

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

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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.”

- Individual Academic Freedom vs. Institutional Academic Freedom
- AF in western countries may be important for not being fired etc, in other areas this may mean death, imprisonment, etc (Lysenko case and North African doctor case.

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.



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.



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.



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.”



Teachers' Liabilities and the Standard of Care

Introvigne v Commonwealth of Australia (1980) 21 ALR 251

A formulation of the duty of care:

'The duty of care owed by the teacher required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to the pupils. This duty not being one to ensure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury, which ex-hypothesi the teacher should reasonably have foreseen.'

It is clear from the judgment that a teacher has a duty to take positive steps to maintain the safety of a pupil against risks he or she should reasonably have foreseen. The duty is not, however, so high as to require the teacher to ensure that injury does not occur. A teacher will only be negligent if he or she does not take reasonable care.



15 ta' Frar, 1958

Imhalef:—

Onor. W. Harding, K.M., B.Litt., LL.D.

Il-Pulzija

versus

John Vella

**Offiza fuq il-Persuna — Negligenza — Kolpa — Piena
— Surmast tal-Iskola.**

Tkun xi tkun id-definizzjon tal-kolpa, jibqa' dejjem illi l-elementi tagħha huma l-volontarjetà tal-att, in-nuqqas ta' previżjoni tal-effetti dannużi ta' dak l-att, u l-possibbiltà ta' previżjoni ta' dawk l-effetti dannużi.

Jekk l-effetti dannużi ma jkunux prevedibbli, jew almenu ma setghux ikunu prevedibbli hliet d'diligenza straordinarja, li l-liġi ma teżigix, u li se maj tista' tgħid kolpa ljeviss ma, li ma hix inkriminabbli, ma hemmx htija.

Il-kolpa tista' tikkonsist anki f'imprudenza; d'mod illi min jikkommetti att imprudenti avvolja huwa ma riedx jaġhmel haġ'ohra hliet dak l-att, u ma pprevedix li dak l-att seta' jkollu konsegwenzi koroh, huwa jibqa' fi htija għax seta' jipprevedi dawk il-konsegwenzi.

S'intendi, fil-kolpa hemm dejjem gradazzjonijiet miżurabbli għas-sekonda taċ-ċirkustanzi partikulari ta' kull każ, li jinfluwixxu fuq l-appl kazzjoni tal-piena.

Fil-każ preżenti, surmast tal-iskola primarja tal-Gvern, bhala ċajta, poġġa lapis fit-tarf tal-bank ta' x'uhud milli-iskulari u taħ daqqa ta' riga bier il-lap s ilir; il-lapis tar. gie f'għajn wiehed milli-iskulari, u kkaġunalu offiza ta' xorta gravi; u s-surmast gie ritenut kriminalment responsabbli ta' dik il-ferita m'nhabba li kien f'kolpa. U dan d'applikazzjoni tal-prinċipji hawn fuq infisra.

RESPONSABILITÀ DEGLI INSEGNANTI

Ma, come si diceva, l'atto di bullismo a scuola non è rilevante solo per il suo autore e la sua vittima, ma si traduce in forme di responsabilità, scaturenti dall'omissione dell'obbligo di vigilanza, anche per i docenti, per gli ausiliari e, a diverso titolo (omissione degli obblighi organizzativi), per i dirigenti scolastici e, in particolare, come responsabilità civile extracontrattuale verso i terzi (cioè verso gli alunni e le loro famiglie).

La sanzione o l'obbligo nasce solo in presenza dell'elemento subiettivo della colpevolezza, nelle due forme del dolo e della colpa: ossia come conseguenza di un atto "contra ius" volontario e cosciente, ovvero per negligenza, imprudenza o imperizia.



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