Award in Maltese Education Law and Data Privacy Implications in the Education Sector

Lecture Title: The Academic Freedom and other Freedoms, Liabilities and Standard of Care

21 ACADEMY

Diploma in Law (Malta)

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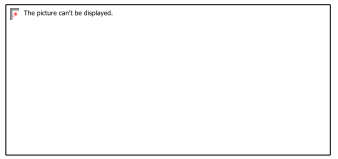

The Academic and other Freedoms of teachers

a) Academic Freedom
b) Freedom of Expression
c) Freedom from Discrimination
d) Freedom as regards Privacy Rights
e) Freedom of Association and
f) Personal Appearance.

Academic Freedom

General definition - the right of a teacher or of a student, especially at a higher level of education, to discuss or investigate any topic, or to express their opinions on any topic, without any interference or fear of penalty or other reprisal from either the school or the government. It may also be extended to include a particular institution's freedom to control its own policies without government interference, penalty, or reprisal.

U.S. Supreme Court (Shelton vs. Tucker): “Any inhibition of freedom of thought, and of action upon thought in the case of teachers brings the safeguards of those amendments [First and Fourteenth] vividly into operation.”

(Sweezy vs. New Hampshire) teachers need always to be “free to inquire, to study and to evaluate, to gain new maturity and understanding.”

- AF in western countries may be important for not being fired etc, in other areas this may mean death, imprisonment, etc

(Lysenko case – Farming)
(North African doctor case – SUDAN Dr. Farouk Ibrahim el Nur).

1940 Statement on Academic Freedom and Tenure, teachers “should be careful to avoid controversial matter that is unrelated to the subject. When they speak or write in public, they are free to express their opinions without fear from institutional censorship or discipline, but they should show restraint and clearly indicate that they are not speaking for their institution”.

Universities in Medieval Europe laid the foundation for academic freedom. They were established as self-governing organizations, protected by royal charters and papal bulls, free to establish their own standards for admission and graduation.

The University of Berlin, founded in 1811, became the beacon of academic freedom with the concepts of **Lehrfreiheit** (the freedom to teach) and **Lernfreiheit** (the freedom to learn). These ideas became the model of the freedoms expected in universities throughout the free world.

In medieval universities, academics had a calling. They had the God-given task of pursuing and teaching the Truth. In the new university there is no longer a basis for the notion of a calling. Teaching is a profession. And as a profession it is to be treated as any other profession. Unionization, tenure, collective bargaining all begin to make sense. Professors are no longer servants of God and Truth; they are servants of mankind. …

The Charter of fundamental rights of the European Union holds in Article 11(1) that:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

More specifically, Article 13 then holds that:

“The arts and scientific research shall be free of constraint. Academic freedom shall be respected.”

Council of Europe - Parliamentary Assembly

Threats to academic freedom and autonomy of higher education institutions in Europe

Resolution 2352 (2020)

1. Academic freedom and institutional autonomy of higher education institutions are not only crucial for the quality of education and research; they are essential components of democratic societies. Yet these values are facing multiple threats today, ranging from the criminalisation of researchers, scholars and students to the commodification of higher education and commercialisation of knowledge, which are increasingly damaging the quality of education and research and distancing higher education from wider civic, democratic and societal purposes.

4. The Assembly regrets that to this day, ….. , declarative statements have not yet translated into an internationally agreed definition or conceptual reference of academic freedom. This explains in part the low awareness among the academic community of their rights and helps to turn a blind eye to institutions and countries that fail … their duties.

6. The Assembly expresses concern over the increasing external funding and commodification of higher education, which undermine the idea of higher education as a public good and a public responsibility. The commercial and political interests of external funders may subvert the focus of research towards … and set limits to the freedom to publish the research results.

RECOMMENDATIONS OF THE ASSEMBLY

In light of the above, the Assembly calls upon the governments of member and observer States:

9.1 to ensure that the protection of academic freedom and institutional autonomy is enshrined in national legislation and that the relevant legal provisions are put into practice; to refrain from undertaking any undue action that could endanger or impinge on academic freedom and institutional autonomy and establish the frameworks that make their practice possible;

9.3 to provide adequate public funding for higher education and research, in line with established national priorities, thus enabling institutions to maintain their independence as far as possible; to enhance transparency within the regulatory mechanisms for higher education funding and make clear provisions to prevent any possible threat to academic freedom and autonomy through financing schemes, whether the sources are public or private.

Malta

- 6 APR 2022

LETTER

1 April 2022

Re: Case No CEDUC-22-2586 – Final Opinion

Justice Emeritus De Gaetano,

Reference is made to your letter regarding the above-mentioned subject matter, dated 4th March 2022, in which you enclosed your final opinion regarding a complaint lodged by [redacted] (the **"Complainant"**), following an investigation by your Office.

While thanking you for the conclusion of the said investigation, the University of Malta (**"UM"**) would hereby like to formally put forward its position regarding your proposed recommendation to reconstitute the Board of Examiners which examined the Complainant's dissertation.

In your final opinion, you state as follows:

> *6. In the Commissioner's considered opinion, the complainant's dissertation was doomed from the very moment that the Board of Examiners was approved by Senate on a recommendation of the Institute. [...]*
>
> *7. In sum, the composition of the examining board in this case was, for the reasons given above, wrong in principle and resulted – predictably, one may add – in a very low mark [...].*

With regards to the above observations, and with due respect to your considered opinion, the composition of the Board of Examiners, once effected according to law, cannot be subject to review by the office of the Commissioner of Education, being that the backbone of the University of Malta is its academic autonomy, as enshrined in the Education Act (Chapter 327, laws of Malta). The same law is clear as to the academic supremacy of Senate. In academic matters, the law grants Senate a wide role not only within the University of Malta, but also with respect to contribution to Maltese society (see article 79(g) of the Education Act). Senate's pivotal academic role is such that the University of Malta is a self-accrediting institution at the highest levels of the Malta Qualifications Framework.

INDIVIDUAL VS INSTITUTIONAL ACADEMIC FREEDOM

Definitions developed in response to actual historical circumstances.

The AAUP 1915 statement defined academic freedom on the lines of protecting professors from university trustees. In post war America (characterized by the 1940s - 1950s dangers of communism to American society and institutions) the Supreme Court identified academic freedom as a first amendment right protecting the University as a whole from state interference.

The academic freedom of faculty members consists of four interrelated elements:

Teaching:	freedom to discuss all relevant matters in the classroom;
Research:	freedom to explore all avenues of scholarship, research, and creative expression and to publish the results of such work;
Intramural speech:	freedom from institutional censorship or discipline when addressing matters of institutional policy or action; and
Extramural speech:	freedom from institutional censorship or discipline when speaking or writing as citizens.

Higher education relies on “four essential freedoms” of institutions –

Established in **Sweezy v. New Hampshire** 354 U.S. 234 (1957):

". . . *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*."

6 ELEMENTS:

1) self-determination;
2) on academic grounds;
3) who may teach;
4) what may be taught;
5) how it shall be taught; and
6) who may be admitted to study.

Individual Academic Freedom:-

William Van Alstyne:
"the personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of that freedom".

This means that expressions on matters **unrelated** to their professional concerns, though possibly covered by...free speech [jurisprudence], is not protected by academic freedom.

Institutional Academic Freedom:-

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" as regards academic decisions that require "the exclusion of governmental intervention in the intellectual life of a university."

Again, institutional academic freedom is triggered **only** by institutional decisions that implicate their educational functions, which may be absorbed under the four essential freedoms

LIMITS ON Academic Freedom:-

INDIVIDUAL – MUST BE DIRECTLY LINKED TO THE 4 FREEDOMS – e.g. the false shouting of fire in a crowded theatre by a professor of psychology may lead to legal consequences for ensuing panic (even if intended to observe crowd reaction first-hand to great and sudden stress.

INSTITUTIONAL – Just as academic freedom for individual professors is not unbounded, so too does institutional academic freedom have its limits. It is triggered **only** by those institutional decisions that implicate their educational functions.

Elizabeth Mertz:- Universities have an interest in defending the rights of individual academics, for it is only in their role as defenders of those rights that universities can claim any special constitutional status.

These conceptions of individual and institutional academic freedom can be mutually reinforcing in the search for knowledge and truth, but can also come into conflict when forces within the institutions themselves threaten the free expression rights of faculty members or students.

Keyishian v. Board of Regents, 385 U.S. 589 (1967) "Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."

Regents of the University of California v. Bakke - university's admissions criteria which used race as a definite and exclusive basis for an admission decision violated the Equal Protection Clause and the Civil Rights Act of 1964. A medical school implemented a quota system where white applicants could only compete for 84% of posts (remaining 16% reserved for minorities). Bakke argued that the clear-cut racial quota system was unconstitutional. School argued that

a) quota served remedying the traditional underrepresentation of minorities in the medical profession; and
b) that the diversity in the classroom enhances the free exchange of ideas.

Keyishian v. Board of Regents of the University of the State of New York

Court - state laws requiring educators to sign loyalty oaths and to refrain from "treasonable or seditious speech or acts" were unconstitutional. "... *a law which applies to membership [only] without the specific intent to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of guilt by association which has no place here*".

What are the main threats to academic freedom?

- **Pressure from donors or board members**.
  (e.g. donors push administrators not to appoint a high profile faculty member whose views or public utterances they dislike).

- **Pressure from the community**
  (esp. if content of teaching or research is controversial - parents have objected to the use of nudes in an art history class).

- **Strings attached to donations or research funding**.
  (eg donor agreements that fund academic programs / allow the company to review research findings before publication).

- **Legislative interference**.
  Legislators restrict what can be taught.

- **Targeted harassment**.
  (esp. online harassment)

- **Lack of procedural protections**.
  Faculty members vulnerable to being quietly non-reappointed, with no reasons given.

Freedom of Expression

A leading case in jurisprudence regarding protected forms of expression is Pickering v. Board of Education. This case involved a teacher whose job was terminated when he wrote to a local newspaper an editorial critical of the teacher's employer. The US Supreme Court held that the school had unconstitutionally restricted the First Amendment rights of the teacher to speak on issues of public importance. Based on Pickering and similar cases, teachers generally enjoy rights to freedom of expression, though there are some restrictions. Teachers may not materially disrupt the educational interest of the school, nor may teachers undermine authority or adversely affect working relationships at the school.

Constitution

41. (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference … and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub-article (1) of this article to the extent that the law in question makes provision …

(b) that imposes restrictions upon public officers, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Public Administration Act - First Schedule – Article 21(2) "Political participation and public comment by public employees …. may be subject to limitations in line with rules and regulations aimed at maintaining public confidence in the impartiality of the public administration"

CONTRIBUTIONS TO THE MEDIA AND PUBLIC COMMENTS BY PUBLIC OFFICERS

Definition of "public comment"

5.1. "Public comment" means public comment on matters relating to public policy and political issues. It includes … comments on radio, TV, and the electronic media (inclusive of internet forums and social networking websites), and expressing views … will spread to the community at large.

Public comment in a personal capacity

5.2. Public officers in scales 6 and lower are allowed to engage in public comment in a personal capacity. Moreover they are allowed to do so only as long as they ensure that their comments are being put forward solely as a matter of personal opinion…(up to the officers concerned to ensure … comments are not …. interpreted as being an official comment... But public officers are to refrain from commenting on matters that pertain to their ministry and in particular their area of work, even if in a personal capacity.

5.3. While public officers, as members of the community, have the right in a personal capacity to make public comment and to enter into public debate on political, administrative and social issues, there are some circumstances in which public comment is inappropriate. These include:

(a) the possibility comment is linked or interpreted to be official comment; and
(b) where public comment, is …. sufficiently strong or persistent; and
(c) where the public officer is in scale 5 and above.

5.5. A public officer, whether on duty or on leave of absence, is not to comment publicly or allow himself/herself to be interviewed on matters concerning Government policy and programmes without prior authority to do so. Requests for such authority are to be submitted to the Permanent Secretary of the relative ministry.

CIRCULAR DG DES 2812024

This policy outlines the guidelines and procedures for educators (all grades) regarding their pa1ticipation and appearances in media. Educators wishing to participate in media appearances must seek prior approval from their line manager. The request for approval must be submitted in writing, specifying the nature of the media appearance, topics discussed, and the media house involved.

13. This in effect casts a blanket prohibition on all teachers and educators, whatever their scale in the public service, from commenting on anything that has to do with teaching and education, including the education of the children entrusted to their care. This blanket restriction is clearly in violation of teachers' and educators' right to freedom of expression since such a limitation cannot, by any stretch of the imagination, be considered to be reasonably necessary – in other words, required by a pressing social need – in a modern democratic society.

Freedom of Association

42. (1) Except with his own consent or by way of parental discipline no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade or other unions or associations for the protection of his interest.

Similar to rights to freedom of expression, teachers enjoy rights to freedom of association, based on the Constitution's provision that grants citizens the right to peaceful assembly. These rights generally permit teachers to join professional, trade, or similar unions / organizations; run for public office; and similar forms of association. However, teachers may be required to ensure that participation in these activities is completely independent from their responsibilities to the school.

OLD EDUCATION ACT (part still in force)

Art 34.(1) An association of teachers is an association of teachers established with the primary aim of promoting the principles, values and standards related to the practice of the teaching profession.

Privacy Rights

Teachers enjoy limited rights to personal privacy, though foreign courts have often supported disciplinary action taken by a school when a teacher's private life affects the integrity of the school or the effectiveness by which a teacher can teach. Thus, for example, there have been cases where a teacher had post terminated for such acts as adultery or other sexual misconduct, and courts will be hesitant to overrule the decisions of the school board.

Teaching and Allied Professions Act – CAP 606 Article 11(2)
"A person shall not qualify for a teachers' warrant unless such person: (b) is of good conduct and ……. (d) is not enlisted in the Register established under the Protection of Minors (Registration) Act".

The Protection of Minors (Registration) Act provides for the registration of sexual offenders and other offenders who commit offences of serious violence.

Personal Appearance

All teachers shall maintain dress, grooming and personal appearance consistent with their area of teaching.

The Public Service Management Code

6.1.1 Office Attire

"Employees are representing their organisation, therefore, maintaining professional attire is key to the organisation's corporate image. The following table lists types of acceptable and unacceptable office wear. These lists are not exhaustive and should therefore not be considered as such. Rather, these should be considered as guidelines for proper attire. Directors/ Heads of Department/Organisation, through the respective Permanent Secretary, may also issue instructions with regard to particular forms of dress as may be required according to the needs of the particular offices within their ministry.

Unacceptable attire also includes transparent clothing, visible underwear/piercings and all forms of beachwear/sportswear, heavy make-up and jewellery, and conspicuous hair colour. Tattoos will need to be adequately covered and not visible. Policies regulating tattoos, which have been approved by the Office of the Principal Permanent Secretary, through the People & Standards Division, shall however, apply."

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