THE CONSTITUTIONALITY OF STATE ASSISTANCE TO PRIVATE EDUCATION

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I. INTRODUCTION

Much has been said about the correlation between standards and financial capability, particularly in the context of education. Without substantial resources, educational institutions find it difficult, if not almost impossible, to make the appropriate responses to academic and economic developments. Recognizing this truth, the Constitution has mandated that education should enjoy the highest budgetary priority.[1] With debt-servicing[2] taking up a major share of the national budget, however, both the executive and legislative branches must look for more efficient and imaginative solutions to the financial problem.

Among those hit by the crisis in education is the private sector. In a round-table conference sponsored by the Department of Education, Culture and Sports, and the education committees of the Senate and the House of Representatives,[3] it was proposed that government also provide support for existing private educational institutions.

The initial response to such a proposal is usually negative, in spite of the fact that there has been some legislative recognition for it.[4]

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[1] CONST., art. XIV, sec. 5(5).

[2] Debt servicing (both foreign and local) accounted for 44% of the total 1988 and 1989 budget. In 1989, 97 billion pesos was channeled to debt servicing, compared to 25 billion for education. As it is, the education budget as a percentage of the total government budget already increased from 13.7% in 1983 to 19.9% in 1988. *See* Arcelo, *Financing Education in the Philippines*, 16 FAPE Review 41 (May-Oct. 1989-90).

[3] This round-table conference was held at the Ateneo de Manila University Professional Schools on Nov. 30, 1988. The participants were given the task of presenting the problems of Philippine education and recommending solutions to be submitted to the Congressional Commission to Review and Assess Phil. Education. *See* 16 FAPE Review (May-Oct. 1989-90) for the text of policy papers read during the conference.

[4] THE EDUCATION ACT OF 1982 (B.P. Blg. 232), for instance, included the following provision:

> SEC. 41. Government Assistance - The government, in recognition of their complementary role in the educational system,

Why, it is posited, would scarce funds be channeled to private schools rather than the public schools government is obliged to support? The answer lies in the appreciation of a social and economic reality -- supporting private schools would be one way of maintaining adequate and quality education without much strain on resources. In economic terms, it costs our society more to send a child to a public school than to a private school.[5] Indubitably, the latter's inadequate resources, largely dependent on state-regulated tuition fees, have forced most private schools to be more efficient. Moreover, statistics show that a substantial number of secondary and tertiary level schools are privately-owned and operated. For schoolyear 1988-89, private institutions accounted for 39% of all secondary schools and 75% of all tertiary schools.[6] Translated, this means that private schools are responsible for the education of more than three million students nationwide.[7] Thus, government cannot afford to allow these institutions to founder, especially since it is doubtful whether the public schools could absorb the slack. Besides, it is admitted that private schools maintain a standard of education unmatched by most public schools. As noted by one authority, "in addition to relieving the government of an appreciable proportion of the financial burden of education, the private institutions of learning are making a distinctive contribution to the intellectual life of the nation."[8]

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may provide aid to the programs of private schools in the form of grants or scholarships, or loans from government financial institutions: Provided, That such programs meet certain defined educational requirements and contribute to the attainment of national development goals.

[5] "In 1988, the per capita cost of education in private high schools is P1,000 on the average. In public high schools, it is P1,349 when capital outlays are not included in the computation and P2,068 when included...in state colleges, the per capita cost for 1987, 1988 and 1989 are P3,360, P3,420 and P3,870 for the undergraduate programs. The semestral fee in an average school, like the UE, is only P1,107." Felipe, *Government Support for Private Education*, 16 FAPE Review 13, 14 (May-Oct. 1989-90). Testifying before the House Committee on Education, former Secretary Lourdes Quisumbing also estimated that it costs three to five times more for the government to send a single student to state colleges or universities than to send such student to a private college. *See* Report of the Committee on Education, House of Representatives, April 5, 1989, p. 17.

[6] NATIONAL STATISTICS COORDINATION BOARD, 1990 PHILIPPINE STATISTICAL YEARBOOK.

[7] *Id.*

[8] SINCO, THE CASE OF PHILIPPINE PRIVATE EDUCATION: A STUDY OF A MONOLITHIC SYSTEM OF EDUCATION 66 (1967).

Be that as it may, actual and substantial assistance to private education continues to be an "extremely rare phenomenon"[9] in the Philippines and a utopian dream for many educators. However, if the approval last June 10, 1989 of Republic Act No. 6728[10] is any indication, then the trend might be shifting towards more aid. Further, with the entry into force of the 1987 Constitution, the possibilities for state aid have dramatically increased.

II. PRIVATE SCHOOLS VIS-A-VIS THE CONSTITUTION

For the first time in constitutional history, private schools are given explicit recognition. Art. XIV, sec. 4 provides that "the State recognizes the complementary roles of public and private institutions in the educational system." One member of the Constitutional Commission, Fr. Bernas, has described Sec. 4 as a "formal recognition of the necessary and even indispensable role which private education plays in society."[11] With this provision, the Constitution has clarified the relationship between public and private educational institutions as being one of partnership rather than hostile competition. The complementary role follows from the basic state policy expressed in Art. II, sec. 12 that "the natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of government."[12]

The desire of society as a whole for an educational system that is adequate, equitable and relevant has become manifest in other provisions. Under Art. XIV, sec. 1, the state is mandated to "protect and promote the rights of all citizens to quality education at all levels and ... take appropriate steps to make such education accessible to all." Towards this end, it must "establish, maintain, and support a complete, adequate, and integrated system of education relevant to the needs of the people and society."[13] It has been suggested that the phrase

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[9] 2 J. BERNAS, CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 513 (1988).

[10] Entitled "An Act Providing Government Assistance to Students and Teachers in Private Education and Appropriating Funds therefor." This law purports to extend assistance through tuition fee supplements, a textbook assistance fund, scholarship grants, an education loan fund, a college faculty development fund and others to private education.

[11] BERNAS, *supra* note 9, at 511.

[12] Felipe, *supra* note 5.

[13] CONST., art. XIV, sec. 2(1).

"integrated system of education" refers to a system comprising both public and private schools.[14]

Improving upon previous constitutions, the present Charter also grants specific incentives to deserving private school children in the form of scholarship grants, student loan programs, subsidies and other incentives.[15] Additionally, private schools may enjoy tax exemptions under Art. VI, Sec. 28(3), Art. XIV, Sec. 4(3) and Art. XIV, Sec. 4(4).

From a general perspective, it may be conceded that private schools perform a public function. If we take this point of view, then it is doubtful whether any state assistance could be seriously questioned under the principle that public money shall only be used for public purposes. The State, as *parens patriae,* has an overriding interest in the maintenance of quality education.[16] Furthermore, the determination of whether the appropriation is for public use depends on legislative discretion as to whether the appropriation is for the support of government or any of the recognized objects of government; in this respect, the object of the legislation and the advantage to the public are among the material factors that must be considered.[17] "In general, the test of validity of the expenditure is the character of the use for which the money is expended, [and] not who receives it."[18]

Up to this point, we have been looking at private schools from an overall perspective. We cannot lose sight of the fact, however, that a majority of private schools are religiously-affiliated, owned, or operated. Catholic and Protestant schools are common in the metropolis and in other regions of the country. In Muslim Mindanao, Madrasah schools[19] are part and parcel of Islamic heritage and way of life. Considering the limitations and restrictions in the constitution against religious support and interference, what would be the possibilities for state assistance to these sectarian schools[20] and their students? This

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[14]Felipe, *supra* note 5.

[15]CONST., art. XIV, sec. 2(3).

[16]Bainton, *State Regulation of Private Religious Schools and the State's Interest in Private Education,* 25 ARIZ. L. REV. 123, 126 (1983).

[17]81 C.J.S., sec. 133. *See* also Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, on the issue of whether aid to private schools by the State would constitute a taking of private property without due process of law.

[18]Kentucky Bldg. v. Effron, 220 S.W. 2d 836 (1949).

[19]For an extensive discussion of the history, objectives and problems facing the Madrasah, *see* 12 FAPE Review (May 1982).

[20]The term "sectarian" has been defined as "denominational; devoted to, peculiar to, pertaining to, or promotive of interests of any sect or sects." *See* Manual of Regulations for Private Schools (7th ed., 1970).

paper will focus primarily on this issue, with emphasis on the Non-Establishment Clause and the separation of church and state.

III. JURISPRUDENCE AND TESTS FOR DETERMINING CONSTITUTIONALITY

Few issues are more intricate or emotional than the relationship between religion and the State, particularly in the field of education. The sheer complexity of this area of law has forced the U.S. Supreme Court and various state courts to develop tests for determining the validity of statutes granting different kinds of aid to sectarian schools. These tests have proved invaluable in ascertaining the actual beneficiaries of state assistance[21] and in discerning the limits of permissible assistance. The cases in point are briefly summarized below.

The first major challenge under the Non-Establishment Clause was made in the 1947 case of *Everson v. Board of Education*.[22] In that case, a taxpayer questioned the validity of a statute providing free bus transportation to all elementary students, whether studying in sectarian or secular schools. The Supreme Court, using a secular purpose test, upheld the statute on the ground that it was public welfare legislation comparable to police or fire protection. The statute ostensibly "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[23] In effect, the Court was saying that people could not be deprived of public welfare benefits because of their religion as this would violate the Free Exercise Clause.

This secular purpose test was supplemented in *Abington Township School Dist. v. Schempp*.[24] In declaring unconstitutional a Pennsylvania statute requiring the reading of ten verses from the Bible and the recitation of the Lord's Prayer at the start of each school day, the court said:

> What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the

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[21] ENCYCLOPEDIC DICTIONARY OF SCHOOL LAW [hereinafter ENCYCLOPEDIA], *Private and Parochial School Aid*, 198 (1975).

[22] 330 U.S. 1; 67 S. Ct. 504 (1947).

[23] 67 S. Ct. at 513.

[24] 374 U.S. 203 (1963).

> enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[25]

Schempp dealt with a practice that might be construed as a pure religious exercise. Twenty-one years after *Everson*, however, state assistance involving a more secular item was the object of litigation in *Board of Education v. Allen*.[26] Using the tests developed in *Everson* and *Schempp*, the court upheld a New York statute providing for the free loan of secular textbooks to all students from Grades 7-12. But while *Everson* had been limited to the rationale of public welfare, health and safety, *Allen* crossed the line into the educational function of sectarian schools.[27] In separating religious instruction from secular education, the court determined that the primary effect of the statute was to further the interest of the State in secular education.[28] The three dissenting opinions, however, emphasized the importance of textbooks in the teaching process and the fact that they can help promote religious dogma.[29]

In 1970, the U.S. Supreme Court in *Walz v. Tax Commission*[30] introduced the framework for the "entanglement" test. It declared that courts must ensure that the end result of any piece of legislation is not an excessive government entanglement with religion.[31] It characterized the test as "inescapably one of degree."[32]

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[25] *Id.*, at 222.

[26] 392 U.S. 236 (1968).

[27] Carter, *Social Implications and Constitutionality of Recent Proposals for Tuition Tax Credits for Parents of Private School Children*, 51 U. M. K. C. L. REV. 297 (1983).

[28] *Id.*

[29] *Id.*

[30] 397 U.S. 664 (1970).

[31] The type of entanglement contemplated by the Court involved "programs, whose very nature is apt to entangle the state in details of administration ..." *Id.*, at 695.

[32] *Id.*, at 674-75. The court further stated:

> Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.

Walz was also authority for the neutrality principle, i.e., that government aid must neither advance nor inhibit religious belief or exercise. The test would require a precise balancing between the two religion clauses of the Constitution -- Free Exercise and Non-Establishment, which *Walz* was able to achieve. There the court held that the First Amendment prohibited "governmentally established religion" or "government interference with religion."[33] "Short of those expressly proscribed governmental acts, there is room for play in the joint productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[34] As applied to education, this meant that the withholding of public benefits must not place such a burden on parents as to put in danger the right to exercise freedom of worship.

The framework in *Walz* eventually led to the formulation of the now famous three-pronged test in *Lemon v. Kurtzman*,[35] a 1971 case involving the validity of two statutes providing aid in the form of salary supplements and reimbursement of costs of textbooks and instructional materials in certain secular subjects. Lemon reiterated the purpose and primary effect test found in *Everson* and *Allen*; however, it also called for close scrutiny of government entanglement with religion. In this regard, the Court said:

> In order to determine whether government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.[36]

The Court noted that the potential for violation of the Non-Establishment Clause was great, by the very nature of the medium involved. Unlike the content of textbooks to be loaned in *Allen*, the teacher's handling of a particular subject is not readily ascertainable. Obviously, a "comprehensive, discriminating and continuing state

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[33] *Id.*, at 699.

[34] *Id.* For a wider discussion of the concept of neutrality, *see* Gianella, *Religious Liberty, Non-Establishment, and Doctrinal Development*, 81 HARV. L. REV. 513 (1968); Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV. L. REV. 696 (1979); Wong, *State Aid to Parochial Schools*, 23 SANTA CLARA L. REV. 587 (1983).

[35] 403 U.S. 602 (1971). In *Lemon*, the Court established the three-part test that must be satisfied by the legislation providing state aid to sectarian schools: (1) the statute must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster excessive government entanglement with religion. *Id.*, at 612-613.

[36] *Id.*, at 615.

surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."[37] Moreover, the court expressed fears that such state aid would be potentially politically divisive as it would result in political lobbying by various religious groups for continuing annual appropriations.

Despite the gains made in *Everson*, *Allen*, and *Walz*, later decisions made it clear that these rulings would apply only to their specific fact situations. There was no intent to open the floodgates of state aid to parochial education. In fact, a mere seven years after the promulgation of the decision in *Allen*, the Court in *Meek v. Pittenger*[38] affirmed the inseparability doctrine, *i.e.*, that religion so pervades the curriculum in lower sectarian schools that even secular instruction runs the risk of religious orientation and, as a result, religious and secular functions are virtually inseparable.[39] The *Meek* court concluded that any state aid to education granted to sectarian schools, except for the loan of textbooks to students allowed in *Allen*, would have to be prohibited. The *Meek* standard was described as quite stringent, amounting to a *per se* rule declaring practically all state aid unconstitutional.[40]

In more recent years, however, *Meek's* constitutional strictures were relaxed somewhat, particularly in *Wolman v. Walter*.[41] In that case, the court upheld a statute allowing the state of Ohio to provide sectarian schools with diagnostic testing and scoring services which were prepared, administered and graded by the state itself. Since the program required the content of the tests to be subject to the control of the state and prohibited any direct transfer of funds, the Court found that the non-establishment clause would not be infringed. Strangely, the justices declared that there was no inconsistency between *Meek* and *Wolman*, since both were meant to be narrowly construed. Justice Powell, in his separate opinion in *Wolman*, summarized this restrictive interpretation of the Court:

> I am not persuaded...nor did Meek hold, that all loans of secular instructional material and equipment inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise.[42]

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[37] *Id.*

[38] 421 U.S. 349 (1975).

[39] *See* Committee for Public Education and Religious Liberty v. Levitt, 461 F. Supp. 1123, 1127 (1978).

[40] *Id.*

[41] 433 U.S. 229 (1977).

[42] *Id.*, at 263.

Despite this clear statement, many lower courts, construing *Wolman*, found difficulty in reconciling the stringent standard of *Meek* with the sudden liberality of the Court. The confusion intensified with the decision in *Committee for Public Education and Religious Liberty v. Regan*,[43] upholding a statute authorizing the state of New York to reimburse private schools for costs of performing state-mandated testing and record-keeping services. As in *Wolman*, the tests were prepared by the state itself. Furthermore, the statute provided a method for auditing payments made to the school to ensure that the services were actually being performed and that reimbursements do not exceed the actual costs.[44] The Court concluded that

> state aid may be extended to [sectarian] schools' education activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.[45]

As in *Wolman*, the majority in *Regan* believed that while this "appreciable risk" standard was indeed more flexible, it was not inconsistent with *Meek*. Justice Blackmun found this statement incomprehensible in light of the inseparability doctrine. He said:

> [F]aced with the substantial amounts of direct support authorized by [the statute], it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many ... church-related elementary and secondary schools and to then characterize [the statute] as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion.[46]

For the majority, the key factor in upholding the statute seems to be the absence of control by teachers and school administrators over the object of the aid -- the content of the tests itself.[47] The court

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[43] 100 S. Ct. 840 (1980).

[44] *See* Giacoma, *Committee for Public Education and Religious Liberty v. Regan: New Possibilities for State Aid to Nonpublic Schools*, 24 ST. LOUIS U.L.J. 406, 411 (1980).

[45] 100 S. Ct. at 846.

[46] *Id.*, at 853-54.

[47] Giacoma, *supra* note 44, at 419.

dismissed the argument of the appellants that the legislation would lead to excessive government entanglement. It noted that:

> The reimbursement process...is straight-forward and susceptible to the routinization that characterizes most reimbursement schemes. On its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.[48]

Thus, in refusing to predict any future entanglement, the court significantly whittled down the entanglement test of *Lemon* and increased the possibility of more aid programs being allowed in the future.

As it stands, therefore, the trend of decisions seem to show a split between two philosophical positions: "the acceptance of the view that a 'high and impregnable' wall must separate church and state or the adoption of a constantly evolving and flexible interpretation of the establishment clause that adapts to changes that occur in state governmental functions and the interests which affect religious institutions."[49] The difficulties faced by U.S. courts highlight the problems that are likely to befall similar legislation in the Philippines. To date, no such statutes have been legally challenged before Philippine courts, perhaps because government has failed to fully implement any of the measures. The situation leaves much room for academic discussion.

IV. THE CASE FOR UNCONSTITUTIONALITY

Historically, the Philippine Constitution has always mandated the real and absolute separation of church and state.[50] The basic provision itself, Art. II, Sec. 6 of the 1987 Constitution, has remained largely unchanged. Experience has shown that this sharp divergence between church and state must be maintained in order to preserve the integrity of both institutions. The companion provision of the separation clause is Art. III, Sec. 5 of the Constitution, the Non-Establishment and Free Exercise Clause, which states that "no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."

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[48] 100 S. Ct. at 850.

[49] Giacoma, *supra* note 44, at 422.

[50] *See* BERNAS, *supra* note 9, at 214-15.

While the language of these provisions may seem clear and precise, American jurisprudence has indicated that the issue of state aid to sectarian educational institutions has started to blur the heretofore distinct wall of separation. In many cases, the question of permissibility boiled down to a determination of whether protective mechanisms were present in statutes or whether aid could be channeled without excessive interference in religious functions. It is doubtful whether this hairsplitting can be done under Philippine law. Unlike its American counterpart, the Philippine Constitution further provides that "no public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion..."[51]

On the basis of this provision, Prof. Perfecto Fernandez, a noted authority, has unequivocally opined that state aid to sectarian schools is prohibited. This view is shared by Prof. Esteban Bautista of the UP Law Center.[52] According to Prof. Fernandez, the schools are "integral units of every church,"[53] thus echoing Justice Blackmun's dissent in *Regan:*

> The very purpose of many [religious] schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief ... Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole ... the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.[54]

Prof. Fernandez points out that with no equivalent provision to Art. VI, Sec. 29 (2), U.S. courts must justify the prohibition of state assistance under the non-establishment clause alone. This apparently explains the ambiguous stand of the Federal Court *vis-a-vis* questions of financial support.[55] In this situation, reference must be made, not to Federal Court decisions, but rather to the decisions of state courts

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[51] CONST., art. VI, sec. 29(2).

[52] The Journal, April 18, 1989.

[53] Address by Prof. Perfecto Fernandez entitled "The Unconstitutionality of State Assistance to Private Education" [hereinafter Fernandez], Symposium on Private Education, Ramon Magsaysay Memorial Center, May 8, 1990.

[54] 100 S. Ct. at 854.

[55] Fernandez, *supra* note 53.

applying similar, if not identical, constitutional provisions.[56] *Gurney v. Ferguson*,[57] for instance, discussed the question of whether private or parochial school children would be entitled to free bus transportation to and from their schools whenever any law of Oklahoma provides the same privileges to public school children. The factual situation is similar to that presented in *Everson*. The court cited section 3, article 2 of the Oklahoma Constitution which almost duplicates Art. VI, Sec. 29(2) of our own Constitution:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

The Court declared that the term "sectarian institution" would embrace institutions of learning owned or maintained by a church and which teaches the religious dogma of such church. Hence, free bus transportation would fall under the state assistance proscribed by the Constitution. Of particular interest was the statement of the Court rebutting the child-benefit theory[58] espoused by the plaintiffs. Citing *Judd v. Board of Education*,[59] the Court said:

> It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of the same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.[60]

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[56] *Id.*

[57] 122 P. 2d. 1002 (1942).

[58] The theory was applied in the case of Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930). The theory upholds the statute by asserting that school children and the State are the direct beneficiaries of any aid and therefore, any benefit to private schools is merely incidental. It has lost support among many state courts. *See* ENCYCLOPEDIA, *supra* note 21.

[59] 278 N.Y. 200 (1938).

[60] 122 P. 2d. at 1003-1004.

The decision in *Gurney* would seem to impose a heavier burden on legislation providing for state aid to sectarian schools, approximating the *per se* rule of unconstitutionality developed in *Meek*. Moreover, the court's rebuttal of the child-benefit theory effectively closes the door to all other state aid programs. *Everson*, decided a scant 5 years after *Gurney*, emphasized public welfare considerations. However, under a provision similar to section 3, Art. 2 of the Oklahoma Constitution, it is questionable whether the statute would have survived.

Another case, this time with a factual situation similar to *Allen*, involved distribution of free textbooks to private school children. In *Dickman v. School District*,[61] the court adopted the rationale of *Gurney* and *Judd, i.e.*, the child being an essential part of the school, any benefit to the child would be benefit to the school and hence state assistance that is prohibited under the Constitution. Consequently, the statute was struck down. Similarly, other state courts disallowed the use of public funds for the maintenance of sectarian schools and reimbursements for tuition payments[62] on non-establishment grounds and the prohibition on the use of public money for religious purposes.

A major stumbling block for most anti-aid advocates are the constitutional provisions in Secs. 1-5 of Art. XIV which collectively allow for state support of private education, particularly in the case of students. Prof. Fernandez, however, asserts that since the language of Art. VI, Sec. 29(2) is prohibitory, it should control over the permissive language of Art. XIV. He submits that

> certainly, it can be conceded that state aid to education expressly provided for in Sec. 2 of Art. XIV, particularly subsec. (3) thereof, embraces private schools, but unlike the mandate of Sec. 6, Art. II on separation of church and state and the prohibition in Sec. 29(2) of Art. VI, the provisions of Art. XIV, Sec. 2 are not self-executing but require enabling or implementing legislation by Congress, hence, subject to said restraints and limitations on two counts: first, Sec. 2 of Art. XIV as an authorizing or enabling provision must be deemed qualified by said restrictions, and second, the legislative power itself by which the implementation is to be affected, is likewise qualified, delimited and restrained.[63]

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[61] 366 P. 2d. 533 (1961).

[62] *See*, for example, Berghorn v. Reorg. School District, 260 S.W.2d 573; Swart v. South Burlington School, 167 A. 2d 514 (1961), cited in Fernandez, *supra* note 53.

[63] Fernandez, *supra* note 53.

Prof. Fernandez then concludes that "private schools, within the context of the entire constitution, is meant to refer to private schools that are non-sectarian."[64]

What then of legislation such as Republic Act No. 6728? Whether we apply the strict test of *Meek* or the tripartite test of *Lemon*,[65] the law seems inadequate. It should be noted that while it identifies students and teachers as the recipients of assistance, the declaration of policy in Sec. 2 implicitly recognizes the benefit that would be enjoyed by the schools.[66] The package of incentives creates a possibility of excessive government entanglement, as accounting and other school records would constantly have to be inspected[67] to ensure that the restrictions in the law are obeyed. Hence, it might be wise for the law to be amended, to ensure that constitutional principles are not circumvented.

V. THE CASE FOR CONSTITUTIONALITY

Admittedly, arguing for validity of state assistance to private education, whether sectarian or secular, would truly be a burdensome task, were it not for the fact that the 1987 Constitution provides sufficient ground for speculation. As already mentioned, Art. XIV, Sec. 4 asserts that "the State recognizes the complementary roles of public and private institutions in the educational system..." Moreover, the charter provides that "the State shall protect and promote the right of all citizens to quality education at all levels and shall take appropriate steps to make such education accessible to all."[68] Specifically, the state shall:

> (1) establish, maintain and support a complete, adequate and integrated system of education relevant to the needs of the people and society; [and] ....
>
> (3) establish and maintain a system of scholarship grants, student loan programs, subsidies and other incentives which shall

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[64] *Id.*

[65] *See* accompanying text, *supra* note 35.

[66] Sec. 2 provides, in part, that "the State shall provide the mechanisms to improve quality in private education by maximizing the use of existing resources of private education..."

[67] *See*, for instance, sec. 5(2) of R.A. 6728.

[68] CONST., art. XIV, sec. 1.

> be available to deserving students in both public and private schools, especially to the underprivileged.[69]

The rationale behind this sudden largesse of incentives was explained by Delegate Monsod:

> This is a more efficient way to directly help the poor students rather than through the fee structure in the state colleges for two reasons: (1) we are not benefitting those who really are willing to pay and can afford to pay; and (2) we will even give the students an option of where to go - whether to ... a private school or to a public school.[70]

Monsod went on to suggest that the form of assistance go beyond subsidy for tuition, expressing the view that "a comprehensive system of subsidy would really help these poor students directly, and not the schools."[71] Clearly, the language of the Constitution reflects the intent of the delegates that assistance be given directly to students, avoiding any real benefit or diversion of assistance to the schools concerned. This intention, apparently, was the reason behind the elimination of a provision granting direct subsidies to private educational institutions.[72] In effect, the framers wrote their own version of the child-benefit theory. In this jurisdiction, therefore, the argument of the court in *Gurney* and *Judd* dismissing such theory would seem to be inapplicable.

But what then of the opinion expressed that private schools, in the context of the entire constitution, refers only to non-sectarian institutions? Would this also mean that private school children studying in parochial schools would be denied the incentives provided in Sec. 2 of Art. XIV? The clearest gauge should be the language of the provisions itself. But in that case, no distinction between sectarian and non-sectarian private schools was made. Applying the prohibition in Art. VI Sec. 29(2) seems to be extreme in light of the fact that the ConCom deliberately focused on the school children rather than the schools in granting such incentives. From all indications, the ConCom considered Art. XIV Sec. 2(3) as a wiser and more ideal method of achieving social interests without sacrificing constitutional principles. Considering that this is a new provision and that the framers could hardly have been unaware of the many religiously-affiliated schools in the country, it would be plausible to assume that the specific reference to

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[69] CONST., art. XIV, sec. 2.

[70] 4 RECORDS OF THE 1986 CONSTITUTIONAL COMMISSION (1986).

[71] *Id.*

[72] *Id.*

school children, instead of the institution itself, took the incentives out of the reach of Art. VI, Sec. 29(2).

In addition, a narrow interpretation of Art. XIV, Sec. 2(3) might be challenged on free exercise grounds. The disincentives to parochial education may well be such that it would affect the rights of both parents and students to choose the manner by which the latter would be taught. For parents whose religion would not allow their children to be educated in other schools, the choice is particularly difficult since free public education in the elementary and high school levels is already offered. As in the case of *Walz*, religious groups could argue that the neutrality of the State would be infringed. The right to freely exercise religion would be impaired "if government could create unfair competition by funding activities of organizations not associated with religion."[73] In any case, what the Non-Establishment clause seeks to avoid is support of any religion or preference of one over another. It cannot be used as the basis for hostile treatment of all religions.

Another line of argument would focus directly on the interpretation given by the Philippine Supreme Court to the prohibition on the use of public money for religious purposes. This was discussed in *Aglipay v. Ruiz*.[74] In that case, the court was asked to invalidate the issuance and sale of postage stamps commemorating the 33rd International Eucharistic Congress of the Catholic Church on the ground that it violated the prohibition. Justice Laurel, citing *Bradfield v. Roberts*,[75] penned the majority opinion. He said:

> It is obvious that while the issuance and sale of the stamps in question may be said to be inseparably linked with an event of a religious character, the resulting propaganda, if any, received by the Roman Catholic Church, was not the aim and purpose of the Government. We are of the opinion that the Goverment should not be embarrassed in its activities simply because of incidental results, more or less religious in character, if the purpose had in view is one which could legitimately be undertaken by appropriate legislation. The main purpose should not be frustrated by its subordination to mere incidental results not contemplated.[76]

Undoubtedly, providing its citizens with more opportunities for education is a legitimate objective of government. In fact, it is a constitutional imperative. In the case of R.A 6728, the deliberations of the legislature demonstrate that a secular purpose was intended. Any

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[73] Walz v. Tax Commission, 397 U.S. at 669.

[74] 64 Phil. 201 (1937).

[75] 175 U.S. 291 (1899).

[76] 64 Phil. at 209-210.

benefit to sectarian institutions, direct or indirect, was not contemplated. For instance, when Rep. Carlos Padilla, the principal sponsor, was asked whether the proposed tuition subsidy would be an indirect form of aid to the sectarian school, since the funds are inevitably paid to the school, he answered:

> MR. PADILLA: Mr. Speaker, first, let me point out that when the Gentleman from Agusan Del Norte...made mention of the words directly or indirectly, this is insofar as aiding a religion or a church, Mr. Speaker...But the intent of this bill, Mr. Speaker, is not to directly or indirectly aid a church or religion or a pastor, but to aid a student and this is in view of the provision of the constitution which is found in par. 3, sec. 2 of Art. XIV...
>
> that article or provision of the Constitution [Art. VI, Sec. 29(2)]...was lengthily discussed in one of our Committee meetings wherein distinguished legal luminaries, including professors of the UP, testified ... that as long as the assistance is to the student, then it is constitutionally tenable.[77]

Rep. Padilla went on to explain that because of the objections raised by several lawyers, the original version of the bill was amended to avoid any constitutional problems, even to the extent of changing the title of the bill from "Assistance to Private Schools" to "Assistance to Students in Private Schools."[78] Certain safeguards were also inserted into sections of the bill to ensure that government subsidies would not be used for sectarian purposes.[79] Applying *Aglipay*, therefore, any benefit to the schools may be characterized as an "incidental result".

Finally, no argument for validity would be complete without mentioning the special case of tertiary level education. Unlike the cases on elementary and secondary level aid, the U.S. Supreme Court seems to have been more lenient with religiously-affiliated colleges and universities (RACs). In *Tilton v. Richardson*,[80] *Hunt v. McNair*,[81] and *Roemer v. Board of Public Works*,[82] the Court uniformly found that the use of public funds was constitutionally permissible, albeit on narrow grounds. Applying the tests in *Lemon*, the court found that religious indoctrination was not a substantial purpose or activity of the RACs. In the case of *Tilton*, moreover, the grants involved were one-time, single-

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[77] House of Representatives, Transcript of Session Proceedings, May 31, 1989.

[78] *Id.*

[79] *Id. See*, for example, Sec. 5(2), Sec. 6, and sec. 13.

[80] 403 U.S. 672 (1971).

[81] 413 U.S. 734 (1973).

[82] 426 U.S. 736 (1976).

purpose construction grants, which do not hold any substantial risk of government entanglement. Reliance was placed on the RACs' adherence to principles of academic freedom, as expressed by their commitment to the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors (AAUP).[83] Such a commitment was sufficient for the Court to adopt the rationale of *Allen* and *Regan, i.e.*, that religious instruction and secular education are indeed separable in the case of colleges and universities, to the extent that they cannot be identified as sectarian institutions. Applying this to the Philippine situation, aid to such institutions may not be subject to the limitations of Art. VI, Sec. 29(2). Assuming a test of adherence could be found, it may be possible to grant assistance to these RACs or to students of such RACs.

VI. CONCLUSION

It cannot be denied that both views as to the validity of state assistance to sectarian schools or school children have their respective merits. On one hand, the policy of separation between church and state is of such important social and political value that it must zealously be guarded. On the other hand, the more liberal and flexible interpretation of the constitution upholds the interest of government in quality education and serves the needs of the community and the State. Whether or not the latter position is valid, there seems to be a growing trend in support of it, as exemplified by recent legislation and American judicial experience. In the light of our explicit constitutional limitations, however, we can only speculate whether this trend would be followed by our own courts. In the meantime, we must leave to our legislators the unenviable task of finding that balancing approach that would serve constitutional ends without sacrificing the same.

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[83] Note, *Having One's Cake: Government Funding and Religious Exemptions for Religiously-Affiliated Colleges and Universities*, 5 WIS. L. REV. 1067 (1989).