COMPARATIVE DEVELOPMENTS IN THE LAW OF ACADEMIC FREEDOM*

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A. Constitutional Development

The most significant development in the area of academic freedom in our country is, of course, the incorporation of the guarantee of academic freedom in all educational institutions in the Constitution. Thus, our 1987 Constitution now provides that "academic freedom shall be enjoyed in all institutions of higher learning."[1]

We should disabuse our minds from thinking that this is the same provisions contained in the 1973 Constitution. The 1973 Constitution provided that "all institutions of higher learning shall enjoy academic freedom." The effectiveness of that clause as a guarantee of academic freedom during the martial law regime can be seen from the fact that during that period, freedom indeed became academic. But the same problem still confronts us now: Has academic freedom remained academic?

The difference between the old and the new provisions lies in the coverage of the guarantee. It is said that under the 1973 Constitution, the grant of academic freedom was given only to the institutions of higher learning; in other words, the freedom guaranteed was institutional in character, and it did not include the freedom of the professors and that of the students. In the present Constitution, the grant was given to all three entities: to the universities and colleges, to the teachers and researchers, and to the students. Thus, Delegate Adolf Azcuna, sponsoring the amendment, declared before the body:

> MR. AZCUNA: In the 1973 Constitution, this freedom is given to the institution itself. All institutions of higher learning shall enjoy academic freedom. So, with this proposal we will provide academic freedom in the institutions -- enjoyed by students, by the teachers, by the researchers and we will not freeze the meaning and the limits of this freedom. Since academic freedom is a dynamic concept and we want to expand the frontiers of freedom, specially in education, therefore, we will leave it to the courts to develop further the parameters of academic

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[1]Art. XIV, sec. 5(2).

> freedom. We just say that it shall be enjoyed in all institutions of higher learning.[2]

So, while the United States and other countries have been agonizing over the fact that the academic freedom of their colleges and universities is just a corollary to the freedom of speech and of the press, we rest assured with the thought that here in our benighted country, academic freedom is enshrined in our Constitution.

This should be a cause for rejoicing in intellectual circles for this marks an advance in the guarantee of academic freedom for our professors and scholars both in public and in private institutions of higher learning.

Contrast this with the constitutional provision of 1973. What should be noted is that the guarantee of academic freedom is given, not to the teacher and to the scholar, but to "institutions of higher learning." What has been guaranteed by the 1973 Constitution is institutional academic freedom, not the individual freedom of the researcher and the professor. The 1987 Constitution became aware of the problem of teachers and students against the unbridled exercise of academic freedom, and sought to remedy this problem. I do not think that it succeeded in proposing a practical solution.

The tension between the two strands of freedom is illustrated in the late unlamented case of the U.P. College of Medicine[3] which is still under reconsideration in the Supreme Court. It was in this case where the Supreme Court had the opportunity to point out the distinction between the two strands of academic freedom: thus, while it remained cognizant of the academic freedom of the teachers who were the petitioners here, it stated that what was involved was the right of the University to determine who may be admitted to study, which is an element of institutional academic freedom of the U.P., and not of the academic freedom of the professor or the researcher.

B. Institutional Academic Freedom

The distinction between the two strands of academic freedom has been previously expounded by academic and judicial authorities in the western world.

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[2] 4 RECORD OF THE CONSTITUTIONAL COMMISSION 439 (1986).

[3] Reyes v. Board of Regents, G.R. 94961, Feb. 25, 1991.

"It is a well-established fact, and yet one which sometimes tends to be obscured," wrote Dr. Marcel Bouchard, Rector of the University of Dijon, France, "that the collective liberty of an organization is by no means the same thing as the freedom of the individual members within it; in fact, the two kinds of freedom are not even necessarily connected. In considering the problems of academic freedom one must distinguish therefore between the autonomy of the university and the freedom of the teacher."

Institutional academic freedom has been defined by Justice Felix Frankfurter, who was a long-time professor at Harvard Law School, to consist of four essential freedoms to determine for itself on academic grounds: (1) who may teach; (2) what may be taught; (3) how it shall be taught; and (4) who may be admitted to study.

It is to be noted that these four essential freedoms are given to the university as an institution, not to the professors or to the researchers in that institution. The problem then arises: in whom is power to exercise these four freedoms vested? The answer to the question is very crucial because, in most cases, the conflict arises between the university administrators and the individual teachers. The most persistent and subtle threats to academic freedom no longer come from people outside the university; these come from the governing board, or from the administrators of the university. It is thus that institutional academic freedom becomes a double-bladed weapon that cuts both ways against the individual professor, since it is the university as an institution that enjoys the freedom, among others, to determine for itself on academic grounds who may teach, what may be taught, how it may be taught, and who may be admitted to study.

The annals of anti-intellectualism show that this was the weapon used against Spinoza in 1673 by the University of Heidelberg, which rejected the famous philosopher as a professor because the latter would not take a pledge not to disturb the state religion. The freedom to determine who may teach was the same weapon used by the English and the American sectarian universities to bar free-thinkers and other independent-minded scholars from their faculty. Thus, even in a non-sectarian university like the University of Virginia in 1819, the first teacher who was appointed to the faculty was later dismissed at the instance of religious lay leaders, which shows how, in some instances, institutional academic freedom can come into direct conflict with the academic freedom of the professor and the researcher. And this guarantee of academic freedom that now appears in our Constitution can now be used by the sectarian universities and colleges to determine that those who may teach are only those who adhere to the Catholic faith, that those who may be admitted to study are only students of the same

religious belief, and that what may be taught are the values and doctrines consistent with the Catholic religion.

While the 1987 constitutional guarantee is an improvement, it can still be used by the intolerant majority or by the heavy hand of administration or the short-sighted but powerful politicians to reject, discipline, persecute and otherwise keep in check professors and scholars who may not be of the same persuasion, religion or party as the ruling class.

Of course, the one solution to this dilemma is to place the locus of the exercise of institutional academic freedom in the hands of the academic staff. As Sir Eric Ashby, President of the Queens University in Belfast, stated:

> The internal conditions for academic freedom in a university are that the academic staff should have *de facto* control of the following functions: (1) the admission and examination of students; (2) curricula for courses of study; (3) the appointment and tenure of office of academic staff; (4) the allocation of income among the different categories of expenditure. It would be a poor prospect for academic freedom if universities had to rely on the literal interpretation of their constitutions in order to acquire for their academic members control of those four functions, for in one condition or another most of those functions are laid on the shoulders of the lay governing body.

The problem then is where to locate the center of gravity of academic freedom in an institution of higher learning. Since the Constitution does not specify the location of the exercise of this power in any group or body within the institutions of higher learning, the university administration always claims this for itself or on behalf of the governing board. In this instance, the university is perceived as just another form of corporate entity which is governed by a board of directors, and which day-to-day operations are entrusted to the hands of a president or a manager. In the corporate world, where the bottom line is always profitability, the disciplinary powers over the employees are always wielded by the operating officers and their subalterns. The question is whether institutions of higher learning should at all be analogized to ordinary corporations with regard to the intellectual discipline of their staff.

This issue is best exemplified in the U.P. College of Medicine case. Here, six students who did not make the cut-off score in the National Medical Admission Test as set by the college faculty went to court to compel the University to admit them, on the theory that the cut-off score set by the college faculty was not confirmed by the university body designated to approve conditions for admission. The

faculty of the College, initially with the nominal acquiescence of the governing body of the University, resisted the claim of the students, insisting that the College through the faculty, should decide that issue, citing a Board of Regents resolution that "the act of fixing cut-off scores in any entrance examination required in any college of the university is within the authority of the college faculty; and any question regarding the exercise of such act should be elevated and resolved by the University Council of the autonomous campus." After the case had dragged on for more than three years, the six students, upon the advice of the U.P. President, relented and wrote a letter to the Medicine faculty saying that they never intended to question the faculty's right to academic freedom, and moved to dismiss the action pending in court. Later, the Board of Regents, invoking its plenary power over matters affecting University matters, resolved to approve the admission of the students to the College, and ordered the faculty to admit them. But the faculty voted not to follow the Board's order. So when the case reached the Supreme Court, it held that, under the University Charter, the institutional academic freedom of the U.P. was vested in the academic staff, and that meant, in this case, the University Council. But the Court found that the cut-off score fixed by the Medicine faculty was not previously approved by the University Council of U.P. Manila, and it was confirmed only later after the controversy was at its peak. What the Board did, in the eyes of the Court, was merely to uphold the cut-off score previously approved by the University Council. The high court added that if there is abuse or misuse in the exercise of the Council's authority, then the Board may step in to correct the anomaly. The case is still under reconsideration by the Supreme Court.

The earlier case on institutional academic freedom involved, of all schools, a seminary. A female student sought to compel the Loyola School of Theology to allow her to continue studying therein, and, of course, since at that time the 1973 Constitution had already granted academic freedom to all institutions of higher learning, the Supreme Court ruled that, under the circumstances of the case, no duty was cast on the school to let the petitioner continue her theology studies.[4]

C. Academic Freedom of Teachers

The negative side of institutional academic freedom cuts away at the individual academic freedom of teachers. This can be seen in cases decided in the United States. Several years back, the U.S. Supreme Court upheld the institutional freedom of a public school in New York to terminate the employment of a teacher who belonged to an

[4]Garcia v. Faculty Admission Committee, Loyola School of Theology, 68 SCRA 277 (1975).

organization which advocated unlawful overthrow of the government.[5] Fortunately, this ruling was reversed after more than a decade later in the case of *Keyishian v. Board of Regents*,[6] where the U.S. Supreme Court held that mere knowing membership in an organization that advocated unlawful overthrow of the government is not an adequate criterion for disqualification from employment in the public schools. The Court added that the teacher concerned must have specific intent to support the illegal objectives of the organization before sanctions may be imposed. In so holding, the Court expressed the social interest that underlines academic freedom in the following words:

> Our Nation is deeply committed to safeguard academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.[7]

The exercise of institutional academic freedom by a state university was struck down by the U.S. Supreme Court in the recent case of *Regents of the University of California v. Bakke*,[8] which involved reverse discrimination. Here, the University of California adopted an affirmative action program under which only disadvantaged members of certain minority races were considered for 16 of the 100 places in each year's class in the medical school, whereas, members of any race could qualify under the school's general admission program for the other 84 places. The plaintiff, a white male who was denied admission even though applicants with lower entrance exam scores had been admitted under the special admissions program, sued for declaratory and injunctive relief against the Board of Regents, alleging that the affirmative action program violated his equal protection rights. In a close 5-4 decision, the U.S. Supreme Court invalidated the affirmative action program of the university. Justice Powell, who wrote for the majority, declared that "it is too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a greater degree of protection than that accorded to others." While the majority recognized that one of the essential freedoms of a university is "the freedom to select a diverse student body, and that academic freedom is a countervailing interest to the equal protection clause," it was ruled that even the institutional freedom of a university would not allow it to choose its students through an admissions program based on race.

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[5]Adler v. Board of Education, 342 U.S. 485 (1952).

[6]385 U.S. 589 (1967).

[7]Keyishian v. Board, 385 U.S. at 603.

[8]438 U.S. 265 (1978).

What we should not lose sight of here in discussing the academic freedom of teachers is that this is an important part of the freedom of expression guaranteed by the Constitution, and is part of procedural due process insofar as protection of the teacher's security of tenure is concerned. This dual aspect of academic freedom was briefly discussed by our Supreme Court in the case of *Montemayor v. Araneta University*[9] where the Court, through Chief Justice Fernando, quoted with approval Robert MacIver's concept of academic freedom as "a right claimed by the accredited educator, as teacher and as investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation or penalization because these conclusions are unacceptable to some constituted authority within or beyond the institution," and that "tenure is the essence or such freedom." It was here where our Supreme Court recognized the concept of academic due process. The Court quoted with approval the pronouncement of the American Association of University Professors that "every university or college teacher should be entitled before dismissal or demotion to have the charges against him stated in writing, in specific terms and to have a fair trial on these charges before a special or permanent judicial committee of the faculty or by the faculty at large. At such trial, the teacher accused should have full opportunity to present evidence." Academic due process was defined as a system of procedure designed to yield the best possible judgment when an adverse decision against a professor may be the consequence, with stress on the clear, orderly, and fair way of reaching a conclusion.

In this case, the Court noted that in a hearing conducted by the University on a charge of making homosexual advances, where the accused's motion for postponement was denied by the hearing committee and the hearing proceeded without the presence of the accused or his counsel, the professor's due process rights were not observed by the committee, where it received vital evidence immediately and proceeded to submit its report finding the professor guilty of the charges. However, it was noted by the Court that, when the case was appealed to the Department of Labor, the professor concerned had the opportunity to present his case before the Labor Commission, and this remedied the deficiency in the University's hearing process.

Once academic due process is held to be applicable, the next problem is determining what process is due. The seven cardinal rules of due process, in an academic context, should be recast as follows:

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[9]77 SCRA 321 (1977).

First, there must be an impartial hearing tribunal composed of fellow faculty members of the respondent professor, teaching colleagues who are without any administrative duties and who have been duly elected by the faculty. The reason for choosing faculty members without any administrative duties is to dissociate the administration from the hearing tribunal, so that the impartiality of the tribunal will not be placed in doubt. Since the prosecution is usually the administration, electing faculty members with administrative functions in the hearing tribunal will cast a cloud on the neutrality of the body. And the tribunal should be composed wholly of faculty members so as to ensure that faculty judgment will come into play without being diluted by other value judgments that may not be appropriate in this kind of hearing.

Second, the formal complaint against the respondent professor should contain a complete statement of the charges, together with a summary of the evidence and the witnesses to be presented. The hearing procedures should also be outlined, together with a copy of pertinent rules and regulations.

Third, a faculty counsel should assist the respondent in all stages of the case.

Fourth, the hearing should be conducted like a full-blown trial, with the respondent being afforded the right to cross-examine witnesses against him and to refute adverse evidence. The hearing tribunal should assert its authority to compel witnesses who may have to be summoned by the respondent.

Fifth, the hearing tribunal must act independently in appraising the evidence presented. The proceedings must be put on record and a copy of the record must be made available to the respondent. The burden of proof will have to be borne by those who bring them, and the quantum of evidence for a finding by the hearing tribunal will be substantial evidence.

Sixth, the decision of the hearing tribunal must cover all points in issue, complete with reasons relied upon for the disposition of each issue of the case.

Seventh, the procedures must lay down the rules for appellate review, which should be done by the Board of Regents directly without passing through an intermediate administration official. This is to prevent the administration from injecting other issues which may load the dice in favor of the prosecution.

It may not be amiss to mention one of the developments in the law of academic freedom in the United States. This is the gradually-emerging theory of considering violation of teachers' academic freedom as a tort, or a legal wrong, for which the aggrieved party can recover damages. This is to ensure that the academic freedom of teachers has the status of a constitutional right, the violation of which is considered an actionable wrong.

Here in the Philippines, we do not have to grope for such a theory, since relief is provided in our Civil Code. Thus, Article 32 makes liable for damages "any public officer who directly or indirectly obstructs, defeats, violates, or in any manner impedes or impairs the rights of a person guaranteed under the Bill of Rights." Since academic freedom has been enshrined in the Constitution, not to mention the fact that it is really a part of a professor's freedom of expression, there is no doubt that violation of this right calls for the payment of monetary damages by way of relief.

D. Conclusion

There is no doubt that the two strands of academic freedom, the institutional and the individual academic freedom, can be reconciled. This can happen only where the university administration realizes that it is the business of the university to protect the individual academic freedom of its scholars and researchers. As Justice Frankfurter declared in his concurring opinion in *Sweezy*:

> In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of a Church for State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being of Socrates -- 'to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.[10]

It is only when the administration of a university is enlightened enough to realize the proper role of a university in society that individual academic freedom can be amply protected and given meaning and substance, so that the scholars and researchers can fulfill their function for the nation.

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[10]Sweezy v. New Hampshire, 354 U.S. 234 (1957).