

Antoon De Baets

“How Free Expression and Academic Freedom Differ”

University Values: A Bulletin on International Academic Freedom, Autonomy & Responsibility, no. 3 (January 2011)

(http://scholarsatrisk.nyu.edu/documents/UV_JAN_2011.pdf)

Many academics believe that the right to free expression and academic freedom are identical or that the latter is the preferred name for the former in an academic context. This is a fallacy, as is shown by inspecting the *Universal Declaration of Human Rights* and the two covenants derived from it. The *Universal Declaration* itself and the *International Covenant on Civil and Political Rights* give a prominent place to free expression but do not speak of academic freedom at all. The *International Covenant on Economic, Social and Cultural Rights*, in its turn, urges states “to respect the freedom indispensable for scientific research.” However, scientific freedom is not academic freedom; it is broader since it serves both academic and non-academic groups. Academic freedom, serving only academics, draws from scientific freedom but also from other rights. UNESCO, in its *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, defines academic freedom as “[T]he right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.” (para. 27).

How then are free expression and academic freedom related? The former is a necessary but not a sufficient condition of the latter. Academic freedom can be derived from a combination of human rights mentioned in the *Civil and Political Covenant* (arts. 18–22) and the *Economic, Social and Cultural Covenant* (arts. 13–15). To begin with, it requires the protection of individual scholars through the rights to free expression and to intellectual property. Moreover, as it takes shape in an institutional context, it needs the rights to peaceful assembly and association. Next, there is the duty of states to respect scientific freedom. Finally, the audience of the scholars can claim the rights to education, to culture, and to sharing in the benefits of scientific progress. Only this entire set of *Covenant* rights gives rise to academic freedom.

It thus emerges that free expression and academic freedom are not identical. They differ in four important respects. First, free expression is universal, whereas academic

freedom is meant for the academic community only. Second, free expression is valid in all circumstances (although derogable in times of emergency), whereas academic freedom is duty-dependent: it can be invoked only when academics perform their academic duties, that is, when they are engaged in the honest search for truth in research and teaching. These duties include scholarship-related activities *outside* academe, but exclude matters unrelated to scholarship: the latter are not protected under academic freedom (though they still may be under other human rights). Third, free expression is an individual right, whereas academic freedom is an individual *and* a collective right. The collective aspect of academic freedom is called university autonomy, understood as the freedom of academic institutions to regulate their own affairs in the core areas of the curriculum, the awarding of degrees, the admission of students, and the selection and promotion of staff—in exchange, though, for a set of clear accountability principles. Fourth, academic freedom can be more restricted than free expression but also less. According to the *Civil and Political Covenant*, restrictions on free expression should be prescribed by law, necessary in a democratic society, and directly related to one of the following purposes: respect for the rights or reputations of others or the protection of national security, public order, public health, or morals. Academic freedom is subject to the same restrictions regime, but also to further restrictions rooted in scientific tradition and procedure: universities possess a sophisticated system of peer review and quality checks. These sophisticated restrictions render academic debates far more regulated than public debates; but once academics respect the restrictions, their right to heresy is virtually boundless. On balance, then, academic freedom turns out to be narrower than free expression in the first two respects, broader in the third respect, and both more and less restricted than free expression in the last respect. Therefore, equating both is a fallacy.

Antoon De Baets

“The Doctrinal Place of the Right to Academic Freedom Under the UN Covenants on Human Rights—A Rejoinder”

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In “The Doctrinal Place of the Right to Academic Freedom Under the UN Covenants on Human Rights” (*University Values*, July 2011), Klaus Dieter Beiter defends two claims. The first is that, as academic freedom cannot be found explicitly in the United Nations Covenants on Human Rights, it has to be derived from a combination of human rights stipulated in these Covenants. The second claim is that this complex situation can be simplified by deriving academic freedom from one single human right, namely the right to education. I will show that the first claim is justified, while the second is not.

The right to academic freedom is the result of a combination of various rights taken from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The question is whether we can agree on what human rights to combine. Beiter’s list differs from the one I gave in my “How Free Expression and Academic Freedom Differ” (*University Values*, January 2011). His list is as follows: ICCPR Article 9 on liberty and security of the person, ICCPR Article 12 on liberty of movement, ICCPR Articles 18–19 on freedom of thought and expression, ICCPR Articles 21–22 on the rights to assembly and association and ICESCR Article 15(3) on freedom of scientific research and creative activity. My list is the following: ICCPR Articles 18–19 on freedom of thought and expression, ICCPR Article 20 with its prohibition of hate speech, ICCPR Articles 21–22 on the rights to assembly and association, ICESCR Articles 13–14 on the right to education, and the complete ICESCR Article 15 on freedom of scientific research and creative activity and on the right to benefit from scientific progress and from copyright.

There is much overlap between these two lists but there are also discrepancies. These discrepancies can be dissolved fairly easily by introducing two types of rights for our purposes: those directly contributing to academic freedom (like freedom of thought) and those indirectly contributing to it. For example, the right not to be held in slavery (ICCPR Article 8) is obviously a precondition to academic freedom but it does not directly contribute to it. In my view, most of the Covenant rights are preconditions for academic freedom, but only ICCPR

articles 18–22 and ICESCR articles 13–15 contribute to it directly. This means that, on the one hand, security of the person and liberty of movement on Beiter’s list are preconditions only, while on the other rights directly contributing to academic freedom are omitted from his list.

Thus far Beiter and I follow the same logic although important details differ. Then, however, Beiter defends a second claim: “[A] single and complete locus for the right to academic freedom exists within the UN Covenants: Article 13 of the ICESCR on the right to education.” This second claim contradicts the first one in two respects. A multilayered roof for academic freedom is irreconcilable with a single roof. And, strikingly, the right to education is absent in Beiter’s first claim while it is central to his second. He justifies this second claim by invoking the position of the Committee on Economic, Social and Cultural Rights (the body supervising ICESCR implementation), which perceives academic freedom as an absolute requirement for the enjoyment of the right to education. This position, accurate in itself, is not a good justification here: that academic freedom is a precondition for the right to education does not mean that the right to education is the sole precondition for academic freedom.

Indeed, Article 13 ICESCR alone is too weak a basis to support academic freedom because the latter has many aspects which are not education-related. Look at the UNESCO definition of academic freedom—the most authoritative and the one used in both our essays: “[T]he right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.” This definition encompasses three domains: teaching, research and academic self-governance. The first domain corresponds, of course, to the right to education. The second, research, is sometimes education-related but often it is not or only remotely so. Likewise, many aspects of the third domain, academic self-governance, deal with teaching-related aspects but many others do not. Therefore, Beiter’s second claim is untenable. The right to education alone can never sufficiently justify nor explain academic freedom. Academic freedom is the result of a complex interplay of human rights.

Antoon De Baets

“Some Puzzles of Academic Freedom (Part 1)”

University Values: A Bulletin on International Academic Freedom, Autonomy & Responsibility (3 July 2014;

http://salsa4.salsalabs.com/o/50943/p/salsa/web/blog/public/?blog_entry_KEY=32&killorg=True)

In his criticism of my view on academic freedom, Klaus Beiter touches upon some puzzles of academic freedom (1). I want to make some observations on these puzzles, explaining in the process where I think Beiter has misunderstood me and where I believe his views are debatable.

The first puzzle is that neither intellectual freedom nor freedom of scientific research nor academic freedom is explicitly mentioned in the International Covenants. Intellectual freedom, however, is clearly implied in Article 19 ICCPR—the freedoms to hold and express opinions. I have not seen this questioned. The term “freedom of scientific research” is not used in the Covenants either, but Article 15.3 ICESCR speaks of “freedom indispensable for scientific research.” While there is no real problem in shortening this formula to freedom of scientific research, Beiter abbreviates it to “freedom of research.” This is questionable because not all research is scientific. I myself abbreviated it to “scientific freedom,” which on closer scrutiny is also problematic because scientific freedom can be construed as a concept larger than freedom of scientific research. Academic freedom finally, is not mentioned implicitly or explicitly in the Covenants. For Beiter, academic freedom is included in “freedom of research.” He writes: “One should not confuse ‘academic freedom’ with ‘freedom of research.’ The latter includes academic freedom (...)”. In this view, academic freedom would be the name for freedom of scientific research when applied to academics. I agree but only in part because Beiter’s view is solely based on the distinction academic/non-academic. Another view is possible. That other view is based on the distinction research/teaching. Viewed as such, academic freedom is not exhaustively included in freedom of scientific research; it rather overlaps with it for the research component but not for the teaching component. Academic freedom as a guarantee for teaching is covered by the rights to education (Article 13 ICESCR) and free expression. I believe this other view is just as valid as that defended by Beiter. In short, the relationship between intellectual freedom, freedom of scientific research and academic freedom is more complex than Beiter assumes. The fundamental reason for this is the lack of conceptual clarity in the Covenants.

Beiter repeatedly argued that the right to education is the “single and complete locus” for academic freedom. If this were so, why, then, does he assert that it is a part of the freedom of scientific research, which is itself not part of Article 13 but of Article 15.3 ICESCR? In contrast to Beiter, I believe that much research conducted at universities and academies has no educational component at all because it is directed at the discovery rather than the transmission of knowledge. To call all academic research part of education merely because it takes place at “higher-education institutions” is to stretch the meaning of education beyond acceptable limits. Let us now look closely at Article 13 ICESCR. It formulates education as a right of the educated only but nowhere as an explicit right of the educators. (Implicitly, of course, educators’ rights are necessary for the exercise of the rights of the educated.) Furthermore, Article 13 refers to the goals of, and access to education, but says little about teaching, let alone teaching at higher-education level, and nothing about research. In short, Article 13 is essential but incomplete. To cover the full academic freedom spectrum, we also need other human rights, like free expression.

A certain historical myopia may be at play here. Why? In 1999, the Committee on Economic, Social and Cultural Rights issued its General Comment on Article 13. Several paragraphs were devoted to academic freedom. But the Committee’s work on Article 15—containing the rights to culture and science—has barely begun: hitherto, only General Comments on copyright (15.1.c) and the right to culture (15.1.a) have been issued, but those on the right to benefit from science (15.1.b) and on the state duties regarding the promotion of science, respect for freedom of scientific research and international contacts (Articles 15.2–15.4) are still lacking. When they appear one day, they will evidently contain passages on academic freedom—exactly like the comment on education did. The first signs are already there in the documents preparing the ground for these future Comments. In 2013, for example, the UN Special Rapporteur for Cultural Rights “recall[ed] that several human rights provisions protect academic freedoms.” (Note, in passing, the plurals: provisions, freedoms.) From a historical perspective, then, it is premature to state that academic freedom solely depends on the right to education.

In part 2, I will discuss the degree to which various human rights determine academic freedom and the issue of the right to academic travel. In part 3, constitutional protections for academic freedom will be considered as well as the diverging views of UNESCO and the Committee on Economic, Social and Cultural Rights regarding academic freedom.

(1) See Klaus Dieter Beiter, “The doctrinal place of the right to academic freedom under the UN covenants on human rights—A rejoinder to Antoon de Baets” in *University Values Bulletin*, December 2013, a response to De Baets in *University Values Bulletin*, May 2012, itself a rejoinder to Beiter in *University Values Bulletin*, July 2011.

(2) *University Values Bulletin*, January 2011.

Antoon De Baets

“Some Puzzles of Academic Freedom (Parts 2 and 3)”

University Values: A Bulletin on International Academic Freedom, Autonomy & Responsibility (9 January 2015;

http://salsa4.salsalabs.com/o/50943/p/salsa/web/blog/public/?blog_entry_KEY=46&killorg=True).

In part 1 of this post, published in the *University Values* bulletin in July 2014, I argued that by not explicitly mentioning intellectual freedom, freedom of scientific research and academic freedom, the two international human rights covenants lack conceptual clarity. I also took issue with Klaus Beiter’s assertion that art. 13 ICESCR (the right to education) is sufficient as a conceptual base for academic freedom.(1) I argued that Beiter suffers from historical myopia. I will therefore now discuss the degree to which various human rights determine academic freedom and add a note on the particular issue of the right to academic travel. I will then consider constitutional protections for academic freedom as well as the diverging views of UNESCO and the Committee on Economic, Social and Cultural Rights regarding academic freedom.

Part 2. *The degree to which various human rights determine academic freedom.* In an earlier contribution (2), I defended the view that academic freedom is sustained by some human rights directly and by others indirectly. The direct determinants, I argued, were the rights to free thought, free expression and information, peaceful assembly and association and the prohibition of hate speech (arts. 18–22 ICCPR) and the rights to education, culture and science (arts. 13–15 ICESCR). On further reflection (space restrictions do not allow for a full explanation here), I would now also like to add art. 17 ICCPR, the rights to privacy and reputation, to these direct determinants. The indirect determinants—I called them preconditions—were the remaining human rights. For Beiter, the indivisibility of human rights means that while all human rights (can) influence academic freedom to an equal degree, paradoxically it is still possible to call education (art. 13 ICESCR) the “single and complete locus” for academic freedom. Beiter tries to refute my direct/indirect determinants view as follows: “[A]ttacks on the liberty and security of university staff and students or their physical integrity, honour and reputation are so widespread that it would be a mockery not to describe these as assaults on academic freedom itself, specifically as the human rights violations concerned occur precisely because of academic content supported by scholars.” Beiter erroneously thinks that my direct/indirect determinants approach obscures a large part of the

assaults on academic freedom, namely those engendered by what I called preconditions. In order to reason like this, he must equate “preconditions” with “no conditions at all.” It is not because I describe freedom from murder or torture as preconditions for academic freedom rather than direct determinants that I neglect their roles as causes of academic freedom violations. The opposite is the case. In a recent essay, “Political Murders of Historians (1945–2014),” I calculated on a case-by-case basis that worldwide 214 historians and history producers were killed for political reasons after 1945. I also estimated that the deaths of one out of four of these history producers killed for political reasons had some substantial relationship to their historical (including academic) work. (3)

The right to academic travel. Beiter reproaches me that I do not take into account the right to academic travel. At first sight, he has a point here. Let us also recall a major finding of the 1986 study by John Ziman and others, *The World of Science and the Rule of Law* (4). They wrote: “With only one exception—the lack of a right to enter a country of which one is not a citizen, for professional scientific purposes—*all the rights necessary for the free and effective pursuit of science are already covered by the existing international code of human rights law*” (italics in original). This finding contains two parts: an exception and a conclusion. First a word about the conclusion itself. It is a radical conclusion since it states that, on the condition that all human rights of scholars are respected, we can abolish the concept of academic freedom: there is no need for such a special claim by the academic profession. Note, in passing, that Ziman emphasizes *all* human rights and not only the right to education, as Beiter does.

Now the exception about academic travel. If we agree that the right to enter a country of which one is not a citizen *is* basically covered by the freedom of movement (arts. 12–13 ICCPR), although the latter does not specifically talk about “professional scientific purposes,” then we can drop the exception. Beiter would surely agree with this. Be that as it may, one could argue that the importance of the right to academic travel has fundamentally changed since the publication of Ziman’s study almost 30 years ago, given that today we can email, skype and access internet archives. Scholars who in the past did not benefit from international contacts because they were unable to travel for economic or political reasons have alternative channels now. But this will not be my argument here. It will be that, contrary to what Beiter and Ziman think, the right to academic travel *is* included in my direct determinants of academic freedom, because it is strongly implied in art. 15.4 ICESCR, which says: “The States Parties...recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.” This amounts

to much the same as arts. 12–13 ICCPR *and* it is specifically designed for scientists. In short, I concur with Beiter that the right to academic travel, is crucial. And I would even add that, unfortunately, many states frequently abuse exit and entry visa policies as instruments of censorship and so neglect their international obligations in this regard.

Part 3. Constitutional protections. Not surprisingly, the diffuse presence of the idea of academic freedom in the Covenants is reflected in its diffuse presence in the world's constitutions. Scholars at Risk prepared a revealing graph presenting “Constitutional protections for academic freedom,” (5) in which three categories of countries are distinguished: those whose constitutions explicitly guarantee academic freedom (21 countries, at the time the graph was produced), those who directly guarantee *elements* of academic freedom (99 countries), and the remaining 76 countries whose constitutions *indirectly* guarantee academic freedom (that is, via other rights). I note in passing that, like me, Scholars at Risk finds a direct/indirect determinants approach (which I defended above) useful.

I have three observations about the graph. In contrast to what one may expect, the list of 21 countries with constitutions explicitly guaranteeing academic freedom—the top category—is not very reassuring. There are several notorious violators of academic freedom among them: pick the examples yourselves or compare the list with the countries discussed in the recent report of the Global Coalition to Protect Education from Attack, *Education under Attack 2014* (6). The list is telling in a second respect. Several of the countries in the top category introduced explicit constitutional guarantees for academic freedom after excruciating periods of repression and conflict (for example, Spain, Japan, El Salvador, Tunisia), ostensibly because their universities had been among the first casualties at the time. Lastly, it is striking that most consolidated democracies do *not* (yet) provide explicit constitutional guarantees for academic freedom: some directly guarantee *elements* of academic freedom while others guarantee academic freedom via other rights.

A last surprise. In the passages devoted to academic freedom in its General Comment on the Right to Education of 1999, referred to in *part 1* of this post, the Committee on Economic, Social and Cultural Rights (CESCR) writes that its observations apply to higher-education institutions in particular, but then somewhat mysteriously adds: “The Committee wishes to emphasize, however, that staff and students throughout the education sector are entitled to academic freedom.” This is a baffling statement since elsewhere in its General Comment the CESCR seems to endorse the definition of academic freedom given by UNESCO in art. 27 of its 1997 *Recommendation Concerning the Status of Higher-Education Teaching Personnel*. Although the CESCR does not quote this definition in its entirety, it

discusses several of its elements and refers to the *Recommendation* itself. The CESCR, however, is ostensibly developing its own view on academic freedom rather than adopting the UNESCO one, which sees academic freedom as applicable to “higher-education personnel” only. I think that the CESCR overstretched its hand here. It is already a matter of controversy whether students in higher education enjoy the same degree of academic freedom as lecturers and researchers (the *Recommendation* does not mention academic freedom for students), and it is even more questionable to allocate academic freedom to secondary-school textbook authors or teachers, let alone their students, and even far more so, to primary-school teachers and their pupils.

The Covenants contain several inconsistencies and gaps, undoubtedly the product of the drawn-out negotiation process during which they were first drafted in the 1950s. The authoritative General Comments struggle with these same inconsistencies and gaps. We already pointed to the lack of conceptual clarity in *part I*. Fortunately, in one of the most enlightened passages of its General Comment on the Freedoms of Opinion and Expression of 2011, the Human Rights Committee recognized that “The Covenant does not permit general prohibition of expressions of an erroneous opinion.” We all benefit from the right to err.

(1) Antoon De Baets, “Some Puzzles of Academic Freedom, Part 1,” *University Values* (July 2014); Klaus Dieter Beiter, “The Doctrinal Place of the Right to Academic Freedom under the UN Covenants on Human Rights—A Rejoinder to Antoon de Baets” *University Values* (December 2013), a response to De Baets in *University Values* (May 2012), itself a rejoinder to Beiter in *University Values* (July 2011).

(2) Antoon De Baets, “The Doctrinal Place of the Right to Academic Freedom Under the UN Covenants on Human Rights—A Rejoinder,” *University Values* (May 2012).

(3) Antoon De Baets, “Political Murders of Historians (1945–2014),” in Stefan Berger, ed., *Historians as Engaged Intellectuals* (New York / Oxford: Berghahn, forthcoming [2015]). For similar findings, see Antoon De Baets, “Archivists Killed for Political Reasons,” *Comma: International Journal on Archives*, 2013, no. 2, 123–134 (published with delay in 2015)].

(4) John Ziman, Paul Sieghart and John Humphrey, *The World of Science and the Rule of Law: A Study of the Observance and Violations of the Human Rights of Scientists in the Participating States of the Helsinki Accords* (Oxford: Oxford University Press, 1986), 10.

(5) Scholars at Risk, “Constitutional Protections for Academic Freedom” (version January 2014; http://scholarsatrisk.nyu.edu/Documents/SAR_AF_Constitutions_Pyramid.pdf).

(6) Global Coalition to Protect Education from Attack, *Education under Attack 2014* (New York: GCPEA, 2014; <http://www.protectingeducation.org/education-under-attack-2014>).