IS CMO 46 LEGALLY INFIRM?

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I. The Legal Framework

American jurists knew that for academe to thrive and for universities as centers of bold thinking and uncensored research to thrive, they had to be free, and professors had to be free. Their problem was fitting it into a rather parsimonious US Constitution. What they did was anchor the claim to academic freedom on the First Amendment guarantee of free speech.[1]

It was in the dissenting opinion of Justice William Douglas in *Adler v. Board of Education of the City of New York*[2] that required teachers in the public schools to choose between being members of the community party and their public school employment, and to suffer the consequence of severance from the service when the choice was wrong. Douglas argued persuasively that absent academic freedom, a school could not be the 'cradle of democracy' that it was meant to be. The search for truth, Douglas maintained, was not compatible with institutionalized thought. Academic freedom, was for him, the necessary precondition for the achievement of the goals of critical democratic education – enabling members of society to participate in the robust debate that is at the heart of every democracy.

There are two crucial provisions of the Constitution of the Republic of the Philippines that must be read together, as we review CMO 46. Art. XIV, Sec 4 lays down the parameters of State intervention in education: "reasonable supervision and regulation". The Constitution is significant not only in what it provides, but also in what it omits. By omitting, for example, from integration into our Bill of Rights the Second Amendment to the US Constitution, we reject outright any claim of a constitutional right on the part of citizens to bear firearms, thank God. In respect to education, the State is limited to "reasonable supervision and regulation". It does not and cannot control. Put otherwise, if CMO 46 in any way controls education whether private or public, it would constitute a usurpation of a power not granted by the Constitution.

Book IV, Chapter 7, Sec 38 of the Administrative Code of 1987 defines 'control':

Supervision and Control.—Supervision and control shall include authority to act directly whenever a specific function is entrusted by law or regulation to a subordinate; direct the performance of duty; restrain the commission of acts; review, approve, reverse or modify acts and decisions of subordinate officials or units; determine priorities in the execution of plans and programs; and prescribe standards,

[1] Rebecca Gose Lynch, "Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm", *California Law Review* 91:4 (2003), 1061 et seq.
[2] 342 U.S. 485 (1952)

guidelines, plans and programs. Unless a different meaning is explicitly provided in the specific law governing the relationship of particular agencies, the word "control" shall encompass supervision and control as defined in this paragraph.

Advertence to this definition is necessary so that it may be clear what the CHED does not and cannot exercise in respect to higher educational institutions.

In contrast to the US Constitution, the Philippine Constitution textually provides for academic freedom 'in all institutions of higher learning' – leaving undefined the concept itself. In accordance with the accepted canons of statutory construction, the term is then to be construed as it is understood in academe and in American jurisprudence to which our Constitutional provision traces its provenance. I then submit that the common distinction usually made between the "professional concept of academic freedom" and its "juridical definition" does not hold, in the Philippines. Just as the law accommodates business practice as normative, it must also understand the concept of 'academic freedom' as academics understand it.

In this respect, I will take up two land-mark decisions in respect to academic freedom, in relation to the examination of CMO 46.

Garcia v. Loyola School of Theology[3] taught:

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 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."

3. That is only one aspect though. 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."

We will underscore the following points:

a. The institution decides for itself its aims and objectives and how best to attain them;

[3] G.R. 40779 (November 28, 1975)

b. The only acceptable basis for State intervention is 'overriding public welfare'. When State intervention, therefore, as in the form of a CMO, fails the test of 'overriding public welfare' such intervention is, in the very least, constitutionally suspect.
c. Academic freedom is to be amply construed.

The second case involved the issue of so-called 'ghost students' who got grades although their classmates never saw them in class. This was the case of *Camacho v. Coresis*[4] Was it permissible for a graduate school dean to exempt a student from regular class attendance and to provide for some alternative method of deliver of instruction? Mr. Justice Leonardo Quisumbing, writing for the Court, asserted:

> Academic freedom also accords a faculty member the right to pursue his studies in his particular specialty. It is defined 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 penalty because these conclusions are unacceptable to some constituted authority within or beyond the institution. As applied to the case at bar, academic freedom clothes Dr. Daleon with the widest latitude to innovate and experiment on the method of teaching which is most fitting to his students (graduate students at that), subject only to the rules and policies of the university. Considering that the Board of Regents, whose task is to lay down school rules and policies of the University of Southeastern Philippines, has validated his teaching style, we see no reason for petitioner to complain before us simply because he holds a contrary opinion on the matter.

In the matter of the delivery of instruction, the school freely determines its policies, and within the parameters institutionally determined, the professor is free to adopt the delivery method he or she deems most conducive to instruction.

CHED has invoked its supposed powers under R.A. 7722 as the legal bases for CMO 46, hence a closer examination of the statute is called for.

Sec 2 that declares state policy announces the priority given to academic freedom, seeing in it the key to the attainment of the goals of higher education. It is this section of a statute that guides the construal of subsequent provisions.

So it seems that CHED reads too much into Sec 8, paragraphs 'd' and 'e' that empower the CHED to set minimum standards for programs and institutions, as well as to monitor and evaluate. To these powers should always be added the proviso, by virtue of the Constitution and of existing jurisprudence: PROVIDED THAT academic freedom is not transgressed.

Quite interestingly, CMO 46 and the Briefer released 'to allay our fears' is silent about Sec 13 that constitutes the 'rule of construction' of the statute: No provision of the law shall be read as a derogation of the academic freedom that is due all higher education institutions.

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[4] G.R. 134372 (August 22, 2002)

There is yet another provision of the Constitution that CMO 46 seems oblivious to: Art XIV, Section 5 requires the State to "take into account regional and sectoral needs and conditions" as well as to "encourage local planning in the development of educational policies and programs." I do not see anything in CMO 46 that complies with this directive. "Shall" in law signals what is mandatory. While protesting that it rejects a 'one-size-fits-all' approach, the CHED is in effect imposing one size – its version of Quality Assessment – on all, regional and sectoral differences and needs notwithstanding!

II. So, what is wrong with CMO 46?

First, the Briefer confirms rather than allays our fears. In informing us that the CHED's goal is to bring higher education to levels comparable with recognized centers of learning in the region and in the world, to make Philippine higher education globally competitive and to see to it that our graduates are employable, CHED is in effect admitting that this intrusive CMO is creditor-driven – a demand of those who lend our government money and those who employ our graduates.

There are three ways that State action may impinge on academic freedom: first, legislative or regulatory restrictions; second, the judicial enforcement of constitutional barriers to such impairments; third, through judicial protection of the right to freedom against limitation by academic authorities themselves.[5]

CMO 46 is obviously restrictive: It restricts the form in which academic communities may organize themselves, apart from setting minimum standards. And even if CMO 46 purports to set minimum standards, the exercise of its regulatory authority must not cross the frontier of the constitutional guarantee of academic freedom.

The following are the infirmities I find:

1. Art I, Sec 2 sets out the 'multiple missions' of Philippine higher education. What the section actually does is pre-empt educational institutions in the matter of determining their goal and their mission. It pre-determines the mission of HEIs. What, for example, does "To produce thoughtful graduates imbued with values reflective of a humanist orientation" mean? What is a 'humanist orientation' and who determines it?

2. Art II, Sec 6 defines quality – as CHED sees it. The fallacy emerges: the CHED makes of itself the arbiter of quality, the adjudicator of academics about what academics should be doing. The section clearly oversteps the boundary of CHED's regulatory authority – because in

[5] Ralph Fuchs, "Academic Freedom – Its Basic Philosophy, Function and History" in *Law and Contemporary Problems,* 440

respect to 'excellence', its role is not to prescribe standards of excellence but to 'identify, support and develop potential centers of excellence'.[6]

Particularly presumptuous is Sec 7 of the CMO's Article II: "Quality assurance for CHED does not mean merely specifying the standards of specifications against which to measure or control quality. Rather, QA is about ensuring that there are mechanisms, procedures and processes in place to ensure that the desired quality, however defined and measured, is delivered." Does CHED propose to "control quality" and to institute "mechanisms, procedures and processes" to enforce its concept of quality? Where did it get the authority to do this?

3. It is Article V of CMO 46 that is unabashedly intrusive. Aside from directing that academic communities be organized either as professional institutions, colleges or universities, it also lays down the following prescriptions:

a. That faculty members meet CHED requirements as to relevant degrees. But is it not at the very heart of academic freedom that an institution be left to itself to decide who should teach, and to let the public judge whether or not it has accepted charlatans in its employ?

b. That the degree programs and their core curricula meet the aims set forth in Sec. 23.2. Once more, why should CHED pre-empt educational institutions in determining what the goals of an institution's programs should be?

4. Art VI of CMO 46 virtually converts CHED into an accrediting agency – in fact it bureaucratizes what should be voluntary accreditation, in transgression of Sec 13 of R.A. 7722 that limits CHED's role, insofar as accreditation is concerned, to providing 'incentives to institutions of higher learning, public and private, whose programs are accredited or whose needs are for accreditation purposes' – clearly signaling that accreditation and the determination of quality surpassing minimum requirements is not a CHED function at all.

5. Art. VII, the Transitory Provisions, are far from transitory. They are more akin to the 'penal provisions' of penal statutes. It sets deadlines for compliance with the QA standards laid down. Particularly interesting – and disturbing – is Sec 31. It allows universities recognized before the establishment of CHED or granted such status by CHED 'will retain this status unless they choose to be classified differently along the horizontal typology', making clear and leaving no doubt that their status is subject to review for compliance with the requirements of CMO 46. It is then very well possible that a university that is subsequently found deficient according to the standards of CMO 46 is 're-classified'. This clearly violates the established legal doctrine of 'vested rights'.

[6] R.A. 7722, Sec 8 "f".

In *Zari v. Santos*[7] the Supreme Court explained the doctrine of 'vested rights' in the following wise:

In *Benguet Consolidated Mining Co. vs. Pineda*, this Court explained that a vested right is "some right or interest in the property who has become *fixed* and *established*, and is no longer open to doubt or controversy"; it is an "immediate *fixed right of present and future enjoyment*"; it is to be contradistinguished from a right that is "expectant or contingent." The *Benguet* case continued on to quote from 16 C.J.S. 214-215, as follows:

> Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete and unconditional, independent of a contingency, and a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right. So, inchoate rights which have not been acted on are not vested.

Once a community of academics has been organized and has been conferred the status of a college or a university, the right to such a classification is fixed and established, beyond doubt and controversy, and it violates the doctrine to impose new standards by which to negative the vesting of the right.

6. The vague provisions of the CMO – such as the requirement that "learning resources support structures that are appropriate for developing professional knowledge and skills" (Sec 23.1), or requirement that the core curriculum of a college "holistically develop[s] thinking, problem-solving, decision-making, etc" or that a university engage in "viable research programs" leave too much to the discretion of the various regional offices of CHED leading to an unequal application of the laws. The reason is not difficult to find: CHED has intruded into matters that are best left to the determination of academic communities themselves. In *Philippine Judges Association v. Prado*[8] we were taught the minimum requirement of 'equal protection of the laws':

According to a long line of decisions, equal protection simply requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed, Similar subjects, in other words, should not be treated differently, so as to give undue favor to some and unjustly discriminate against others.

7. Finally, in attempting to direct the structuring of HEIs, their manner of operation and the goals they must pursue, CMO 46 violates the rights of educational corporations under B.P. 68 that allows in Sec. 14, the corporation to declare its own purposes and that subjects corporate decisions in respect to the management and operations of the corporation's

[7] G.R. 21213 (March 28, 1968)
[8] G.R. 105371 (November 11, 1993)

enterprise, in this case HEIs, to their respective trustees. This provision of the Corporation Code is to be read in conjunction with Section 13 of the Education Act of 1982 that expressly recognizes, as a right of the school itself "The right of their governing boards or lawful authorities to provide for the proper governance of the school and to adopt and enforce administrative or management systems" and Section 30 of the same law that relates to the organization of the school and provides: "Each school shall establish such internal organization as will best enable it to carry out its academic and administrative functions, subject to limitations provided by law."

What are our legal options?

Obviously, the first option is to ask CHED to recall the CMO and to amend it accordingly. That it is unlikely to do this is apparent from its response to Fr. Joel's letter in behalf of PAASCU.

However, we need not give up on this option just as yet, because CEAP can galvanize academics' views against the CMO. CHED, if it decides to be prudent, cannot ride roughshod over popular sentiment – rationally founded – against the CMO.

Regulation can always be interdicted by legislation, and so if we can conscript the friendly assistance of friendly legislators, legislation can be introduced that strengthens academic freedom and impedes CHED from derogating from it in the way that CMO 46 does. Obviously, this will have to wait for the next Congress, and is subject to the vagaries and the politics of law-making in this country.

Finally, we have our judicial remedies. We can allege grave abuse of discretion in the issuance of a CMO that offends against academic freedom and other constitutional and legal guarantees. True, courts cannot question the wisdom of laws, these being policy decisions that a constitutional apportionment of power leaves to the Legislature. But we are questioning the legality and the constitutionality of CMO 46 on the following grounds:

First: CMO 46 violates the constitutional guarantee of academic freedom of HEIs – as textually established by the Constitution and developed by jurisprudence -- insofar as it attempts to determine their internal structure, their governance, the purposes they must pursue and the means by which these purposes are to be achieved.

Second: CMO 46 acts in excess of the jurisdiction granted it by R.A. 7722 insofar as CMO 46 does not only set minimum standards but institutionalizes and makes bureaucratic its version of quality and its tool of quality assessment. CMO 46's provisions constitute acts of 'control' over HEIs that the Constitution purposefully excludes from the State's regulatory authority.

Third: Insofar as CMO 46 tacitly provides for the possibility of re-classification of institutions that have already been granted "college" or "university" status by the retroactive application of a newly promulgated set of standards, it violates the doctrine of vested rights.

Fourth: CMO 46 preempts educational corporations in setting the goals and purposes, as well as in determining the means by which these goals and purposes are to be attained. In this respect it violates the Corporation Code as well as the Education Act of 1982.

Fifth: Owing to the vagueness of many of its provisions, too much latitude is given the implementing officers of the assailed CMO, specifically Regional Directors, resulting in the 'unequal application of the laws'.

Conclusion

Even as we must discuss our legal options, it behooves us, academics, to be vigilant about academic freedom, and more importantly, to make use to the space it creates within which to teach, research, investigate, define our goals and missions, our objectives and purposes while we jealously guard against the importuning and intrusion particularly of bureaucrats.

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