

STATE ASSISTANCE TO PRIVATE EDUCATION IN RA 6728: A SEARCH FOR CONSTITUTIONAL VIABILITY

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There are conflicting opinions on the constitutional viability of state assistance to private education. Favorable attitude towards assistance finds basis on the welfare clauses of the Constitution. Hostile attitude on the other hand, hinges on the impregnable wall separating the Church and the State. Where most private educational institutions are owned by religious corporations,¹ the orientational trend seems to preponderate on the hostile stance.

The Need for Private Educational Institutions: The Legal Framework

Public schools are those established and maintained at public expense, primarily from money raised by general taxation. They are controlled and administered by the State or its agencies. Every person who fulfills the requirements prescribed by law is entitled to admission in these schools as a matter of right. Such schools are sometimes called government schools.

Private schools, as contradistinguished from public ones, are those which are ordinarily owned, supported and controlled by private persons or by private and eleemosinary corporations and to which admission is a matter of private contract.²

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¹ C. AGUILA, EDUCATIONAL LEGISLATIONS 477 (1956).

² *Id.*, at 20. Similar definitions are found in Batas Pambansa Blg. 232 (1982). Vicente Sinco, writing on the difference between public and private schools, observed that:

... these are merely two groups of institutions, not two distinct systems ... for the difference between them is only in their formal organization and ownership, not in educational content and academic

For Schoolyear 1990-1991, statistics show that private educational institutions in the country were responsible for the education of approximately eight (8) per cent of elementary students, forty-five (45) per cent of high school enrollees, and more than sixty-five (65) per cent of college and post-graduate students.³ In 1986, although only fifteen (15) per cent of all schools established in the Philippines were private, non-governmental schools nevertheless outnumbered public pre-school, secondary and tertiary schools.⁴

The above-mentioned data indicate the importance of private educational institutions in the country. In 1967, Vicente Sinco had already noted that the

... amount and extent of assistance these private institutions have given the government and the people of the country have been literally enormous. As far back as the year 1932, the Commissioner of Private Education calculated that if the government then had to provide the education for the students in the recognized private schools, it would have appropriated at least P10,710,886 a year without including the cost of building and equipment... (A)ccording to the Annual Report of the Director of Private Schools for 1965-1966, the private secondary schools alone would have cost the government from P21,352,055 to P170,864,563 on the basis of the wide-ranging cost per student in different public high schools, or an average of about P96,000,000.⁵

procedure and practice... (e)ach one of these two groups.. has definite constitutional provisions for its bases. The public schools find their basis in that part of the Constitution which makes it the duty of the government to establish and maintain a complete and adequate system of public education... The organization and maintenance of private educational institutions on the other hand, find their basic support in various constitutional provisions. One of them may be found in the Bill of Rights which says, the right to form associations or societies for purposes not contrary to law shall not be abridged'. Among such societies or associations are of course, churches, civic and cultural clubs and schools or educational centers....

SINCO, THE CASE OF PHILIPPINE PRIVATE EDUCATION: A STUDY OF A MONOLITHIC SYSTEM OF EDUCATION 20-22 (1967).

³NATIONAL STATISTICS COORDINATION BOARD, PHILIPPINE STATISTICAL YEARBOOK 10-10 (1991).

⁴NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, PHILIPPINE STATISTICAL YEARBOOK 446 (1986).

⁵SINCO, *supra* note 2, at 66.

Despite the liberalization of educational opportunities which began way back in the early part of the century, education remains a luxury to many Filipinos. This justified state aid and support to the cause of education.⁶ The 1935 Constitution provided that:

All educational institutions shall be under the supervision of and subject to regulation by the State.⁷

This same provision was retained in the 1973 Constitution.⁸ On August 4, 1969, the Student Loan Fund Authority⁹ was created providing assistance to students in public schools based on the merit system. Presidential Decree No. 932 was later enacted¹⁰ to democratize educational opportunities and to promote the "Study Now Pay Later Scheme". In 1982, Batas Pambansa Blg. 232, also known as the "Education Act of 1982" contained a provision, section 51 thereof, expressly granting assistance to students in private schools. Owing to lack of funds, this law was never implemented. The results of previous state assistance legislations were therefore negligible.

The Constitutional Commission of 1986 sought the invigoration of the educational system in the country.¹¹ Cognizant of the inefficiency of public educational institutions in uplifting the state of the Philippine educational system, the framers of the 1987 Constitution drafted the following provision:

The State recognizes the *complementary roles of public and private institutions* in the educational system and shall exercise reasonable supervision and regulation of all educational institutions.¹²

⁶This is known as the subsidiary theory espoused by Andres Narvasa. See Narvasa, *On State Control of Education*, 21 U.S.T. L. REV. 95 (1970).

⁷CONST. (1935), art. XIV, sec.5.

⁸CONST. (1973), art. XV, sec. 8, par. (1).

⁹The SLF was created by virtue of Republic Act No. 6014 (1969).

¹⁰on June 4, 1976. The law was amended by Pres. Decree No. 1371 (1978).

¹¹4 RECORDS OF THE CONSTITUTIONAL COMMISSION 12 (1986).

¹²CONST., art. XIV, sec. 4, par. (1) (emphasis supplied).

In conjunction with the express recognition of the role of private educational institutions, Article XIV, section 2 of the Constitution mandates that:

The State shall establish and maintain a system of scholarship grants, student loan programs, subsidies and other incentives which shall be available to deserving students in both public and private schools especially for the underprivileged.

This provision is the bedrock of state assistance to private education.

The Basic Law: The Basic Issue

Pursuant to Article XIV of the Constitution, Republic Act No. 6728 was enacted¹³ providing the mechanism for improving the quality of education by maximizing the use of existing resources.¹⁴ The law, known as the "Government Assistance to Students and Teachers in Private Education Act"¹⁵ (hereinafter referred to as the GASTIPEA), provides for eight forms of government assistance to private education, namely:

- Tuition fee supplements
- High school Textbook Assistance Fund
- Expansion of existing Educational Service Contracting Scheme
- Voucher system for the private education student
- Financial Assistance Program
- Scholarship grants to valedictorians and salutatorians

¹³On June 10, 1989. Sec. 2 of this legislation provides: The State... hereby recognizes the complementary roles of public and private educational institutions in the educational system and the invaluable contribution that they... have made and will make to education.

¹⁴Rep. Act No. 6728, sec 2 (1989).

¹⁵Rep. Act No. 6728, sec 1.

- Tuition fee supplement to students in private colleges
- Educational Loan Fund, and the
- College Faculty Development Fund.

The GASTIPEA was supposed to be implemented starting Schoolyear 1989-1990.¹⁶ At its onset, signs of success had been envisioned.¹⁷ Fears of legal impediments however, haunt the implementation of the GASTIPEA.¹⁸ Such fears revolve around a single issue: Is state assistance to private education constitutional?

Pro-State Assistance

The basic premise of the favorable attitude toward state assistance to private education is the universal recognition of the duty of the State to provide for the well-being of its citizens. This is expressed in the proverbial concept of the welfare state.

According to one distinguished legal writer,¹⁹ a "welfare state" puts a premium on the assurance of decent living conditions for the entire population so that the specter of hunger, disease and misery could no longer haunt the poverty-stricken masses. Its objective is to uphold man's innate dignity. In more prosaic terms, it implies that state power is utilized to modify the free play of economic and social forces so that the health, education, housing, and other basic necessities of life are not neglected. The goal of a welfare state is well-being for all.

The Philippine Constitution is replete with provisions signifying the welfare state character of the polity. In *Edu v. Ericta*,²⁰

¹⁶The implementation of the GASTIPEA coincided with the establishment of the KABISIG Movement.

¹⁷Quisumbing pointed out that about 1.7 million students could benefit from the GASTIPEA. Quisumbing, *Major Accomplishments*, FOOKIEN TIMES PHILIPPINES YEARBOOK 162 (1989).

¹⁸See Address entitled *The Unconstitutionality of State Assistance to Private Education* by Prof. Perfecto Fernandez. Symposium on Private Education, Ramon Magsaysay Memorial Center, May 8, 1990.

¹⁹FERNANDO, *THE CONSTITUTION OF THE PHILIPPINES* 76 (1977).

²⁰35 SCRA 481 (1970).

the Supreme Court operationalized the idea of a welfare state as the rejection of the "*laissez-faire*" doctrine. Said decision holds government responsible for coping with social and economic problems with the commensurate control over social, political and economic affairs.²¹

With respect to education, all Philippine Constitutions vest upon the State both regulatory and supervisory powers over educational institutions.²² In all Philippine Constitutions, education has consistently been treated as a right. Unlike former fundamental laws however, the present Constitution has mandated state assistance to students in private schools.

In the past, assistance as an implement of the State's supervisory and regulatory powers over education had been limited to public schools.²³ Inevitably, the novelty of state assistance to private educational institutions would spur enormous queries. To be viable, this concept of state assistance has to be founded on a need overwhelming enough to radically reorient the meaning of supervisory and regulatory prerogatives of the State. For logical consistency, it must be based on a compelling interest that foregoes the incessant apprehension over state-to-church assistance.

In the Philippines, the compelling interest is the inaccessibility of education to the many. With millions living below the poverty level, making education available to all becomes a primal concern of the State. This concern was the driving force that led to the eventual prioritization of education in the form of a separate article in the present Constitution.²⁴

Other constitutional precepts which signify the importance of education are as follows:

²¹ Cf. *Calalang v. Williams*, 70 Phil. 726 (1940); *Morfe v. Mutuc*, 22 SCRA 424 (1968); *Ermita-Malate Hotel and Motel Operator's Association Inc. v. City Mayor*, 20 SCRA 849 (1967).

²² CONST. , art. XIV, sec.4, par. (1).

²³ Rep. Act No. 6014 (1969) and Pres. Decree No. 932 (1976).

²⁴ RECORDS, *supra* note 11.

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.²⁵

The State shall assign the highest budgetary priority to education.²⁶

The State shall establish, maintain and support a complete, adequate and integrated system of education relevant to the needs of the people and society.²⁷

Other legal provisions institutionalizing the fervent state interest in education can be found in several statutes. Under the New Civil Code of the Philippines,²⁸ a separate title under Book I lays down the societal duty for the care and education of children. Similar provisions are found in the Child and Youth Welfare Code.²⁹ In the Revised Penal Code, it is provided that it shall be punishable for parents to neglect their children by not giving them education.³⁰

Considering all these legal provisions, there need be no elaboration that the state has a stake in education,³¹ both public and private that could validate support in any form.

Co-related rationalizations for the validity of state assistance to private education can be found in the State's exercise of its police power, its power of taxation, eminent domain and in the principle which treats the State as *parens patriae*.³² The concept of equality can also be exploited to support state assistance to private education.³³ Of equal

²⁵ CONST., art. XIV, sec.2, par.(1). The right to education attained a universal status under Article 26 of the Universal Declaration of Human Rights.

²⁶ CONST., art. XIV, sec. 5, par. (5).

²⁷ CONST., art. XIV, sec. 2, par. (1).

²⁸ Rep. Act No. 386 (1949).

²⁹ Pres. Decree No. 603 (1974), arts. 356-363.

³⁰ Act No. 3815 (1932), art. 277.

³¹ BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 511 (1988).

³² For an extensive discussion of these principles see AGUILA, *supra* note 1, at 48 *et. seq.*

³³ HOGAN, THE SCHOOL, THE COURTS AND THE PUBLIC INTEREST 2 (1974).

potency is the assertion of public benefits that would redound to the people via state assistance.³⁴

From the foregoing, it can indeed be safely concluded that state assistance to private education could be supported by many legal constructs. It can even be asserted that state assistance to private education is a constitutional mandate and any doubt to the viability of such precept has to contend with the prodigious burden of averring non-viability of a constitutional provision.

As stated at the outset, the antagonistic attitude toward state assistance to private education, as implemented by the GASTIPEA, hinges on the fear of possible entanglement of the Church and the State. Offhand, the assertion could be met if there are "safeguards" provided in the law in question.

Under section 5, paragraph 2 of the GASTIPEA, there is a proviso to the effect that:

government subsidies are not (to be) used directly for salaries of teachers of non-secular subjects.

A similar provision can be found in section 13 of the law, to wit:

scholarships ... cannot be awarded to promote or inhibit sectarian purposes.

On the superficial level, it can be asserted that no form of direct assistance to religious objectives is allowed under the GASTIPEA. However, it is the "indirect" form of assistance which renders the state assistance under Republic Act No. 6728 open to antagonistic query. And it is in this respect where the fears of state-to-church assistance loom extensively.

Anti-State Assistance

The basic premise of any antagonistic attitude toward state assistance to private education is the recognition that most private schools are non-secular.³⁵ Whereas the GASTIPEA has no explicit

³⁴ *Id.*, at 3.

³⁵ NARVASA, *supra* note 6, at 98.

pronouncement that it would apply only to secular schools, the law has to apply also to those classified as non-secular. This is its basic defect.

To construe it as applying only to secular schools would violate the principle that mandates any law to be non-discriminatory. More so, it is an accepted rule of statutory construction that no one can put into the law what is not therein provided. *Verba legis non est recedendum*.

Writing exclusively on private non-secular schools, Prof. Perfecto V. Fernandez³⁶ offers the following grounds for impugning the constitutionality of state assistance:

- a. State assistance to private non-sectarian schools impinges on the wall of separation between the Church and State,
- b. It would violate the prohibition against the use of public money for the benefit or support of religion,
- c. It would violate the fundamental principle of taxation that tax money cannot be used for a private purpose,
- d. It would transgress the non-establishment clause of the Constitution, and
- e. Article XIV of the Constitution is merely permissive and not self-executory while Article II, section 6 is.

The grounds stated above can be summarized in two general headings: the inviolability of the separation of Church and State and the construction to be given the constitutional provisions on education.

Regarding the impregnable wall between the Church and the State, a three-prong test was formulated in *Lemon v. Kurtzman*³⁷ with which any governmental act is gauged as to whether it violates the Separation Clause. The Lemon three-prong test or the "purpose-effect-entanglement" test raises the questions:

³⁶FERNANDEZ, *supra* note 18.

³⁷403 U.S. 602 (1971). The Lemon test is the combination of previous tests laid down in the earlier cases of *Everson v. Bd. of Education*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington v. Schempp*, 374 U.S. 203 (1963). For a comprehensive discussion, see JOHNSON AND YOST, *SEPARATION OF CHURCH AND STATE IN THE U.S.* (1948), and KAUPER, *RELIGION AND THE CONSTITUTION* (1964 ed.).

1. Is there a non-secular legislative purpose?
2. Is the primary effect of legislation a benefit or limitation to religion?
3. Would the legislation result in excessive entanglement of government with religion?

The answers to these questions as they relate to state assistance to private education is not within the competence of any writer. The viability of the present law on state assistance cannot be passed upon prematurely with only the Lemon test as measure. In the first place, the test and the law converge only in a factual situation. Secondly, the judicial mind works only through standard channels hence, absent a concrete situation, any conclusion would be mere guesswork.³⁸

Fatal as it may seem, the proper recourse would be to resort to a hypothetical scenario.

Commissioner Monsod, in one of the public hearings of the Constitutional Commission of 1986,³⁹ presented a portentous scenario. Inquiring on the wisdom of subsidizing students in the private schools, he said:

When we subsidize those who cannot afford, then we are also enabling private institutions to be financially viable because these institutions can charge their students with the full tuition fees. Once the subsidy goes to the students, the students will go to them even when they (the private institutions) are charging the full cost.

By this scenario, there is an implied admission of the general attitude toward private schools: that they are better than government institutions of learning. As a matter of course, any subsidy to the students would be a subsidy to their schools. And where there is no allowable mandate of choosing only public educational institutions, lest academic freedom is violated, a constitutional infirmity in the form of indirect assistance to the Church becomes evident.

³⁸ Cf. *Lorenzo v. Director*, 50 Phil 596 (1927); *People v. Carlos*, 78 Phil 533 (1947); and *Quintin v. Lacson*, 97 Phil 290 (1955).

³⁹ Held on September 1, 1986, transcripts of which are entered in RECORDS, *supra* note 11, at 122.

In this respect, the GASTIPEA affords no redemption to justify state assistance to private education. If at all, the safeguards which the law provides is superficial. The Act is silent as to how it is to be implemented and more importantly, where it is to be implemented.

It seems the lawmakers have left the law's scope of application vague by specifying the law to refer to "Private Education" in general, while in its text, the law makes exceptions in the case of private sectarian schools, and then, only with respect to certain aspects. For example, the GASTIPEA provides that state subsidy would not be applied for sectarian objectives only as to the salaries of teachers and with respect to the College Faculty Development Fund. There is no explicit provision, however, disallowing application of the whole statute for sectarian objectives.⁴⁰ Clearly, this is a fatal defect in the law as the other forms of support are more susceptible to abuse, say, the Tuition Fee Voucher system which works directly through the schools.

As of this writing, the Department of Education, Culture and Sports has not yet laid down the Implementing Rules of the GASTIPEA. Like the earlier laws on state assistance to education, the GASTIPEA may remain unenforced for the convenient reason of lack of funds. Secretary Cariño in 1991 made the following observations:

DECS is reviewing the financial scheme for the entire program of Government Assistance to Private Education. Of the various sources stipulated in R.A. 6728, only the Development Bank of the Philippines has complied with its obligation under this law. Inadequacy of funding has prevented DECS from fully implementing the Assistance Program.⁴¹

The basic defects of Republic Act No. 6728 therefore, are its non-exclusivity and the lack of prioritization efforts on the part of those upon whom its implementation depends. Whether GASTIPEA would suffer the same fate as previous state assistance schemes hinges on a realization that at its present stage, it exists as a mere paper policy.

⁴⁰ Rep. Act No. 6728, sec. 5, par. (2), and sec. 13.

⁴¹ Cariño, *A New Philosophy of Education*, 1991 FOOKIEN TIMES PHILIPPINES YEARBOOK 316.

On the issue of the proper construction of Article 14 of the Constitution, Professo: Fernandez theorizes that such provision is only permissive. It is not self-executory⁴² and is subordinate to mandatory provisions like the inviolability of the separation of the Church and State. In case of conflict between the precepts of separation and the implementation of state assistance to education, the former must therefore prevail. Using this perspective, any law which supports private education must specifically exclude sectarian schools. As already explained, the GASTIPEA falls short of this requirement.⁴³

Conclusion: a middle ground?

Any discussion on the constitutional viability of state assistance to private education would inevitably highlight two basic and conflicting interests of society: the interest of making fundamental rights accessible to all and the interest of maintaining the moral constitution of the State.

The interest of making education accessible to all affords a fertile basis for justifying state assistance to private education. Operationalized as an essential implement of the State's police power, state assistance finds constitutional support in the welfare clauses of the Constitution.

On the other hand, the interest of preventing state entanglement with the Church provides the rationale for resisting any form of state assistance to private education. With most private educational institutions being owned by religious entities, state assistance would have to be armored with sufficient safeguards so as to deter any possible form of direct or indirect support. At the very least, any legislation of

⁴²CONST., art. 18, sec. 20 provides "that the First Congress must give priority in implementing the constitutional provisions on education".

⁴³The idea of conflict between mandatory and permissive provisions of the Constitution should be taken with reservations. It is a fundamental principle in statutory construction that the Constitution must be construed as a whole. Any putative contradiction is therefore unwarranted. Hence, it could be argued that both articles XIV and II, paragraph 6 are mandatory, although the former is not self-executory. Of course this argument would be of no use with respect to Republic Act No. 6728 as this law begs the conflict.

assistance must provide clear and specific guidelines with respect to its applicability.

The present law of state assistance to private education suffers from statutory inconsistency. It has been shown that the law specifies no consistent guidelines for its implementation. In short, the law lacks the requisite safeguards. If a middle ground is desired, that is, where both the separation of Church and State clause and the provision which spells the need for state support to private secular schools, would be respected, it is imperative that the inconsistencies in the present law be cured. Only then would any apprehension that the law is but an assistance to religion carrying feigned secular objectives be removed.