ACADEMIC FREEDOM AS A CONSTITUTIONAL RIGHT*

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We are here once again to do honor to the revered memory of a great jurist, the foremost constitutionalist of his era, Justice George C. Malcolm. As founder of the school from which most of us present graduated and to which we manifest as we should continuing loyalty, he is no less entitled to be ranked as truly one of the most distinguished educators to have rendered service to our country. Even now the influence that he wields is considerable, considering that of the fourteen members of the Supreme Court, twelve are from such College, headed by Chief Justice Fred Ruiz Castro. It is quite appropriate then that one of the Malcolm lectures be on academic freedom as a constitutional right. It is quite understandable why no opinion on that subject was ever penned by him. There was no such provision in the two organic acts under the American regime, the Philippine Bill of 1902 and the Philippine Autonomy Act of 1916. Beginning with the 1935 Constitution, however, academic freedom has found express mention in the fundamental law. It was worded thus: "Universities established by the State shall enjoy academic freedom."[1] The present Constitution is quite definite and has removed doubts as to its scope: "All institutions of higher learning shall enjoy academic freedom."[2]

1. *Academic freedom not a constitutional right in the United States*

It may be useful to note that such is not the case in the United States. In 1964, Professor Murphy could characterize it at the most as an "emerging constitutional right."[3] According to Professor Fuchs, the concept of academic freedom dominant in colleges and universities in the United States "rests mainly on three foundations: (1) the philosophy of intellectual freedom, which originated in Greece,

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[1] Article XIV, sec. 5.

[2] Article XI, sec. 8, par. (2).

[3] Murphy, *Academic Freedom—An Emerging Constitutional Rights* in BAADE, (ED.), ACADEMIC FREEDOM 17-56 (1964).

arose again in Europe, especially under the impact of the Renaissance, and came to maturity in the Age of Reason; (2) the idea of autonomy for communities of scholars, which arose in the universities of Europe; and (3) the freedoms guaranteed by the Bill of Rights of the federal constitution as elaborated by the courts."[4]

2. *The importance of academic freedom*

It is indispensable to a nation's well-being, especially in view of the rapid growth of knowledge and the complexity of modern life, that education on the collegiate and university level be not only maintained but also improved. The standard of instruction must be kept rigorous and exacting. In the language of a distinguished member of the academe, both as a professor and administrator, former Chancellor Hutchins of the University of Chicago: "A country that makes no provision for serious higher learning*** will suffer from the degradation of its culture, the confusion of its thinkers, and the ultimate cessation of its scientific progress."[5]

Nor are the benefits traceable to educational institutions in that category confined to national boundaries. They extend much further. There are no limits imposed by space and by time. Professor MacIver explained why it is so: "Essentially, the university is a company of scholars and learners, teachers and students. It is a guild serving the community, and while it serves more immediately the region to which most of its students and teachers belong, it serves also the whole of mankind. Knowledge, once attained, is imperishable and universal. Knowledge has no frontiers, and the great gifts it brings are at the service of all mankind, no matter what barriers we raise, no matter how we may abuse the powers it gives us."[6]

The significance of academic freedom to the democratic process cannot be overemphasized. In a polity that rests on the consent of the governed it is essential that there be an informed citizenry. As Justice Cardozo so felicitously phrased it: "We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge,—or none that is not illusory."[7] So with Spinoza: "He is the free man, who lives according to the dictates of reason alone."[8] What passes for reason when issuing forth from lips of public men should be viewed

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[4] Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History* in BAADE, (ED.), *op. cit., supra*, note 3 at 1-16.
[5] HUTCHINS, THE UNIVERSITY OF UTOPIA 48 (1953).
[6] MACIVER, ACADEMIC FREEDOM IN OUR TIME 7 (1955).
[7] CARDOZO, PARADOXES OF LEGAL SCIENCE 104 (1928).
[8] *Ibid.*

with healthy skepticism as it could be dictated by partisan advantage. It is different where educators are concerned if true to their calling and faithful to their mission. In their field of specialization, they are expected to speak with detachment, objectivity, and expertise. What they say may not be equated with wisdom, but it could furnish the basis for wise decisions. "Free trade in ideas," as noted by Professor Byse, "is indispensable to enlightened community decision and action."[9]

In its most general connotation, academic freedom is identified by MacIver with the liberty "of the scholar within an institution devoted to scholarship, the 'academy.' In this reference 'academy,' named after the garden in Athens where Plato taught, means any institution of higher learning, where knowledge is pursued and not merely purveyed. Academic freedom is one aspect of the freedom that redeems man alike from superstitution and from brutal servitude, the freedom of the mind, of which Milton said: 'Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.' "[10] Thereby colleges and universities are enabled to extend the frontiers of knowledge, to make available to students the wisdom and knowledge of the past, and to help them to develop their capacities for critical, independent thought. That is the primary task of professors as educators.

3. *Academic freedom of the institution of higher learning: Garcia v. The Faculty Admission Committee, Loyola School of Theology*

It is time therefore that a more specific discussion of academic freedom as a constitutional right be attempted. Late in 1975, *Garcia v. The Faculty Admission Committee, Loyola School of Theology*,[11] was decided. The opinion of the Court set forth the question before it thus: "The specific issue posed by this mandamus proceeding to compel the Faculty Admission Committee of the Loyola School of Theology, represented by Father Antonio B. Lambino, to allow petitioner Epicharis T. Garcia to continue studying therein is whether she is deemed possessed of such a right that has to be respected. That is denied not only on general principle, but also in view of the character of the particular educational institution involved. It is a seminary. It would appear therefore that at most she can lay claim to a privilege, no duty being cast on respondent school. Moreover, as a reinforcement to such an obvious conclusion,

[9] Byse, *Academic Freedom, Tenure, and the Law*, 73 HARV. L. REV. 304 (1959).

[10] MacIver, *op. cit., supra*, note 6 at 3.

[11] G.R. No. L-40779, November 28, 1975, 68 SCRA 277 (1975).

there is the autonomy recognized by the Constitution in this explicit language: 'All institutions of higher learning shall enjoy academic freedom.' The petition must therefore fail."[12] Petitioner Garcia alleged that in the summer of 1975, she was admitted for studies leading to a degree of Master of Arts in Theology, that on May 30, 1975, when she wanted to enroll for the same course for the first semester, 1975-1976, she was informed of the faculty's decision to bar her from readmission in their school; that while she attempted to obtain a reversal of such refusal, her efforts failed, and she was told that it was better for her to seek for admission at the University of Santo Tomas Graduate School; that when she inquired from such institution as to the possibilities for her pursuing a course leading to a degree of Master of Arts in Theology, she was made to understand that while she could enroll therein, she would have to fulfill the requirements for Baccalaureate in Philosophy in order to have her degree later in Theology, thus necessitating four to five years more of studies, unlike in the Loyola School of Studies where she could have such a degree only after about two or more years. The foregoing constituted the basis for the special civil action for mandamus that she filed to allow her enrollment in the current semester. Her petition included the letter of respondent Father Lambino which started on a happy note that she was given the grade of B+ and B in two theology subjects, but ended in a manner far from satisfactory for her, as shown by this portion thereof: "Now you will have to forgive me for going into a matter which is not too pleasant. The faculty had a meeting after the summer session and several members are strongly opposed to having you back with us at Loyola School of Theology. In the spirit of honesty may I report this to you as their reason: They felt that your frequent questions and difficulties were not always pertinent and had the effect of slowing down the progress of the class; they felt you could have tried to give the presentation a chance and exerted more effort to understand the point made before immediately thinking of difficulties and problems. The way things are, I would say that the advisability of your completing a program (with all the course work and thesis writing) with us is very questionable. That you have the requisite intellectual ability is not to be doubted. But it would seem to be in your best interests to work with a faculty that is more compatible with your orientation. I regret to have to make this report, but I am only thinking of your welfare."[13]

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[12] *Ibid.*, p. 279.
[13] *Cf. Ibid.*, pp. 279-281.

Respondent's basic position was that while lay students were allowed to enroll in the Loyola School of Theology to take up courses for credit therein, the admission to a degree program must have the consent of the Assistant Dean of the Ateneo de Manila Graduate School and that petitioner was not accepted by such official to pursue a course of studies leading to a degree. It was then alleged that she was merely allowed to take some courses for credit during the summer of 1975 and that the discretion as to whether she could continue her studies was vested in the faculty admission committee, which could consider not only academic or intellectual standards but also other considerations such as personality traits, character orientation in relation with other students, and the nature of Loyola School of Theology as a seminary. It was its submission then that mandamus did not lie as there was no duty, much less a clear duty, on the part of respondent to allow petitioner to take up further courses in the Loyola School of Theology. It was likewise alleged in the aforesaid comment that as set forth in the letter of May 19, 1975, the decision not to allow petitioner to take up further courses in said seminary "is not arbitrary, as it is based on reasonable grounds,***." Thereafter the Supreme Court considered the comment of respondent as answer and required the parties to file their respective memoranda, after which the petition was deemed submitted for decision.[14]

The issue of academic freedom was thus squarely raised. After noting the constitutional provision recognizing academic freedom as enjoyed by institutions of higher learning, the opinion of the Supreme Court in dismissing the petition proceeded thus: "It is more often identified with the right of a faculty member to pursue his studies in his particular specialty and thereafter to make known or publish the result of his endeavors without fear that retribution would be visited on him in the event that his conclusions are found distasteful or objectionable to the powers that be, whether in the political, economic, or academic establishments. For the sociologist, Robert MacIver, it is '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.' As for the educator and philosopher Sidney Hook, this is his version: 'What is academic freedom? Briefly put, it is the freedom of professionally qualified persons to inquire, discover, publish and teach the truth as they see it in the field of their competence. It

[14] *Cf. Ibid.*, pp. 281-282.

is subject to no control or authority except the control or authority of the rational methods by which truths or conclusions are sought and established in these disciplines.' "[15] Such is the academic freedom enjoyed by a faculty member. "That," as the opinion made clear, "is only one aspect."[16] Then came this portion thereof: "Such a view does not comprehend fully the scope of academic freedom recognized by the Constitution. For it is to be noted that the reference is to the 'institutions of higher learning' as the recipients of this boon. It would follow then that the school or college itself is possessed of such a right. It decides for itself its aims and objectives and how best to attain them. It is free from outside coercion or interference save possibly when the overriding public welfare calls for some restraint. It has a wide sphere of autonomy certainly extending to the choice of students. This constitutional provision is not to be construed in a niggardly manner or in a grudging fashion. That would be to frustrate its purpose, nullify its intent. Former President Vicente G. Sinco of the University of the Philippines, in his Philippine Political Law, is similarly of the view that it 'definitely grants the right of academic freedom to the university as an institution as distinguished from the academic freedom of a university professor.' He cited the following from Dr. Marcel Bouchard, Rector of the University of Dijon, France, President of the conference of rectors and vice-chancellors of European universities: ' "It is a well-established fact, and yet one which sometimes tends to be obscured in discussions of the problems of freedom, 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 teacher," ' Also: 'To clarify further the distinction between the freedom of the university and that of the individual scholar, he says: "The personal aspect of freedom consists in the right of each university teacher—recognized and effectively guaranteed by society—to seek and express the truth as he personally sees it, both in his academic work and in his capacity as a private citizen. Thus the status of the individual university teacher is at least as important, in considering academic freedom, as the status of the institutions to which they belong and through which they disseminate their learning." ' He likewise quoted from the President of the Queen's University in Belfast, Sir Eric Ashby: ' "The internal conditions for academic freedom in a university are that the academic staff should have *de*

[15] *Ibid.*, pp. 283-284.
[16] *Ibid.*, p. 284.

facto control of the following functions: (i) the admission and examination of students; (ii) the curricula for courses of study; (iii) the appointment and tenure of office of academic staff; and (iv) 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 these four functions, for in one constitution or another most of these functions are laid on the shoulders of the lay governing body." ' Justice Frankfurter, with his extensive background in legal education as a former Professor of the Harvard Law School, referred to what he called the business of a university and the four essential freedoms in the following language: 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' Thus is reinforced the conclusion reached by us that mandamus does not lie in this case."[17]

4. *Academic freedom of the faculty member*: *Montemayor v. Araneta University*

The Garcia decision, as is quite clear, dealt with the institutional aspect of academic freedom. *Montemayor v. Araneta University Foundation,*[18] promulgated last May, was concerned with the constitutional right of a faculty member to academic freedom. This is quite obvious from the opening paragraph of the opinion: "The protection to labor mandate is more of a reality with the present Constitution expressly providing for security of tenure. Moreover, for a university professor, aptly referred to as a tiller in the vineyard of the mind, there is the guarantee of academic freedom. Nonetheless, for cause duly shown, there may be a forced termination of his services. It is essential though that prior to his removal, procedural due process be observed. The grievance alleged by petitioner in this case, a university professor, was that there was a failure to comply with such a requisite."[19]

On that issue, the Supreme Court found against petitioner, thus affirming an order of the Office of the President sustaining the

[17] *Ibid.*, pp. 284-285.

[18] G.R. No. L-44251, May 31, 1977, 77 SCRA 321 (1977). As there is a pending motion for reconsideration, only the security of tenure aspect will be discussed.

[19] *Ibid.*, pp. 1-2.

action taken by the Secretary of Labor, which granted clearance to respondent Araneta University to separate him from the service. Nonetheless, invocation of academic freedom as a guarantee of security of tenure, while not sufficing to call for a reversal, was fully considered. Thus: "The stand taken by petitioner as to his being entitled to security of tenure is reinforced by the provision on academic freedom which, as noted, is found in the Constitution. While reference therein is to institutions of higher learning, it was pointed out in *Garcia v. The Faculty Admission Committee* that academic freedom 'is more often identified with the right of a faculty member to pursue his studies in his particular specialty and thereafter to make known or publish the result of his endeavors without fear that retribution would be visited on him in the event that his conclusions are found distasteful or objectionable to the powers that be, whether in the political, economic, or academic establishments. For the sociologist, Robert MacIver, it is "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."' Tenure, according to him, is of the essence of such freedom. For him, without tenure that assures a faculty member 'against dismissal or professional penalization on grounds other than professional incompetence or conduct that in the judgment of his colleagues renders him unfit' for membership in the faculty, the academic right becomes non-existent. Security of tenure, for another scholar, Lovejoy, is 'the chief practical requisite for academic freedom' of a university professor. As with MacIver, he did not rule out removal but only 'for some grave cause,' identified by him as 'proved incompetence or moral delinquency.' "[20] After stressing that petitioner was entitled to procedural due process, the opinion went on to state: "To paraphrase Webster, there must be a hearing before condemnation, with the investigation to proceed in an orderly manner, and judgment to be rendered only after such inquiry. As far back as 1915, the American Association of University Professors adopted the principle 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

[20] *Ibid.*, p. 5. The citation from MacIver came from his work, previously referred to, at pages 242 and 283-284. The quotations from Lovejoy may be found in 1 ENCYCLOPEDIA OF SOCIAL SCIENCES 384, 386 (1929).

have full opportunity to present evidence.' Thus the phrase, academic due process, has gained currency. Joughin referred to it 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."[21]

5. *Academic freedom in the United States*

Academic freedom in the United States, as noted, was spoken of as an "emerging constitutional right." Such characterization finds support from the opinion of the late Chief Justice Warren in *Sweezy v. New Hampshire.*[22] "The ultimate question [there]," according to him, "is whether the investigation deprived Sweezy of due process of law under the Fourteenth Amendment."[23] It was shown that petitioner on March 22, 1954, "had delivered a lecture to a class of 100 students in the humanities course at the University of New Hampshire. This talk was given at the invitation of the faculty teaching that course. Petitioner had addressed the class upon invitations in the two preceding years as well. He declined to answer the following questions: 'What was the subject of your lecture?' 'Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?' 'Did you advocate Marxism at that time?' 'Did you express the opinion, or did you make the statement at that time Socialism was inevitable in America?' 'Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?' "[24] Because of such refusal to answer the questions of the state attorney-general, duly empowered by the state legislature to investigate subversive activities, of New Hampshire, he was taken to court and charged with contempt. He was found guilty by a state superior court. He was unsuccessful in his appeal to the New Hampshire Supreme Court.

The matter was elevated to the United States Supreme Court, which reversed his conviction. In the course of Justice Warren's opinion, there was an explicit mention of "petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[25] Then

[21] *Ibid.*, p. 6. The statement issued by the American Association of University Professors was reproduced in Lovejoy at 386. Joughin's essay may be found in BAADE, (ED.), *op. cit., supra,* note 3 at 143-171.

[22] 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed. 2d 1311 (1957). Chief Justice Warren's opinion was concurred in by Justice Black, Douglas, and Brennan.

[23] *Ibid.*, p. 235.

[24] *Ibid.*, pp. 243-244.

[25] *Ibid.*, p. 250.

came this ringing affirmation of academic freedom in institutions of higher learning: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot fluorish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[26]

Justice Frankfurter in a concurring opinion, with which Justice Harlan was in agreement, was equally eloquent. Thus: "When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence. Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with inter-penetrating aspects of holistic perplexities.

"For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

"These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence

[26] *Ibid.*

of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."[27]

Subsequently in *Barenblatt v. United States*,[28] involving a conviction for contempt of a former college teacher, who refused to answer questions from the Congressional Committee on Non-American Activities as to his membership in and affiliation with the Communist Party, the rather liberal approach to academic freedom was qualified. So it would appear from this portion of the opinion of the Court by Justice Harlan: "Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls."[29]

After referring to the concern shown for academic freedom by some American jurists, Professor Fellman, writing in 1961, could conclude: "It must be added however, that while these statements are eloquent and incisive defenses of academic freedom, they were all made in the past ten years, and a search of the 363 volumes of the United States Supreme Court Reports will not yield much more on this subject, if anything at all. While there has been no dearth of litigation in the state appellate courts on subjects involving teachers and education, a reading of hundreds of cases has yielded very few opinions which pay any attention to the subject of academic freedom, and, much less, show any genuine appreciation of either its meaning or importance."[30] Further, he stated: "So far as academic freedom and tenure in colleges and universities are concerned, American decisional law may be ascribed as formless and almost

[27] *Ibid.*, pp. 261-262.

[28] 360 U.S. 109, 79 S.Ct. 1081, 2 L.Ed. 1115 (1959).

[29] *Ibid.*, p. 112. There was, as would be expected, a vigorous dissent from Justice Black, joined by the then Chief Justice Warren and Justice Douglas, with emphasis on freedom of thought.

[30] Fellman, *Academic Freedom in American Law*, WIS. L. REV. 3, 17 (1961).

rudimentary. While there has been some discussion of the concept of tenure in higher education, very little understanding of its meaning and significance will be found in the reported cases, and if professors enjoy some security of tenure, they have it for nonlegal reasons largely. As for academic freedom, one must look very hard indeed to find a judicial opinion in which the phrase is even used, and genuine appreciation of its great values in the life of the nation is almost nonexistent in the published views of appellate judges."[31]

6. *Collision between institutional academic freedom and the academic freedom of a faculty member*

Nothing can be clearer from a perusal of the Montemayor decision than that an institution of higher learning and a faculty member both entitled to lay claim to academic freedom as a constitutional right may be in collision course. This happens when rightly or wrongly a professor's tenure is endangered by the threatened move of the university or college where he may be teaching to terminate his services. That was what transpired in Montemayor. Respondent Araneta University dismissed him for cause. If a justification be shown, there is no violation of academic freedom. Implicit in such a right is the possession by the educator of competence in his chosen field. His conduct likewise must be such that it conforms to the moral standards prevalent in the community. If moral delinquency be shown, he cannot; this guarantee affords him no protection. If therefore in the judgment of his peers it can be established that there has been a failure on his part to live up to the exacting requirements imposed by membership in the academic community, the appropriate steps can be taken leading to his dismissal, which is the harshest form of disciplinary measure. While such a power is conceded, it is likewise equally incumbent on the institution concerned that he be heard in his defense in a manner which, as was so emphatically stressed in Montemayor, is in accordance with the standard of procedural due process. Only thus may a right recognized in the Constitution be prevented from being nullified by what could at times amount to arbitrary action on the part of a university or college administration, lacking sympathy with, if not possessed of views, contrary to, the teaching of the professor concerned. That is to stifle originality and creativeness. Unorthodoxy becomes suspect. Freedom is rendered illusory. This last observation may have to be qualified in the case of a faculty member in a sectarian institution. It is to be assumed that his service there-

[31] *Ibid.*, pp. 35-36.

in may be ascribed to his belief in and acceptance of the creed espoused. Or, at the very least, even if such be not the case, he would not use the classroom for teaching what runs counter to it. Certainly, the concept of religious freedom is broad enough to cover the case of the termination of the services of an education, when it is shown that he manifests hostility to the tenets of the particular religion for the propagation of which a college or university is established.

7. Academic freedom in the context of the times: its observance under martial law

There is relevance to an inquiry on academic freedom as a constitutional right in the context of the times. It is reassuring that both the Garcia and the Montemayor decisions recognize its force and effectivity during the existence of martial law. The Supreme Court is thus committed to the principle that whether viewed as the freedom of an institution of higher learning or of a faculty member, the present regime is by no means incompatible with respect for and observance of such a constitutional right. That is as it should be. For if knowledge be classified in terms of the humanities and sciences, and the latter classified into physical and social, it cannot be said that the pursuit of learning and its dissemination primarily to students could be objectionable on the ground of its inconsistency with or repugnance to the objectives of martial law. I go further. The advances made in the realm of intellect can go far in assisting officialdom in the massive effort now undertaken for development on all fronts.

On a more specific level, I would assume that a scholar whose field is the humanities will not be affected at all by the present situation. Immersion in the great works in art, music, or literature is not likely to be productive of consequences adverse to the maintenance of order. On the whole, that may be said likewise of a professor in any of the physical sciences. He can continue to engage in research. Thereafter, the result of his labors may be published. Or he can talk about them in the classroom. Scientific discoveries, it has been aptly remarked, are neutral in character. This is not to ignore the fact that the use to which they may be put could at times be fraught with pernicious consequences. Thus a physicist or a chemist should not make use of his knowledge for the purpose of making molotov bombs. The social scientists as well could be trusted if true to his calling as a scholar. It could be, however, that a faculty member in the political science department may be under a sense of constraint. That is to be realistic. There can pos-

sibly be no legal objection to his making known his views, even if not impressed with orthodoxy. If he would merely predict or even advocate the adoption of any political system inconsistent with the present form of government, he cannot be taken to task. It is an entirely different matter if he can properly be charged with inciting to sedition or rebellion. It is not always easy of course to be precise about the line that separates discourse amounting to incitement to that constituting mere advocacy. Since I have always maintained that dissent is not disloyalty, I would construe this constitutional right most liberally. Unless there be clear evidence that the party involved is resolved to aid the cause of the dissidents and that his teaching is a mere camouflage for his rebellious activities, he can claim the protection of academic freedom.

8. *The clear and present danger principle as a limitation on the constitutional right to academic freedom*

It is quite obvious therefore that academic freedom as a constitutional right of an educator does not possess an absolute character. Far from it. In the first place, it is not the prerogative of any human being as such. That is true of fundamental human rights enshrined in the Constitution. From the moment of birth, one is entitled to them. That is not the case with academic freedom. It has to be earned. One who lays claim by virtue of his teaching in an institution of higher learning is called upon to spend time and effort in his commitment and dedication to scholarship in his chosen field. It is his membership in a faculty of a college or university that enables him to assert such a right. Even then its exercise is entitled to protection only on a showing that what he says or what he writes is on a subject where his competence in the judgment of his peers is conceded. It does not mean that he could not give vent to his opinions on any matter of public interest. When he does so, however, his reliance is on the constitutional right to freedom of expression that every one enjoys. It has been remarked though, and with reason, that such an utterance would ordinarily be identified with the reasoned conclusion of an academician and therefore worthy of serious consideration. An educator is thus called upon to exercise moderation and restraint in his pronouncements as befits a member of his calling.

Even when in the course of his research or his teaching, a faculty member discourses, whether by the spoken word or in print, on a subject that falls properly within his competence, his immunity from any subsequent liability is not always guaranteed. To maintain the high estate of academic freedom unimpaired, though

consistent with state security, the standard of limitation, for me, is supplied by the clear and present danger doctrine. It received its original formulations from Holmes. Thus: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[32] Justice Laurel, then a delegate to the Constitutional Convention of 1934, in his sponsorship speech of his draft on the Bill of Rights, quoted in full the above excerpt from Holmes and in addition likewise referred to an even more categorical pronouncement of such a view in that jurist's famous dissent in the Abrams[33] case: "While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[34] It would thus appear undeniable that such a principle received the approval of the framers of our 1935 Constitution and of our people, who voted overwhelmingly for its adoption. With the present Constitution adopting in its entirety the former provision, it would appear clear that such a concept remains the test for determining when the bounds of academic freedom has been transcended.[35]

This test then as a limitation on freedom of the mind is justified by the danger or evil of a substantive character that the state has a right to prevent. Such danger must not only be clear but also present. There should be no doubt that what is feared may be traced

[32] Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919). This is not to say that the clear and present danger test has always elicited unqualified approval. Prof. Freund entertains what for him are well-founded doubts. Thus: "Even where it is appropriate, the clear-and-present-danger test is an over-simplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle." The Supreme Court of the United States, 44 (1961).

[33] Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919).

[34] The source of the above summary is found in 3 PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION, LAUREL, (ED.), 671 (1966).

[35] *Cf.* Article IV, sec. 9 of the present Constitution: "No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances."

to the utterance complained of. The causal connection must be evident. Also, there must be reasonable apprehension about its imminence. The time element cannot be ignored. Nor does it suffice if such danger be only probable. There is the requirement of its being well-nigh inevitable. Otherwise, the opportunity for all discussion should be availed of. It must be utilized to expose the falsehood of the expression that gave offense. As Brandeis would put it, "the remedy to be applied is more speech, not enforced silence."[36] Such a doctrine has found acceptance in at least seven Supreme Court decisions, dealing with freedom of expression, namely, *Primicias v. Fugoso*,[37] *American Bible Society v. City of Manila*,[38] *Cabansag v. Fernandez*,[39] *Vera v. Arca*,[40] *Navarro v. Villegas*,[41] *Imbong v. Ferrer*,[42] and *Badoy v. Commission on Elections*.[43] In another case, *Gonzales v. Commission on Elections*,[44] with four Justices concurring in the result as for them the suit was moot and should have been dismissed, two of the four opinions written stressed its applicability.[45] To repeat, as it was under the 1935 Constitution, so it is under the Revised Charter.

It is my submission then that only on a showing that what a professor says or writes creates a clear and present danger of a substantive evil is there a justification for denying his claim to academic freedom as a constitutional right. For it cannot be sufficiently stressed that the freedom of a scholar is rightfully considered as an intellectual liberty of the highest order.

9. *By way of a resumé*

It is my further submission that in thus concluding that academic freedom should be accorded the widest latitude, there is adherence to the well-known libertarian views of the man in whose honor this lecture is held. Both as a member of the Supreme Court

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[36] Brandeis, J., concurring in Whitney v. California, 274 U.S. 357, 371, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).

[37] 80 Phil. 71 (1948).

[38] 101 Phil. 386 (1957).

[39] 102 Phil. 152 (1957).

[40] G.R. No. L-25721, May 26, 1969, 28 SCRA 351 (1969). The opinion came from the lecturer.

[41] G.R. No. L-31687, February 26, 1970, 31 SCRA 731 (1970). Both the Court majority and Justices Castro and the author, who dissented, relied on the clear and present danger principle.

[42] G.R. No. L-32432, September 11, 1970, 35 SCRA 28 (1970).

[43] G.R. No. L-32546, October 17, 1970, 35 SCRA 285 (1970).

[44] G.R. No. L-27833, April 18, 1969, 27 SCRA 835 (1969).

[45] The lecturer, who wrote the opinion, expressed the view for the Court and Justice Sanchez, who concurred and dissented, relied on such a principle. Justice Castro, also concurring and dissenting, was partial to the "balancing of interests" doctrine. Justice Barredo, who did concur and dissent, was for a more latitudinarian approach, being well-nigh absolutist.

and as an educator, Justice George A. Malcolm was ever the valiant defender of the claims of the intellect to be free and as unfettered as possible. The pages of the Philippine Reports are studded with his opinions wherein he eloquently expressed his deep-seated conviction as to man's dignity requiring that his thoughts be not stifled, that his opinions be not repressed. Likewise, as an educator, he was in the forefront of those who felt that the only way the Philippines could truly achieve progress is for professors to be given full and unimpaired opportunity to research and to make known the products of their studies, whether in the classroom or in books, monographs and articles. More specifically, in the social sciences, he had never been niggardly in his appreciation of their labors, especially law professors, to push forward the frontiers of knowledge. He was steadfast in his belief that they be accorded the fullest opportunity to give utterance to their views and their convictions, formed after deep thought and reflection. I am fortified in my belief therefore that in this modest attempt at delineating, although in a rather broad and general way, the scope of academic freedom as a constitutional right, I have not been recreant to the trust incumbent on the holder of the Malcolm Chair of Constitutional Law.