academic Audit Unit (AAU) says that '[a]cademic freedom is inseparable from a university's role as critic and conscience of New Zealand society'. [38] Kelsey argues further that not only is this role important symbolically, but that without the plurality and 'rigorous contest of ideas' that academic freedom entails, 'our communities, society and economy will stultify'.[39] Differing from Dworkin, Kelsey argues that the concept of academic freedom 'should transcend the specifics of the time':[40]

> [I]t is about training the minds of students to analyse, critique and rethink the current orthodoxy[…] . It is about moving with and ahead of the times in ways that make a country internationally competitive, and at times a world leader, and empowers its peoples, to play an active part in a rapidly changing, non-linear world.

In this way, '[a] strong commitment to academic freedom is therefore an investment for the future'.

In this last respect, Kelsey (seemingly inadvertently) foreshadows the ends to which current government policy is oriented; she sees academic freedom as instrumental to that end, just as Government policy sees a coordinated, systematic approach to tertiary provision as the key instrument.[41] The discord between this view and Dworkin's is highlighted by the Minister's denial of the relevance of academic freedom to Government's policy aims:[42] 'Academic freedom is not about the freedom to teach whatever one likes for whatever cost; it is the freedom to express views about the areas that one is responsible for […]'.

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33 Dworkin, above n 14, 189.

34 Ibid 189-191.

35 Ibid.

36 Ibid.

37 *Education Act* 1989 s 162(4)(a)(v).

38 New Zealand Universities Academic Audit Unit, 'Universities as Critic and Conscience of Society: The Role of Academic Freedom' (2000) March, AAU Series on Quality 6, 1.

39 Jane Kelsey 'Academic Freedom: Needed now more than ever' in R Crozier (ed), *Troubled Times: Academic Freedom in New Zealand* (2000) 227, 230.

40 Ibid 228.

41 The Government's present tertiary education policy is discussed further below Part VI.

42 New Zealand, *Parliamentary Debates*, House of Representatives, 25 July 2007, 10686 (Dr Michael Cullen, Minister for Tertiary Education).

Moreover, the Minister's argument is simplistic if not incoherent: it presupposes that one can completely isolate operational efficiency from the protection and advancement of freedom (of speech) in principle.

Other critics see academic freedom as an exercise in self-justification without any meaningful moderating norms:[43]

> Academic freedom is the name of a way of thought that confuses eccentricity with genius and elevates pettiness, boorishness, and irresponsibility to the status of virtue; evacuates morality by making all assertions equivalent and, because equivalent, inconsequential; empties history of its meaning so that actions proceeding from entirely different motives and agendas become indistinguishable as instances of individual preference and free choice; and promotes a regime of relativism by refusing to make judgments, on the reasoning that one man's meat is another man's poison.

Fish's polemic sets out the standard argument against academic freedom as inevitably engendering moral relativism, and decries the worst characteristics of those in the ivory tower whose privilege derives from the patch protected by their academic discipline. Admittedly, Fish's criticism is limited to the internal logic of academic freedom, that is that the privilege afforded academics defeats, by making academic views 'untouchable', the very marketplace of ideas it seeks to advance. However, a powerful response is that this ignores the real advances in knowledge made by those in universities.

Illustrating this last point, and also Menand's initial observation, Calhoun[44] agrees with Fish's analysis that the academic discipline is central to academic freedom, and that it is indeed self-regulatory, with its own 'standards of behaviour and […] role obligations',[45] but argues the point to a different conclusion: that it is effective in 'continuing conversation and disputation, which is how knowledge is developed and truth is established'.[46] Calhoun theorises that academic freedom might usefully be viewed as a set of associational rights accruing to academics who conform to the norms of the discipline.[47] These norms operate as a limiting duty of responsibility attaching to the exercise of academic freedom.

The case of *Rigg v University of Waikato*[48] was decided prior to the Education Act 1989, and further develops the idea of academic responsibility. It concerned the dismissal of a senior lecturer in German for his co-authorship of an article in student magazine *Nexus* alleging that inadequate supervision of the University's biology isotope laboratory had probably resulted in students dying of cancer and that the University […] had concealed this matter to safeguard the University's 'good' reputation. The article stated: 'students are evidently dispensable'.[49]

In his evidence before the Visitor, the petitioner argued that 'academic freedom […] include[s] all the activities which a member of the university community involves in [sic] outside of the sphere of teaching and research'.[50] The issue of whether his conduct was consistent with his posi-

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43 Stanley Fish 'What's Sauce for One Goose: The Logic of Academic Freedom' in Kahn, S (ed), *Academic Freedom and the Inclusive University* (2001), 3.

44 Emily Calhoun 'Academic Freedom: Disciplinary Lessons from Hogwarts' (2006) 77 *University of Colorado Law Review* 843.

45 Ibid 849.

46 Ibid.

47 Ibid 844.

48 [1984] 1 NZLR 149 (*Rigg*).

49 Ibid 149.

50 Ibid 203.

tion at the University fell to be decided on the extent of academic freedom's concomitant responsibilities. The Visitor was unimpressed with the petitioner's attempts to justify a broad scope for academic freedom, and instead favoured an opinion given by Professor FW Marshall, Head of the French Department. Marshall outlined three obligations imposing themselves on those exercising academic freedom.[51] First was truth, and the pursuit of it (although acknowledging that in itself the notion of truth is problematic); secondly, the academic must act with sincerity, or good faith, in that they must make an effort to 'discover the truth, commensurate with the likely effect of the statement';[52] and thirdly, 'humanity', which requires that consideration be given to the 'emotional and material'[53] impact made on people by the exercise of academic freedom. Although the Professor was more narrowly concerned with issues of freedom of speech, and how this applied in the context of academic freedom, the obligations of truth-seeking and good faith resonate with Dworkin's account of the special nature of academic freedom. Furthermore, the Professor's reference to 'material impact' might usefully apply where the free speech aspect of academic freedom is not at issue – for instance in arguments of the cost of giving effect to academic freedom.

B. Conclusion

It is clear that academic freedom is commonly understood to encompass both freedom of speech and the autonomy of academic units (including whole institutions) from governing entities. There is general agreement that something approaching a 'market-place of ideas' is critical to academic pursuits. There are also multiple references to the public good that comes as a result of academic freedom. Perhaps, though, Dworkin's account is to be preferred for the way that it explains the moral conviction academic freedom inspires, and for the way it describes the interdependent relationship between free speech and institutional autonomy. The duties and responsibilities relating to academic freedom might be broadly described as responsibilities of 'good faith'. Therefore the general argument goes that pursuing knowledge in accordance with the best traditions of academic freedom in good faith will result in the desired public outcomes. Viewed in its ideal typical sense, academic freedom is a self-contained concept of both rights and responsibilities, suggesting that external moderating factors are unnecessary additions if its purpose is to be served.

III. Theorising the Role of the State in University Education

Having seen that an ideal typical account of academic freedom is in large part about autonomy, it is now useful to consider the role of the state in university education, especially which aspects of that role might infringe on that autonomy.

A. Theorising the role of the state in university education

Braun and Merrien describe a shift in emphasis from universities as '*cultural institutions* contributing in general and without concrete purpose to the social cohesion and economic development

51 Ibid 204.

52 Ibid.

53 Ibid.

of societies'[54] to a 'new belief system which regards universities as *public service institutions* subject to concrete social, political and economic goals'.[55] (Original emphases.) However, criticism of inefficiencies and a lack of accountability in the functioning of universities has led to the latter approach, where the state contracts universities to deliver to certain defined objectives.[56] Generally, this approach to the provision of public services politicises the decision as to how much of the public good is to be provided, and on what conditions[57] – the 'good' becomes subject to the rationalism of the state.

The authors propose 'a three-dimensional cube on governance' as a comparative tool to evaluate governance models in universities from country to country.[58] The cube distinguishes substantive autonomy (autonomy in what the university does) and procedural autonomy (how it gets it done), with the third dimension representing the belief system of the state as to the purpose of the university. The authors suggest New Zealand's tertiary education policy is 'new managerialist', with tight substantial control over what is done by the university, loose procedural control, and a belief system oriented towards that of public service.[59]

On this analysis, it can be argued that the purpose of the university in New Zealand is viewed by the state as instrumental to its own goals. Applying Braun and Merrien's schema, diminishing institutional autonomy corresponds with a greater interest in university performance by the state, and trends against a view of the university as a cultural institution (which places a greater emphasis on education as an intrinsically valuable thing.) This is a pivotal observation when one considers the quantum of the New Zealand Government's interest in university education relative to other sources of funding. Statistics published in *Education Review* show that in 2006 universities relied on Government grants for between 20 per cent and 43 per cent of their total income (excluding additional Government-provided funding for research). Of the eight universities, five relied on Government grants for 40 per cent or more of their total income.[60] In other words, the state's interest can be measured in monetary terms, with increases in funding coupled to increases in substantive controls.

Moreover, what qualifies for 'loose procedural control' has been considerably tightened by the government's 2007 tertiary reforms, specifically the reforms' increased reporting requirements.[61] In respect of the importance of academic freedom, this represents a progressive consolidation of the state's power to encroach on academic freedom where it perceives it is in its own interest to do so. This represents a transformation of the fundamental principle of academic freedom into one compatible with the tools of, and complicit with respect to, the bureaucratic state management of university education – a process aptly described by Weber's theory of legal-rationality.

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54 Dietmar Braun and Francois-Xavier Merrien 'Governance of Universities and Modernisation of the State' in Dietmar Braun and Francois-Xavier Merrien, *Towards a new model of governance for universities. A comparative view* (1999) 9, 11.

55 Ibid.

56 Ibid 14-15.

57 Ibid, and G Brennan 'The Economic Concept of Contract' in Glyn Davis, Barbara Sullivan, & Anna Yeatman (Eds), *The New Contractualism* (1997) 27-38.

58 Braun and Merrien, above n 21, 23.

59 Ibid.

60 John Gerritsen 'Sources of uni income' (2007) 12 *Education Review* 7. These figures exclude additional government funding based on institutional research performance.

61 See below Part VII.

In furtherance of this argument, it is contended that by legislating for academic freedom, the state has placed potentially extensive limits on the operation of the ideal concept, arguably to the extent that the legislation may undermine the very principle it seeks to protect.

B. Rational-legality

The process of incorporating principle into law is central to Weber's account of 'rational-legality',[62] by which he means 'the progressive secularization and disenchantment of the worldviews from which norms derive their justification'.[63] Weber views the modern state as a bureaucracy built to achieve societal projects; the bureaucratic form being 'the most effective large-scale social technology ever devised by human beings'.[64] The origins of a bureaucracy lie in the perceived solution to a substantive 'determinate human purpose'[65] where in the absence of the bureaucracy competing interests would otherwise pursue divergent means, resulting in society's failure to achieve that purpose. However, the managerialist characteristics inherent in a bureaucracy may eventually come to embody a rational efficiency and zealous compliance with systems and rules that are counter-productive to that purpose.[66] In short, when a concept is monopolised by the state bureaucracy through legislation, there is the potential that it is eventually modified in a manner that subverts the initial purpose for which it gained legal recognition.

Weber's description of the process resembles a criticism traditionally levelled at utilitarian political philosophy: that even with the best intentions, principle gives way to pragmatism when put under enough pressure – the ends justify the means.[67] Often the law seeks to balance competing principles, for instance the limited protection afforded the rights affirmed by the New Zealand Bill of Rights Act 1990 as balanced against the combined effect of ss4-6 of that Act. But there is a danger where the balancing principle (competing against the one protected) is as vague and potentially wide-reaching as the 'national interest'. This is especially so where such a balancing principle is realised by conferring discretions of a political nature on an agent of the state, thereby distancing the agent from the scrutiny of the courts.[68] It is contended later that the 2007 tertiary reforms do just that, and that the legitimacy of the legislative process by which this is enabled owes much to the incorporation of the concept of academic freedom into statutory law in 1989.

IV. Academic Freedom in Legal Terms

From an ideal typical account of academic freedom, to a descriptive theorisation of the role of the state in university education, and then to a theory on the process by which principles lose their flavour upon their enactment as law, we proceed to the enactment of academic freedom itself. In introducing academic freedom in legal terms, we first consider the context of the university as a legal institution in New Zealand.

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62 James Ketchen 'Revisiting Fuller's critique of Hart – Managerial control and the pathology of legal systems: The Hart-Weber nexus' (2003) 53 *University of Toronto Law Journal* 1.

63 Ibid 16.

64 Ibid 12.

65 Ibid 13.

66 Ibid.

67 See for a popular example Peter Singer, Practical Ethics (1993) 100 on killing human beings.

68 See *Wellington CC v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537; *Anns v Merton London Borough Council* [1978] AC 728. See also Kenneth Davis, Discretionary Justice: A preliminary inquiry (1980).

A. The establishment of the University of New Zealand

In keeping with experience elsewhere in the New World, the establishment of the University of New Zealand in 1870[69] 'sought to domesticate [the university] while retaining its essential features'.[70] The University was a federal one, 'responsible for teaching, examining, and the granting of degrees;'[71] although in reality teaching was carried out by its constituent colleges,[72] and initially the examinations were conducted in Great Britain.[73] When the University was formally reduced to an examining and degree-granting body,[74] one consequence was[75] 'that it had no responsibility to play the role it should have played in seeking adequate support from the government for the financial needs of university teaching'.

The Colleges were left to do the 'real university work',[76] suiting the colleges who demanded no interference by the university in their administration.[77]

B. The contemporary university as a legal institution

In 1961 the New Zealand University was disestablished and its constituent colleges themselves were constituted as individual universities. The enactments establishing these universities, and also the 1963 enactments establishing Massey University and the University of Waikato, conceive of the university's purpose as '[f]or the advancement of knowledge and the dissemination and maintenance thereof by teaching and research'.[78]

Legally, each university is comprised of its council, academic staff (the classes of which are expanded on in the acts in some detail) and students, and of the librarian and the registrar.[79] There is an emphasis on the academic staff of a university, yet legally council heads the hierarchy.[80] These two features have led to power struggles between councils and academics throughout the history of the university in New Zealand, as each seeks to assert competing interests.[81]

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69 *New Zealand University Act* 1870.

70 Nicholas Tarling and Ruth Butterworth, A Shakeup Anyway. Government and the Universities in New Zealand in a Decade of Reform (1994) 16.

71 Hugh Parton, The University of New Zealand (1979) 16.

72 The Colleges came to include Canterbury University College (established 1873); Auckland University College (established 1883); Victoria University College (established 1899); and Otago University (which although established before the University in 1869 became an affiliated college in 1874).

73 Parton, above n 71, 18.

74 *University Act* 1874.

75 Parton, above n 71, 18.

76 Ibid 19.

77 Ibid 18.

78 Section 3(1) respectively in the *University of Auckland Act* 1961; the *Victoria University of Wellington Act* 1961; the *University of Canterbury Act 1961*;the *Lincoln University Act* 1961; the *University of Waikato Act* 1963*; the Massey University Act* 1963. The *University of Otago Amendment Act* 1961 confirmed the continuance of the university as established under the principal Ordinance of 1869.

79 Section 3(2) of the 1961 and 1963 Acts noted above n 33. Provisions to this effect are put more succinctly in the *Auckland University of Technology (Establishment) Order 1999*, SR1999/332.

80 *Education Act 1989* s 165(1)(a) provides that an institution's governing body is its council.

81 See generally Keith Sinclair A History of the University of Auckland 1883-1893 (1983).

As to the current legislated purpose of universities, the Education Act 1989 is perhaps paramount, and sets out the following characteristics of universities:[82]

> (a) […]
>
> (i) They are primarily concerned with more advanced learning, the principal aim being to develop intellectual independence:
> (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; and
>
> (b) That—
>
> […]
> iii) A university is characterised by a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of, knowledge, develops intellectual independence, and promotes community learning[…]

These characteristics are to be taken into account by the Minister in making a recommendation to the Governor-General on whether to make an order for the establishment of an institution as a university, and although they are set out for this express purpose they have also been held to express by 'necessary implication' the purpose of the university.[83]

C. Policy culminating in the Education Act 1989

The academic freedom provisions in the Education Act 1989 formed part of what the Minister claimed was 'the most significant reform ever carried out in the history of the New Zealand system of tertiary education and training'.[84] Bulk-funding of tertiary institutions and the distancing of central government from their management were the dual thrusts of that reform.[85] Although prima facie this policy was consistent with notions of academic freedom, providing for academic freedom in the Act itself was an afterthought.[86] Overall, tertiary education policy in the tertiary education sector was merely one component of the radical reform of public service provision as a whole.[87] Competition among providers (in this case, universities and other tertiary institutions) was a feature of the neo-liberal theory of state services this reform implemented.[88] In the education 'quasi-market'[89] competition was created through government's funding of institutions ac-

82 *Education Act* 1989 s 162(4).

83 See *Association of University Staff of New Zealand Inc v University of Waikato* [2002] NZAR 817, 821.

84 New Zealand, *Parliamentary Debate*, House of Representatives, 29 March 1990, 1166 (Phil Goff, Minister of Education).

85 Ibid. See also Gary Hawke, 'Report of the Working Group on Post Compulsory Education and Training' (1988). (The Hawke Report)

86 Having been inserted after the fact by the *Education Amendment Act* 1990. The original policy document for reform: Department of Education, 'Learning for Life. Education and Training Beyond the Age of Fifteen', (1989) contained no express discussion of academic freedom. Its sequel Department of Education Learning for Life Two (1989) resolved this anomaly.

87 Tarling and Butterworth above n 70, 67. The overall reform agenda was set by Treasury, (1984); Government Management (1987).

88 Christine Cheyne, Mike O'Brien, and Michael Belgrave Social Policy in New Zealand. A critical introduction (2005) 81. See also the Hawke Report, above n 127, 24 for advocacy of the place of competition in education provision.

89 Ibid.

cording to the number of equivalent full-time students (EFTS) enrolled, and university provision became demand-led.

D. Education Act 1989: The academic freedom provisions

Academic freedom of and within universities is protected thus by s160 of the Education Act 1989:

> The object of the provisions of this Act relating to institutions is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability.

Section 160 contains both the statement of principle and its limitations, and s161 elaborates:

> (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:
> (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.
>
> (3) In exercising their academic freedom and autonomy, institutions shall act in a manner that is consistent with—
>
> (a) The need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and
> (b) The need for accountability by institutions and the proper use by institutions of resources allocated to them.

Section 161 is explicit as to the precise meaning of academic freedom, and the meaning it provides accords well with the ideal concepts of academic freedom provided above in part II of this paper. The limitations are spelt out in two parts through both sections. In some ways the limitations mirror those attaching to the ideal concept of academic freedom. For example, s161 (3)(a) provides that academic freedom must be exercised consistently with the maintenance of 'the highest ethical standards'. The Professor's opinion given in evidence in Rigg that academics had 'duties' of truth-seeking, acting in good faith, and towards humanity are invoked by this rider, as is Dworkin's account of responsibility. Similarly, the demands of accountability in an academic sense are critical to the academic pursuit itself - recall the transparency of debate in the 'marketplace of ideas'.

However, conditions that academic freedom be exercised consistently with 'the efficient use of national resources' and the 'national interest' are not in themselves a feature of the ideal concept. Rather, they are a consequence of the fact that universities are highly dependent on public funds for their operation.[90] Coupled with this understanding, the 'demands of accountability' take on a different meaning – a meaning also reflected in the Public Finance Act 1989: to account for expenditure of public funds. This does not read as a startling insight, because it is a welcome and

90 Gerritsen, above n 60.

expected feature of modern government generally, but it brings into focus Weber's account of legal-rationalism above.

E. The Courts' Interpretation of the Academic Freedom Provisions

Case law demonstrates the variety of contexts within which academic freedom is contested, emphasising the centrality of the provisions to academic life. For example, s161: was a mandatory relevant consideration for the minister in determining funding levels for the University of Otago's dentistry programme;[91] and supported both the limitation of the International Education Appeal Authority's (IEAA) scope of inquiry into breaches of the code of practice for the pastoral care of international students to the matters complained of, and the prevention of the IEAA from applying standards of best practice in their review function.[92]

The following accounts of the major New Zealand cases relating to academic freedom (post-Education Act 1989) further demonstrate the real limitations applying to academic freedom notwithstanding the concept's incorporation into statute law. Cumulatively – although they don't all refer to considerations of the national interest specifically – they do suggest that parliament's declaration in support of academic freedom is further from absolute than it first appears.

1. *Attorney-General v Unitec Institute of Technology*[93]

This case concerned the application by the institution to the Minister for redesignation as a university.[94] Unitec had been successful in High Court proceedings for judicial review challenging the Minister's decision to decline its application.[95] Much of the case centred on a government policy to limit the number of universities to those already established.[96] The High Court held that the 'national resources, the national interest, and the demands of accountability'[97] were merely a 'qualification to the object of the relevant provisions of the Act,'[98] and therefore did not alone provide the Minister with sufficient grounds to decline the application in support of the aforementioned Government policy.[99] On that basis Miller J held:[100]

> That a decision that a body is to be denied university status, regardless of its academic qualities, on the ground that the minister is opposed to any increase in the number of universities would be contrary to the text and the purpose of the Act.

Implicit in his reasoning was the underlying notion that academic freedom, as provided for in the Act, enabled institutions to develop and change their own profile, even if by doing so, they de

91 *Anning v Minister of Education*, noted [2002] BCL 518.

92 *University of Auckland v International Education Appeal Authority*, noted [2007] BCL 234. The Code of Practice for the *Pastoral* Care of International Students was introduced in 2002 in response to high profile incidents involving international students in New Zealand, including the collapse of several private English Language schools, and the resulting poor publicity for the export education market. The Code must be complied with by all education institutions enrolling international students, and is established pursuant to the Education Act 1989 s 238F.

93 [2007] 1 NZLR 750 (Court of Appeal).

94 The process for the establishment of a university is set out in the *Education Act* 1989 s 162.

95 Reported at *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65 (High Court).

96 A policy represented by the Education (Limiting Number of Universities Amendment) Bill, which never received the Royal Assent.

97 *Education Act* 1989 s 160.

98 *Unitec Institute of Technology v Attorney-General*, above n 95, 81.

99 Ibid.

100 Ibid.

facto displayed the characteristics of another class of institution. The Court's disposition seems to undermine the Act itself by blurring the distinction between the characteristics of different types of tertiary institutions as set out elsewhere in the Act. It also appears to imply a power possessed by institutions to force the Minister's hand.

The Court of Appeal allowed the Crown's appeal in all respects.[101] In reaching this decision, the Court effectively held that Unitec's autonomy as an institution did not in any way compel the minister to accede to its request to change its status.[102] The Court further speculated obiter that s160's 'references to 'efficient use of national resources' and the 'national interest' implied the minister was 'entitled' to consider them given the 'policy issues' inherent in the process of establishing universities.[103]

One can infer from these reasons that the legislation contemplates real political limits on institutions' (including universities') autonomy, and that where the legislation confers discretion on the minister, she or he is entitled to invoke them in exercising that discretion – without breaching academic freedom (as legislated). While the Unitec decisions were not conducive to a full exposition of the political limitations on academic freedom, they hint at their possible extent.

2. *The Association of University Staff of New Zealand Inc v The University of Waikato & Gould*.[104]

As in *Unitec*, the issue of academic freedom was peripheral to the core issues in *University of Waikato*. Nonetheless, Justice Hammond's judgment canvassed the policy and conceptual contexts of the matter before him and included further hints as to the legal meaning of academic freedom, and the distinction between this and its ideal meaning. The central issue in the case was whether the Vice Chancellor's proposal to restructure academic units within the University required consultation with the University's Academic Board. Resolving that question turned on the meaning and scope of 'academic matters' for the purposes of s 182(4) of the Education Act 1989, which requires Council to request and consider advice from academic board on such matters.

Justice Hammond approved of the common notion that ''academic' refers both to the place or unit where something is taught, and the instruction which goes on within its walls'.[105] More importantly for present purposes, he noted that ss161 and 162(4), 'expressly or by necessary implication [… give] very distinct indications as to which matters are academic'.[106] On that reading, it is arguable that s161(2) is an express direction that strictly delimits the scope of academic freedom to those matters specified: to question received wisdom; to engage in research; to regulate the subject-matter of taught content; freedom in methods of assessment; and staff recruitment. Furthermore, the characteristics of a university as set out in s162(4) are Hammond J's necessary implication that the purpose of the university is fundamentally academic.

However, extending this interpretation, if academic matters are so clearly delineated by these provisions, then so are the limits placed on their protection. It is possible even, if the characteristics of the university are 'academic matters' as Hammond J suggests, that the limits on academic freedom apply also to those characteristics, so that the limits may prevail notwithstanding

101 *Attorney-General v Unitec Institute of Technology*, above n 93.

102 Ibid 765.

103 Ibid.

104 [2002] NZAR 817.

105 Ibid 825.

106 Ibid.

that they undermine the characteristics of the university itself. One would then be faced with the (hypothetical) position where it is in the national interest to deny a university to demonstrate its legislated characteristics by impinging on academic freedom. Although in principle it would be strongly arguable that this situation never arises, pragmatic political considerations might find otherwise. It is doubtful that Hammond J considered this possibility, and it certainly wasn't a consideration in deciding the case. Nonetheless, it illustrates the pervasiveness that such limitations can potentially assume.

In the result, the Court held that Council was required to consult with Academic Board on this matter.

3. Grant v Victoria University of Wellington[107]

Contrary to the previous two cases, the issue of academic freedom was central here. The plaintiffs claimed that the University had breached implied contractual terms relating to their enrolment in a masters degree, and had misrepresented the degree's quality. The defendant University agreed that the issue was one of course quality, but argued that the Court was prevented by ss160-161 of the Act from inquiring into such matters. They further argued that 'the need for accountability by institutions'[108] was satisfied by their internal complaints process – involving no less than seven steps terminating at council.

Elias J, approving *Norrie v Senate of the University of Auckland*[109] (which concerned the respective jurisdictions of the office of the Visitor and the Courts in disputes internal to universities) held that the Courts retained inherent jurisdiction on certain matters. In the instant case, this included actions in tort and contract, the latter being the basis – in conjunction with the Act – for the students' relationship with the university. Drawing a parallel with the policy/operational distinction in determining the justiciability of actions in negligence against public bodies,[110] and noting that some actions may be determinable without 'enter[ing] the classroom',[111] Elias J nevertheless maintained that the Courts were ousted where to adjudicate would impinge on academic freedom.[112] Whether a certain case was justiciable was dependant on the facts, and the instant case was one which would 'test the boundaries'.[113] The University's claim to strike out the students' action was denied accordingly.

V. Comparing the Concept of Academic Freedom with its Legal Meaning

What the foregoing passage on academic freedom in legal terms means is considered below using a Hohfeldian analysis comparing it with the ideal typical concept of academic freedom.

107 [2003] NZAR 185 (*Grant*).

108 Section 161(3)(b).

109 [1984] 1 NZLR 129.

110 See *Anns v Merton London Borough Council* [1978] AC 728.

111 *Grant*, above n 107, 191.

112 Ibid 192.

113 Ibid.

A. Hohfeld

Essentially this paper is concerned with the respective claims of parties in a legal relationship. The relationship can be characterised as a sphere, with one party on the inside defending the sphere's shape and size, and from time to time acting so as to stretch the boundaries; and the other party most often tacitly accepting the state of affairs, both in terms of the size and shape of the sphere, but at other times trying to assert interests that are incompatible with the existence of the sphere as it is. The party occupying the former position might at different times be individual academic staff or students, academic departments, associations of academic staff, institutions, or associations of institutions. Corresponding to these respective classes, the latter position might be occupied by academic institutions, individual managers, governing bodies, professional bodies, governments, or commercial interests. Both positions may have recourse to legal remedies to protect or advance their position, but the nature of the concept engendering the relationship is such that its definition is unlikely to ever be clear, and is likely to depend almost on entirely on the specific context, that is, on the facts. However, by classifying the relationship between the various actors, clues may be gained as to the general nature of the obligations between them. It is through this process that the analytical differences between academic freedom conceptually and legally may be revealed.

Hohfeld's theory of jural correlatives describes the impact on others of the state 'confer[ing] an advantage on some citizen'.[114] As in the situation described above, '[c]orrelatives express a single legal relation from the point of view of the two parties'[115] and so Hohfeld's theory is ideally suited to the task. Hohfeld identified the following correlatives:[116]

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

Conferring a right on a person necessarily imposes a duty on another to observe that right and therefore not to interfere with its exercise. If they do, the right-holder has an action against the person in breach of the duty. A privilege is a permission: the privileged person 'has no duty not to'[117] do a thing – and the other person is 'vulnerable to the effects'[118] of the privileged person's actions. If someone has a power, then they are able to positively (in an analytical rather than normative sense) change the legal affairs of others.[119] Conversely, an immunity protects one from another's intrusion on a sphere of influence – the other has a disability, the opposite of a power.

B. Analysis of academic freedom as an ideal type in Hohfeldian terms

Academic freedom entails the privilege of free speech – within certain limits, and immunity against external interference in academic operations. Free speech in the academic context is a privilege prima facie afforded less protection than is provided by the New Zealand Bill of Rights Act 1990. This observation owes to the comparison between limitations that can be 'justified in a

114 J Singer 'The Legal Rights Debate in analytical jurisprudence from Bentham to Hohfeld' (1982) *Wisconsin Law Review* 975, 987.

115 Ibid.

116 Ibid 986.

117 Andrew Halpin, 'The Concept of a Legal Power' (Spring 1996) *Oxford Journal of Legal Studies* 129, 137.

118 Singer, above n 114.

119 Halpin, above n 117, 139.

free and democratic society'[120] and that are consistent with the 'national interest'.[121] However, in other respects, for instance in defence against actions in defamation, academic freedom exercised in good faith might give greater protection than that otherwise available to the general public.[122] The limits of this aspect of academic freedom, that is, its concomitant duties, were recounted in *Rigg*,[123] where they were effectively described as specie of good faith.

Schauer calls the immunity of academic freedom a freedom from 'supervisory obligations'.[124] It is reflected for example in Oxford and Cambridge's eventually successful struggle freeing them from the interference of the ecclesiastics.[125] Supervisory obligations are also inherent in the university in New Zealand. As Sinclair notes, the Auckland University College (as all Colleges and Universities in New Zealand history) was 'state-created and state-funded' and 'ultimately under parliamentary legislative control'.[126] Although Sinclair also notes that Government intervention was rare,[127] its latent potential is constant. The doctrine of parliamentary sovereignty means in strict terms that universities enjoy no absolute immunity against supervisory obligations. However, by convention, and in the ideal of academic freedom, the immunity does exist, and this engenders an expectation of its observance notwithstanding its legal status.

But academic institutions are far from free of external obligations. For example, conditions on funding create obligations of financial accountability '[a]s long as universities retain legal autonomy, the available sanctions to be used to ensure compliance with the wishes of government or society remain chiefly financial'.[128]

There is also concern in academia, most keenly felt in the sciences, about an increased reliance on private funding of research, and the potential for commercial imperatives to dictate the focus of inquiry.[129] Are these accountabilities matched by duties in an ideal typical account of academic freedom? Arguably yes in respect of public funds, as the pragmatic characteristics of liberal democratic governments are in theory directed towards fostering a good life for its constituents, a component of which is surely knowledge and education.

This line of argument appears to suggest the legal requirement that academic freedom is exercised consistently with the national interest is compatible with an ideal typical account of academic freedom. However, it is submitted instead that in specific situations, the requirement may

120 *New Zealand Bill of Rights Act* 1990 s 5.

121 *Education Act* 1989 s 160.

122 See for instance the defences of honest opinion respectively provided by the Defamation Act 1992 ss 9-12 and qualified privilege Defamation Act 1992 ss 16-19. At common law, 'A privileged occasion is…an occasion where the person who makes a communication has an interest or a duty, legal social, or moral, to make it to the person to whom it is made[…]': *Adam v Ward* [1917] AC 309, 334 per Lord Atkinson (HL) cited in Todd, S (Ed), *The Law of Torts in New Zealand* (2005) 706. A hypothetical academic defending an allegation of defamation would, in the right circumstances (hopefully self-evident), have a compelling argument that they were acting as critic and conscience of society as the law protects a person who has a duty to speak.

123 Rigg, above n 48.

124 Frederick Schauer 'Academic Freedom: Rights as Privileges and Immunities' in Sharon Kahn (ed) *Academic Freedom and the Inclusive University* (2001) 13-19, 19.

125 Both finally won their independence from Episcopal interference by Papal Bull in in 1479 and 1433 respectively: Alan Cobban, English University life in the Middle Ages (1999) 214.

126 Sinclair, above n 86, 41.

127 Ibid.

128 Gillian Evans, Calling Academia to Account. Rights and Responsibilities (1999) 47.

129 Ibid 44.

confer powers on the Minister and TEC over and above the duties of accountability owed by universities in the self-limiting privilege and immunity of academic freedom. An example is the recent Education (Tertiary Reforms) Act 2007, of which a case study follows below.

VI. Case Study: 2007 Tertiary Reforms

A. The Policy Behind the Reform

Current Government policy represents a pendulum swing from the excesses, largely in the polytechnic sector, of high growth in low quality courses, to 'a more streamlined system for planning, funding, and monitoring the tertiary education system'.[130] Such growth had been incentivised by the 'bums-on-seats' approach to funding according to the numbers of equivalent full-time students (EFTS) enrolled at an institution. Opposition Education Spokesman Bill English's success in bringing these courses to the public's attention was critical in forcing the Government's hand to implement its reform programme, and perhaps encouraged it to go further than it might otherwise have.

Government's current policy is to 'maximise tertiary education's contribution to our national goals and priorities'[131] which are 'national development in all dimensions – social, economic, cultural and environmental'.[132] Articulating this policy, the Tertiary Education Strategy (TES) expects of tertiary education that it provides 'success for all New Zealanders through lifelong learning'; that it is instrumental in 'creating and applying knowledge to drive innovation'; and that institutions build 'strong connections…[with] the communities they serve'.[133] Universities' distinctive contribution to the strategy is expressed in broad terms. They are to:[134]

1. [P]rovide a wide range of research-led degree and postgraduate education that is of international quality[; and]
2. [U]ndertake excellent research in a broad range of fields[; and]
3. [E]ngage with external stakeholders […] in the dissemination and application of knowledge and in promoting learning.

Although generally the policy represents an express emphasis on the university education as a public service. Quantitative measures of the characteristics of a university such as those used to assess Unitec's application to become a university,[135] and of the outputs of a university in relation to national goals under the TES, provide further evidence of this emphasis. However, regardless of

130 Explanatory note, Education (Tertiary Reforms) Amendment Bill 114-1.

131 Hon Dr Michael Cullen, 'New Tertiary Strategy to drive economic transformation' (Press Release, 14 December 2006) <www.beehive.govt.nz/ViewDocument.aspx?DocumentID=28075> at 27 November 2007.

132 Ibid.

133 Office of the Minister for Tertiary Education 'Tertiary Education Strategy 2007-2012 incorporating Statement of Tertiary Education Priorities 2008-2010' Ministry of Education <www.minedu.govt.nz/web/downloadable/dl11727_v1/tes-2007-12-incorp-step-2008-10.pdf> at 27 November 2007, 7.

134 Ibid 14.

135 See for example the requirement that 50% of enrolments be at degree level or above: Letter from K Gibson to Trevor Mallard, Minister of Education, 24 June 2005 <www.minedu.govt.nz/web/downloadable/dl10653_v1/nzqa-24-june-2005.pdf> at 27 November 2007.

this change in emphasis, the fundamental legal characteristics of the university remain unchanged as a result of the reform.

B. Education (Tertiary Reforms) Amendment Act 2007.

The Education (Tertiary Reforms) Amendment Act 2007 gave legal effect to the policy reform by amending the Act (the principal Act). Parts 13 'General provisions related to tertiary education' and 13A 'Tertiary Education Commission' in particular were heavily amended. Under the reforms Government funding policy is driven by the tertiary education strategy. The strategy is issued by the Minister and sets out the long term strategic direction and the short and medium term priorities.[136] Section159AA further requires that the strategic direction takes account of economic, social, and environmental goals, and the 'development aspirations of Maori and other population groups',[137] and provides that the Minister must consult stakeholders in developing the strategy.[138] In effect, these sections provide the mechanism for the Minister to determine the national interest with respect to tertiary education. The TEC's role on the other hand, through its function in making funding decisions, is to ensure the efficient use of national resources and to provide accountability.

Section 159ABA provides an overall description of how funding decisions are made and is worth setting out in full:[139]

> (a) the Minister determines the design of funding mechanisms and whether funding under those mechanisms is via plans:
>
> (b) the Commission develops the details of how to implement funding mechanisms:
>
> (c) the Commission issues guidance on what must be contained in proposed plans:
>
> (d) the Commission identifies criteria for assessing proposed plans:
>
> (e) an organisation prepares a proposed plan—
>
> (i) in consultation with the stakeholders the organisation considers ought to be consulted and any other persons specified by the Commission; and
>
> (ii) in a manner consistent with the Commission's guidance:
>
> (f) the organisation submits its proposed plan to the Commission:
>
> (g) the Commission applies assessment criteria to the proposed plan and decides whether or not to give funding approval:
>
> (h) if the proposed plan is given funding approval, the Commission determines the amount of funding payable to the organisation by applying the appropriate funding mechanism:
>
> (i) if an organisation's proposed plan receives funding approval, the Commission monitors the organisation's performance to determine if it is achieving, or has achieved, the outcomes it has specified in its plan.

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136 *Education Act* 1989, S 159AA(1).

137 Subsection 2.

138 Subsection 3. The Minister may also change or replace the strategy, but must consult before doing so (s159AC). Note that without express statutory requirements to the contrary, consultation requires considerably less than to agree with stakeholders: *Wellington Airport Ltd v Air New Zealand* 1 NZLR 671 (CA).

139 Note that section contains an express direction that the description is by way of explanation only.

The TEC's functions are set out in section 159F of the Act, and include prescribing the format and content to be included in institutional plans, and the criteria by which funding decisions will be made on the basis of submitted plans.

The Minister determines how funding is to be distributed through 'funding mechanisms'.[140] Currently for universities these mechanisms include the 'Tertiary Education Organisation (TEO) Component' which itself includes for example funding based on institutional research performance, and the 'Student Achievement Component', which carries over elements of the old EFTS-based funding system.[141]

For institutions to receive funding they must submit an 'investment plan' to the TEC and have it approved. The plan must, inter alia, demonstrate the institution's alignment with Government strategies and priorities; describe its full portfolio of programmes; and set outcomes and performance indicators.[142] The TEC may decline funding if the plan does not meet the criteria, and may revoke funding previously granted if, for instance, the performance criteria specified in the plan are not met.[143]

VII. Analysis and Conclusion: Government Policy and Academic Freedom

In general, the reform emphasises a systematised approach to reaching funding decisions, and reflects Government's view of Universities 'as public service institutions subject to concrete social, political and economic goals'.[144] In line with this conclusion, the NZVCC highlights the use of 'goals' to describe the desired outcomes of the TES:[145]

> 'Goals' suggest a narrow focus, on the achievement of a specific outcome or product. In contrast, 'context' suggests a wider and more balanced focus, which recognises the value of the process itself.

It is submitted that such a systematic approach is inconsistent with universities' role as critic and conscience of society, as it provides for the ascendancy of national interest considerations to the detriment of the concept of academic freedom – academic freedom being a necessary condition for universities' proper fulfilment of that purpose.

Establishing the Minister's role in determining the strategic focus of and funding mechanisms for tertiary education, and requiring universities to demonstrate their compliance with these (via a heavily prescribed procedure) gives flesh to a Hohfeldian power in the hands of the state. The 'supervisory obligations' inherent in such a system, and the following risk that universities become 'engines of conformity' show its incompatibility with an ideal notion of academic freedom. Moreover, the system has a potentially significant impact on the academic, operational and management freedoms of universities as set out in s160, as all must effectively be justified and approved in the plan. The supervisory obligations can only be justified legally therefore by an appeal to the national interest and the efficient use of national resources, given that s160 (Parliament's

140 *Education Act* 1989 s 159L.

141 Tertiary Education Commission '2008 Funding Information' <http://www.tec.govt.nz/templates/standard.aspx?id=2513> at 21 January 2008.

142 *Education Act* 1989 s 159P.

143 *Education Act* 1989 s 159YG.

144 Braun and Merrien, above n 54, 11.

145 New Zealand Vice Chancellors' Committee, Submission on Education (Tertiary Reforms) Amendment Bill to the Science and Education Select Committee (2007) at 5.

declaration of intent regarding academic freedom) is declared to be the purpose of the relevant parts of the Act.

Chen and Walker[146] argued during the parliamentary process that the reform 'appears to erode the academic, operational and management freedoms' provided in ss160-161 of the Education Act 1989. Their argument was based on a reading of those sections that institutional autonomy 'can be constrained *only* where such independence and freedom is inconsistent with the efficient use of national resources'.[147] However, this assertion relies on semantics for its force. An equivalent proposition – 'that institutional autonomy can be constrained wherever and whenever its exercise is inconsistent…etc' – reveals the true nature of the latent power residing in those conferred discretions and who assert the national interest. The risk, as Chen and Walker put it, is implied repeal of the protections afforded by ss160-161. However it is clear that the reforms are entirely compatible with those sections, if it can be shown that the basis that for the policy direction is in the national interest. What ought to be the object of criticism is the 'national interest' qualification itself.

Similarly, the New Zealand Vice Chancellors' Committee (NZVCC) argued that 'direct control, over-regulation or implicit claims to Crown ownership rights'[148] threatened institutional autonomy. However, the reforms are a step removed from the activities the Act includes within its meaning of academic freedom (appointment of staff; regulation of subject matter and so on) – any impact on those is likely to be only indirect.

These arguments, while consistent with an ideal typical account of academic freedom, do not take into account the breadth of the qualifications to academic freedom contemplated by the Act, and specifically, the premise of the reform itself: that it aligns with the national interest. Considerations of the national interest are only legitimated in any discussion of academic freedom by their inclusion in s160 of the Education Act 1989.

By legislating for academic freedom, and specifically through including qualifying statements narrowing the extent of academic freedom, parliament has subverted the ideal principle of academic freedom by incorporating broad potential for its derogation. Aside from the actual effects this may have, it reveals an internal inconsistency with the requirement that universities act as critic and conscience of society – external interference in academic affairs is antithetical and indeed incompatible with the pursuit of knowledge.

These conclusions in themselves illustrate the quid pro quo of the legislative process where fundamental principle is politicised and brought securely within the executive branch of Government's domain, ultimately undermining Weber's 'determinate human purpose' for which the principle was initially recognised.

146 Mai Chen and Sarah Walker 'The Education (Tertiary Reforms) Amendment Bill – reforming the sector or eroding academic freedom' *NZ Lawyer* (2007) 6 July (original emphasis).

147 Ibid.

148 New Zealand Vice Chancellors' Committee above n 145, 1.