GOVERNMENT ASSISTANCE TO STUDENTS AND TEACHERS IN PRIVATE EDUCATION: AN ANALYSIS ON THE CONSTITUTIONALITY OF REPUBLIC ACT NO. 6728

Teodulo G. San Juan, Jr.[*]

I. INTRODUCTION

The importance of an efficient and accessible educational system in Philippine or any society for that matter cannot be overemphasized. An educated citizenry is indispensable in any nation's attempt to achieve economic, political, and socio-cultural growth.

Any effort by government to ensure the quality education is made accessible to all Filipinos must proceed from an admission that the private school system is a valid component of the Philippine educational system. For schoolyear 1992-1993, private institutions accounted for forty (40%) percent of all tertiary schools in the country.[1] In the same schoolyear, although private schools were responsible for the education of only seven (7%) per cent of the total number of students at the elementary level, student enrollment at private schools comprised thirty-five (35%) per cent of the total enrollment in the secondary level, and eighty (80%) per cent of the total enrollment in the tertiary level.[2]

Private educational institutions are presently faced with a rather compounded financial crisis. As private business entities, private schools must rely on their own means of generating income. In

---

[*] Fourth Year LL.B.

[1] 1993 PHILIPPINE STATISTIC YEARBOOK-10.4.

[2] *Id*, at 10.6.

most cases, income is derived solely from tuition fee payments. But as private institutions vested with a public function,[3] the ability of private schools to generate income is restricted by government regulations on tuition fee increases.

Responding to increasing clamor for government to provide financial assistance to private educational institutions,[4] Congress enacted Republic Act 6728, entitled "AN ACT PROVIDING GOVERNMENT ASSISTANCE TO STUDENTS AND TEACHERS IN PRIVATE EDUCATION AND APPROPRIATING FUNDS THEREFOR".

From a very general perspective, it is not likely any government assistance to private educational institutions could be seriously assailed on the ground that public funds should only be used for public education.[5] However, we must not lose sight of the fact that most private educational institutions in the Philippines are religiously affiliated, owned or operated. This then brings into operation the Constitutional provisions that prohibit any form of government assistance to religious or sectarian institutions.[6]

This paper shall attempt to provide a framework through which the constitutionality of Republic Act 6728, insofar as it deals with sectarian educational institution, may be determined. This writer will begin with an overview of American Supreme Court jurisprudence relevant to the matter of government aid to religious institutions. These cases will show the different "tests" employed by that Court in evaluating the constitutionality of a statute purporting to grant government assistance to sectarian schools. The survey of cases will

---

[3] House of Representatives, Transcript of Session Proceedings, at 559, 31 May 1989.

[4] 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, it was proposed that government also provide support for existing private educational institutions. This conference was held at the Ateneo de Manila University Professional Schools on 30 November 1988.

[5] PENA, *The Constitutionality of State Assistance to Private Education,* 66 PHIL. L.J. 25 (1991).

[6] CONST. Art. II, sec. 6; Art. III, sec. 5; and Art VI, sec. 29, par. (2).

include the Philippine case of *Aglipay v Ruiz*.[7] The paper will then employ the tests introduced in these cases to analyze the constitutionality of Republic Act 6728.

A. Constitutional Provisions

The 1986 Constitution mandates that the State shall "protect and promote the right of all citizen to qualify education at all levels and take steps to make such education accessible to all."[8] It is in pursuance of this very noble objectives that the Constitution further mandates that the State provide for free public education in the elementary and high school levels[9] and a system of scholarship grants, student loan program, subsidies and other incentives to student both public and private educational institutions."[10]

That there is a direct correlation between educational standards and financial capability is undisputed.[11] Unless provided with adequate financial resources, educational institutions will find it difficult, if not impossible to achieve the aspirations set out by the Constitution with regard to education. In view of this, the Constitution provides that "the State shall assign the highest budgetary priority to education."[12]

The 1986 Constitution is also the first to make specific mention of private educational institutions. Private and public schools are to assume complementary roles in the educational system.[13] This provision reflects an admission that the public school system, by itself, is not sufficient to enable the State to comply with its Constitutional mandate to provide a complete, adequate and integrated system of quality education Art. XIV, sec. 4 has been described as a "formal recognition of the necessary and even indispensable role which private

---

[7] 64 Phil. 201, (1937).
[8] CONST., Art. XIV, sec. 1.
[9] CONST., Art. XIV, sec. 2 (2).
[10] CONST., Art. XIV, sec. 2 (3).
[11] PENA, *supra*, note 5, at 24.
[12] CONST., Art. XIV, sec. 5 (5).
[13] CONST., Art. XIV, sec. 4 (1).

education plays in (Philippine) society.[14] It may be concluded, in view of these provisions, that private schools now assume a public function.

II. A REVIEW OF JURISPRUDENCE ON THE ESTABLISHMENT CLAUSE AND OTHER RELATED CONSTITUTIONAL PROVISIONS

A. The Establishment Clause and the Free Exercise Clause

The Constitution provides that "No law shall be made respecting the establishment of religion, or prohibiting the free exercise thereof."[15] More commonly known as "The Establishment Clause and the Free Exercise Clause", this provision is an exact copy of the First Amendment to the U.S. Constitution.

The First Amendment was a direct result of a collaboration between Thomas Jefferson and James Madison. It all began when Madison, then a young Virginia lawmaker, in consultation with Thomas Jefferson, the American minister in Paris, organized the opposition to a measure being presented before the Virginia House of Delegates entitled "A Bill Establishing a Provision for Teachers of the Christian Religion".[16] The proposed bill provided for state funding to support seminaries. In his famous "Memorial and Remonstrance", Madison argued that official sponsorship religion leads to tyrannical government and corrupted faith.[17] The writings of both Madison and Jefferson showed that they intended the separation between religion and government to be absolute.

American jurisprudence shows that there are two polar positions on the proper interpretation of the Establishment Clause and the Free Exercise Clause of the First Amendment the "non-preferential

---

[14] 2 J. BERNAS, CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 511 (1988).

[15] CONST., Art. III, sec. 5.

[16] Futterman, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools,* 81 GEO. L.J. (1993).

[17] *Id.* Madison wrote: "The Bill implies either that the Civil Magistrate is a competent judge of Religious Truth; or that the may employ religion as an engine of civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world; the second an unhallowed perversion of the means of salvation."

accommodation" doctrine (also known as the strict neutrality doctrine) and the "strict separation" doctrine.[18] The adherents of the non-preferential accommodation doctrine claim that the religion clauses of the Constitution permit various forms of government support for all religion, as long as it does not prefer one religion over another.[19] The strict separation adherents on the other hand argue that the Establishment Clause prohibits any form of government support for religion and the church.[20] The "strict-separationists, in defense of their view, always return to the original intention of the frames of the First Amendment, which was to effect an absolute separation between government and the church. The First Amendment, according to Jefferson," erected a wall between church and state. The wall must be kept high and impregnable".[21]

The First Amendment contains two distincts, though closely interrelated clauses that regulate the relationship between government and religion. The Establishment Clause relates to government aid, support or endorsement or religion, whereas the Free Exercise Clause is concerned with government interference with individuals' practice of religion.[22] To illustrate the manner by which the First Amendment regulates church and State relations, legal scholars have likened the two religion clauses to a pair of riverbanks, forming a parallel set of barriers through which government action must flow.[23] Like a pair of riverbanks, the First Amendment Clauses border on two side sides of government action affecting religion and define a narrow stream of permissible government activity.

The issue of church and State relations, particularly in the field of education, has become the focal point of very intricate and emotional legal debates during the last fifty years. The task of defining a proper interpretation of the First Amendment clauses has proven to be a very

---

[18] Weishaar, *School Choice Vouchers and the Establishment Clause,* 58 ALBANY L. REV. 545 (1994).

[19] *Id.*

[20] *Id.*

[21] Futterman, *supra,* note 16, at 715.

[22] Inskeep, *Zobrest v. Catalina Foothills School District: The Establishment Clause, Government Aid, and Religious Liberty,* 1994 UTAH L. REV. 1219 (1994).

[23] Futterman, *supra,* note 16 at 712.

difficult one for the U.S. Supreme Court. The complexity of this particular legal issue has caused the Court to be quire inconsistent in dealing with statutes that provide for government aid to sectarian schools. The Court initially sought to standardize its review of such statutes by developing "tests", only to find itself either modifying or abandoning the same later on. The cases in point will be summarized in the following section.

B. American Jurisprudence

The first case to arise in the contemporary setting, involving the conflict between religion and government aid programs, was *Everson v. Board of Education.*[24] In this case, the Court was called upon to rule on the constitutionality of a New Jersey town's policy of reimbursing parents for money spent on public bus transportation of their children to and from both public and private schools. The Court, applying the secular purpose test, upheld the statute on the ground that it was a public welfare statue comparable to policed or fire protection.

> "The state contributes no money to the schools.. Its legislation...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."[25]

The Court nevertheless took the opportunity presented by the case to declare its stand in regard to the proper interpretation of the First Amendment. The majority, per Justice Black, adopted the "strict separation" doctrine, stating that:

> "The First Amendment has erected a wall between church and State. That wall must be kept high and impregnable. We [the Court] could not approve the slightest breach."[26]

The case *of Abington School District v. Schempp*[27] did not involve the issue of government aid to sectarian schools. In *Abington,*

---

[24] 330 U.S. 1, 67 S. Ct. 540 (1947).
[25] *Id, at 513.*
[26] *Id.*

the issue of each school day of verses from the Bible, and the recitation of the Lord's prayer by students in unison.[28] The Court held that that statute violated the Establishment Clause and the Free Exercise Clause of the First Amendment, since the "State was conducting a religious exercise...that cannot be done without violating the "neutrality" required of the State [in relation to religion}."[29] It was in this case that the Court introduced a second "test" to complement the "secular purpose" test of *Everson.*

> "...The test in determining whether a legislative enactment violates the 'establishment clause'...is the purpose and primary effect of the enactment...there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion..."[30]

The next case involving government aid to religious schools was *Board of Education v. Allen.*[31] This case involved a New York stature requiring local public school authorities to lend secular textbooks, free of charge, to all secondary school students in public, private and religious schools.[32] Applying the tests developed in *Everson* and *Abington,* the Court upheld the New York statute on the ground that it had a secular purpose, and its primary effect neither inhibited nor advanced religion.[33] The Court found that no funds or books were furnished to parochial schools, and that the financial benefit was to the parents and children, not to the schools.[34] The Court made a very significant statement regarding the distinction between the secular and sectarian aspects of education in parochial schools. It noted that not all teaching in a sectarian school is religious, and that a line may be drawn to distinguish the sectarian aspect from the secular aspect of education I parochial schools. Funding would be allowed to private religious schools if the aid was to further secular programs and purposes.[35]

---

[27] 374 U.S. 203 (1963)
[28] *Id.*
[29] *Id.*
[30] *Id,* at 205.
[31] 392 U.S. 236 (1968)
[32] *Id,* at 244-245,
[33] *Id,* at 245.
[34] *Id.*
[35] Inskeep, *supra,* note 22 at 1223.

The case of *Walz v. Tax Commission*[36] did not involve state aid to sectarian schools. In *Walz*, the Court was made to rule on the constitutionality of a New York statute that exempted from real property tax, property owned by religious associations organized exclusively for religious purposes and used exclusively for carrying out such purpose.[37] In upholding the law, the Court introduced the entanglement test:

> "...[the] test of whether [the] effect of real property tax exemption of church property used exclusively for church purposes is excessive government entanglement with religion is one of degree...whether involvement is excessive and whether involvement is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement..."[38]

In 1971, the Court fashioned a three-prong test in *Lemon v. Kurtzman*[39] to determine the constitutionality of statutes under the Establishment Clause of the First Amendment. The first part of the test was that the statute assailed in *Everson.*[41] The second part of the test was that the statute's principal or primary effect must be one that neither advances nor inhibits religion.[42] The primary effect test was introduced by the Court in the case of *Board of Education v. Allen.*[43] As a third prong of the *Lemon* test, the court required that the assailed statute must not foster an excessive government entanglement with religion.[44] Adding to the test earlier developed in *Walz*[45] the Court interpreted this prong as prohibiting three kinds of entanglement, namely: substantive entanglement, administrative entanglement and entanglement that led to political divisiveness. Impermissible substantive entanglement takes place when there is an intertwining of religious and secular institutions in a given community, in such a way

---

[36] 397 U.S. 664 (1970).
[37] *Id., at 666.*
[38] *Id., at 612-13.*
[39] 403 U.S. 602 (1971).
[41] 330 U.S. 1, 67 S. Ct. 504 (1947).
[42] Lemon, 403 U.S. at 612-13.
[43] 392 U.S. 236 (1968).
[44] Lemon, 403 U.S. at 612-13.
[45] 397 U.s. 664.

as would permit "convenient access for religious exercises" to students in parochial schools. According to the Court, this happens when the religious schools to be supported are located close to churches, display religious symbols and paintings, employ nuns as teachers, and have a their primary purpose the propagation of a particular religious faith.[46] As a second form of entanglement, there is impermissible administrative entanglement when the statute provides for a comprehensive, discriminating and continuing state surveillance to ensure that state aid supports only secular education.[47] The third form of impermissible entanglement arises when a statute causes political division along religious lines. The Court stated that political division along religious lines was "one of the evils against which the First Amendment was intended to protect."[48] A statute is deemed to have failed this part of the entanglement test if its implementation will foster a considerable increase in political activity resulting in political division between those in favor of state aid to sectarian schools and those opposed to such.[49]

The Court in *Lemon* struck down as unconstitutional, statutes from Pennsylvania and Rhode Island that provided both state reimbursements and direct state contributions for teacher salaries, textbooks, and instructional materials in religious schools.[50] Both statutes passed the first two prongs of the *Lemon* test I that they each had a secular legislative purpose and did not have, as their primary effect, the advancement or inhibition of religion. The statutes were invalidated on the ground that their implementation resulted in excessive entanglement between government and religion.[51]

Lemon significant in that it showed a clear intention on the part of the U.S. Supreme Court to create a single standard by which the constitutionality of statutes may be tested in relation to the Establishment Clause. The three-prong *Lemon* test was itself a

---

[46] Lemon, 403 U.S. at 615-20.
[47] *Id*, at 615
[48] *Id.*
[49] *Id*, at 619.
[50] *Id*, at 606-07.
[51] *Id*, at 615.

synthesis of earlier test employed by the court in previous cases where statutes were assailed on First Amendment grounds. But even early on, the *Lemon* test would already be subjected to a lot of criticism. The excessive entanglement portion of the test was criticized for not providing any concrete guidance in decision making.[52]

Two years later, the test developed in *Lemon* would be called into action to determine the constitutionality of a statute that provided direct state aid to schools for maintenance and repair, as well as tuition grants and tax benefits for parents of children in private schools. In *Committee For Public Education and Religious Liberty v. Nyquist,*[53] the Court held that the assailed statute violated the Establishment Clause, particularly the effects prong of the *Lemon* test. The Court fond that with respect to maintenance and repair grants, simply "no attempt is made to restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes."[54] The Establishment Clause was violated because the "effect, inevitably, [was] to subsidize and advance the religious mission of sectarian schools."[55] The Court did not make any determination if the statute in *Nyquist* complied with the entanglement prong of the *Lemon* test. One legal scholar suggest that perhaps the Court was beginning to become aware of the apparent contradiction between the second and third prongs of the *Lemon* test.[56]

The Court strictly applied the *Lemon* test in *Meek v. Pittenger.*[57] This case involved a Pennsylvania statute providing for State expenditures in connection with the education of students in non-public schools: (1) loans of textbooks "acceptable for use in" public

---

[52] Weishaar, *supra*, note 18, at 549. (Noting that a literal reading of this prong would require a virtual ban on administrative entanglement; this would prevent such fundamental governmental oversight as ensuring that parochial schools meet minimum state educational standards).

[53] 413 U.s. 756 (1973).

[54] *Id,* at 774.

[55] Futterman, *supra* , note 16, at 718.

[56] *Id.* To ensure that a statute does not violate the effects prong of the *Lemon* test, the statute may have to provide for mechanisms of surveillance and inspections, thereby creating a type of administrative entanglement prohibited by the third prong of the *Lemon* test.

[57] 421 U.S. 349 (1975).

schools to students in private schools; (2) direct loans to non-public schools of instructional materials and equipment "useful to the education of non-public school students" (periodicals, maps, charts); (3) auxiliary services (counseling, testing, psychological services, speech and hearing therapy and other related services).[58] the Court upheld the aspect of the law that provided textbooks to non-public schools[59] but invalidated the provisions of the law that provided for the loan of other instructional material[60] and for remedial and therapeutic services to non-public schools.[61] The loaning of textbooks was upheld in this case because the benefit was to the parents and the children, and not to the parochial schools directly, and the program applied to all students.[62] With regard to the loan of instructional material to private schools, this was held to be unconstitutional because the aid in this case was provided to parochial schools directly and not incidentally.[63] The loan of instructional equipment therefore violated the effects prong of the *Lemon* test. In *Meek*, the Court abandoned its earlier attempts to determine whether the aid would be used for secular or religious purposes, noting instead that "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many...church-related ... schools",[64] the *Meek* Court 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.[65]

The case of *Wolman v. Walter*,[66] was another case where the Court strictly applied the *Lemon* test to determine the constitutionality of a statute providing for state aid to sectarian schools. The statute provided private school students with books,

---

[58] *Id*, at 354.
[59] *Id*, at 359.
[60] *Id*, at 366.
[61] *Id*, at 374.
[62] *Id*, at 360-61. The books involved were secular textbooks only.
[63] *Id*, at 365.
[64] *Id.*
[65] Pena, *supra*, note 5, at 31.
[66] 433 U.S. 229 (1977).

instructional equipment, standardized tests and scoring, diagnostic services to be held at the private schools, therapeutic services on public property, and field trip transportation.[67] The Court upheld the statute except the part that provided for the loan of secular instructional material and equipment and the part that provided for field trip transportation to non-public school pupils. The court held that the loan of secular instructional material and equipment and the part that provided for field trip transportation to non-public school pupils. The Court held that the loan of secular instructional material and equipment such as tape recorders, projectors, and maps had the same effect as direct aid to parochial schools because the aid would inevitably support the religious purpose of the schools.[68] Focusing once again on the inseparability of the secular and religious characters of lower sectarian schools, the Court held that substantial aid to the educational function of such schools necessarily results in aid to the sectarian enterprise as a whole.[69] With regard to the state sponsored field trips, the Court looked unfavorably upon the fact that the private school controlled the trips. The Court was unwilling to take the risk of the teacher fostering religion in state-sponsored buses.[70] The Court stated that it was not assuming that private-school teachers would act in bad faith, but that a religious person in a religious school would "inevitably experience great difficulty in remaining religiously neutral."[71] Using an analysis similar to *Meek* and *Allen* the Court

[67] *Id,* at 233. The Ohio statute authorized expenditure of public funds to: (1) purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools, and to loan such textbooks to nonpublic school pupils or their parents; (2) supply for use by non-public schools such standardized tests and scoring services as are in use in public schools to measure the progress of students in secular subjects; (3) provide speech, hearing and psychological diagnostic services (also available to public school student) to non-public school students, to be performed at public schools and administered by government personnel; (4) provide therapeutic, guidance and remedial services to non-public school students identified as needing specialized attention, to be administered in public schools by government personnel; (5) purchase and loan to non-public schools "incapable of diversion to religious use"; (6) provide field trip transportation and services to non-public school pupils (same provided to public school pupils) with the choice of destination being made by the non-public school teacher.

[68] *Id,* at 249-50.

[69] *Id,* at 251.

[70] *Id,* at 254.

[71] *Id.*

upheld the loaning of secular textbooks to private school pupils and their parents.[72]

The Court shifted away from a rigid application of the *Lemon* test in *Meuller v. Allen*.[73] This case involved a Minnesota statute which allowed state taxpayers, in computing their state income tax, to deduct expenses incurred in providing tuition, textbooks and transportation for their children attending elementary and secondary school, whether or not the school was religious or public.[74] The Court held that the statute had a legitimate secular purpose and did not have the primary effect of either advancing or inhibiting religion.[75] Furthermore, the Court found that having state officials determine which textbooks qualified for tax deduction was not an "excessive entanglement" between government and religion.[76] The court relied on the fact that the assistance arrived at parochial schools because of the individual choices of parents to send their children to such schools. In finding that "indirect benefits" to parochial schools did not offend the First Amendment, the court stated that "...The attenuated financial benefits flowing to parochial schools [are removed from] the evils against which the Establishment Clause was designed to protect."[77] Although it would seem as if the *Meuller* Court abandoned the third prong of the *Lemon* test,[78] the Court found itself applying the "excessive entanglement" test in invalidating a New York statute in the case of *Aguilar v. Felton*.[79]

The statute in *Aguilar* provided for remedial services including reading, math, english, and guidance services to private schools to be administered by volunteer public school teachers who would then be teaching in private schools.[80] The law also provided for an elaborate system of supervision and inspection to ensure that the services were

---

[72] *I d*, at 237.
[73] 463 U.S. 388 (1983).
[74] *Id*, at 391.
[75] *Id*, at 394.
[76] *I d*, at 403.
[77] *Id*, at 399.
[78] Futterman, *supra*, note 16, at 724.
[79] 473 U.S. 402 (1985).
[80] *Id*,, at 407.

used solely for secular purposes.[81] The statute was held to be unconstitutional, not because the parochial schools received an impermissible benefit, but because the supervision scheme constituted an impermissible administrative entanglement and courted political entanglement based on religious divisions.[82] As if finally admitting what it had earlier suspected as a seeming contradiction between the second and third prongs of the *Lemon* test, the Court held that the steps needed to ensure that the Establishment Clause was not violated, i.e. supervision and inspection, themselves violated the Clause.[83] In short, *Aguilar* meant that the provision of aid to religious schools even for purely secular purposes was all but forbidden. Justice Rehnquist, in his dissent, criticized the "Catch-22" paradox of the *Lemon* test – whereby "aid must be supervised to ensure no entanglement, but the supervision itself is held to cause an entanglement."[84]

Just before *Aguilar* the Court had adopted a rigid application of the *Lemon* test in declaring as unconstitutional a statute that provided for "Shared Time" and "Community Education" programs at religious schools.[85] The court in *Ball* found both programs unconstitutional under the second and third prongs of the *Lemon* test. As in *Meek* and *Wolman*, the court held that the secular and sectarian aspects of a religious institution were "inextricably intertwined", that public school teachers teaching in a religious institution might be influenced by its [the religious school's] sectarian nature.[86] Furthermore, the Court concluded that although the programs had a secular purpose of providing additional educational opportunities for children, the programs created impermissible substantive entanglement because "by

---

[81] *Id,* at 409.

[82] *Id,* at 415.

[83] Futterman, *supra,* note 16, at 722.

[84] Aguilar, 473 U.S. at 420-21

[85] Grand Rapids School District v. Ball, 473 U.S. 373 (1985). The "Shared Time" program offered classes during the day in private schools, with full-time public education teachers, while the "Community Education" programs offered after-school classes, with part-time publicly employed teachers (who for the most part were full-time non-public teachers at the schools where the classes were held).

[86] *Id,* at 380.

teaching these classes in religious schools, the symbolic union between church and state was too great."[87]

In *Ball* and *Aguilar*, the Court gave every indication that it was going to return to a strict application of the *Lemon* test in determining the constitutionality of state aid to parochial schools in relation to the Establishment Clause of the First Amendment. The leniency it had earlier displayed in *Meuller* was absent in the Court's analysis of the assailed statutes in these two cases. Legal scholars attribute this latest development in the Courts attitude towards *Lemon* to the efforts of Justice Brennan who sought to shift the Court away from a perspective of "non-preferential accommodation of religion" to one of "strict-separation between church and state".[88] Justice Rehnquist, who wrote the majority opinion in *Mueller*, continued to urge the Court to return to the original principle of drawing lines between the secular and religious functions of parochial schools in his dissenting opinions in *Aguilar* and *Ball*.[89] He advocated an abandonment of the *Lemon* test, and argued that for as long as the aid was used for clearly defined secular purposes and reached the religious institution through the constitutionally impenetrable choice of the individual student or her parent, the same would be permissible under the Establishment Clause.[90]

The Court's inconsistency in applying *Lemon* was highlighted when it shifted once again, away from a strict application of the three-prong test in the case of *Witters v. Washington Department of Services*.[91] Decided just less than a year after *Ball*, the Court in *Witters* considered a challenge to a Washington statute authorizing state rehabilitation assistance for the blind. The petitioner was a student attending a Christian college and studying to become a pastor, missionary or youth director. His application for rehabilitation assistance under the statute consisting of payments for his education, was denied by the state agency on the ground that his training

---

[87] *Id*, at 390.
[88] Futterman, *supra*, note 16, 721-23.
[89] *Id*, at 722.
[90] Meek, 421 U.S. at 395 (Rehnquist, J. dissenting).
[91] 474 U.S. 481 (1986)

constituted religious instruction for which the State Constitution prohibited the use of public funds.[92] Ostensibly applying *Lemon*, the Court upheld the grant of vocational assistance based on the following grounds: First, the statute had a secular purpose - to aid the blind in acquiring employment.[93] Second, the Court held that there was no violation of the effects prong because the effect of the aid program was to benefit the student, rather than the religious school.[94] The Court's ruling in *Witters* solidified the choice principle announced in *Meuller*. The Court said that the "aid ultimately flowed to the religious institution...only as a result of the genuinely independent and private choice of the individual."[95] Once the choice of a private individual is interposed between the government providing aid and the private religious school receiving it, the fact that the aid sponsors both secular and religious activities is seemingly inconsequential. Even the line-drawing between secular and religious functions introduced in *Everson* and *Lemon* seemed to have been abandoned. The state is now permitted to find both so long as the decision to support religious education is made by the individual, and not by the State. It must be noted that the entanglement prong of the *Lemon* test was not even raised by the Court in *Witters*. The Washington statute did not provide for any system for ensuring that government money went only for secular purposes.

In its decision in the case of *Lee v. Weisman,*[96] the Court did not apply nor mention the *Lemon* test in its analysis. This case involved the acts of a school district in inviting various clergy members of different denominations to give invocations and benedictions at graduation.[97] The school district also provided the clergy with guidelines for nonsectarian prayers.[98] Instead of using *Lemon* the Court based its decision to invalidate the assailed program of the Rhode Island school district on a perceived "coercion" that students feel

---

[92] *Id,* at 483.
[93] *Id,* at 485-86.
[94] *Id,* at 488.
[95] *Id,* at 488.
[96] 112 S. Ct. 2649 (1992).
[97] *Id,* at 2652.
[98] *Id.*

to attend their graduation ceremony.[99] One commentator stated that *Weisman* demonstrates how the Court has simply ignored the *Lemon* test when faced with difficult decisions.[100]

Many legal scholars thought that the Court, after ignoring the three-prong test altogether in *Weisman* would finally discard the *Lemon* test as a guide in its analysis of state aid to parochial schools.[101] In 1993, the Court applied a rather "weakend" version of the *Lemon* test in *Lamb's Chapel v. Center Moriches Union Free School District.*[102] This case involved a New York secondary school's policy of prohibiting the use of its facilities by religious groups, pursuant to the New York Education Law and the Establishment Clause of the Constitution.[103] The school denied a request by the plaintiffs, who wanted to present a series of movies involving Christian themes.[104] In holding that the denial of plaintiff's request was improper, the Court declared that an "open access" policy on the part of the school would be more consistent to the neutrality required of government in dealing with religious groups. The Court stated that a public school must make its property available to all groups, regardless of religious ends.[105] Relying on the effects prong of *Lemon* the Court ruled that the school could not exclude the program on the basis of its religious message, as the effect of equal access would not be an advancement of religion.[106] The *Lamb's Chapel* decision showed that the Court had adopted the doctrine of "non-preferential accommodation of religion" in its analysis of state support to religion. So long as government does not prefer one religion over another, aid to all religions is permitted by the Establishment Clause.

In a more recent case, *Zobrest v. Catalina Foothills School District,*[107] the Court solidified its position that neutrally provided state

---

[99] *Id.*
[100] Inskeep, *supra,* note 22, at 1229.
[101] *Id.*
[102] 113 S. Ct. 2141 (1993).
[103] *Id,* at 2144.
[104] *Id.*
[105] *Id,* at 2148.
[106] *Id.*
[107] 113 S. Ct. 2462 (1993).

benefits do not violated the Establishment Clause merely because religious institutions might receive a benefit. The issue in *Zobrest* was the validity of a school district's act in denying the plaintiff's application for the services of a sign language interpreter under the "Individuals with Disabilities Act" (IDEA).[108] Plaintiff *Zobrest* is profoundly deaf, and requires the services of a sign-language interpreter.[109] By the time of application, *Zobrest* was enrolled in the Salpointe Catholic High School.[110] The Supreme Court reversed the Court of Appeals ruling and held that *Zobrest* was entitled to the services of a sign-language interpreter. The Court stated that neutrally provided benefits do not violate the Establishment Clause merely because religious institutions might receive a benefit.[111] The Court noted that religious groups are not precluded from participating in general government welfare programs that are neutrally granted to a broad range of citizens.[112] Relying heavily on *Meuller* and *Witters,* the Court reiterated the constitutionality of neutrally based government aid programs which benefit a broad class without reference to religion, even in cases in which a religious may obtain an attenuated benefit.[113] The Court pointed out that the benefit to the religious school, as in *Witters*, was a result of the individual beneficiary's decision.[114] The Court further noted that the law did not create a financial incentive for parents to choose a religious school over a public school.[115] Quite significantly, neither the majority nor the dissenting opinions even mentioned the *Lemon* test. Its noticeable absence from any of the opinions' analyses may suggest a relaxation, or even an abandonment the often-criticized *Lemon* test.[116]

A review of the decisions of the U.S. Supreme Court on the constitutionality of state aid to parochial schools, from *Everson* to

---

[108] *Id,* at 2464.
[109] *Id.*
[110] *Id.*
[111] *Id,* at 2466.
[112] *Id.*
[113] *Id.*
[114] *Id,* at 2467.
[115] *Id.*
[116] Pierce, *Making Aid Without Lemon*?: *Zobrest v. Catalina Foothills School District,* 63 U. CIN. L. REV. 597 (1994).

Zobrest, reveals an inability on the part of the Court to adopt and maintain a consistent approach to its analysis of government acts vis-à-vis the Establishment Clause. The *Lemon* test still remains to be an authority, as the same has not been explicitly abandoned by the Court. One legal scholar suggests that the Court's reluctance to completely abandon the *Lemon* test may be due in part to the Court's recognition that there is something basically right about analyzing for constitutionality a statute's "purpose", "effect", and "entanglement."[117] Another view is that the Court has not abandoned the *Lemon* test because it has failed to develop any satisfactory alternative. Justice O'Connor stated in her concurring opinion in *Wallace v. Jaffree*[118] that she is "...not ready to abandon all aspects of the *Lemon* test, ...[although]... the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment."[119]

The *Lemon* test is based on *Everson's* "strict separationist" ideal. Any challenge to replace *Lemon* must determine the threshold issue of whether strict separation between church and state is the proper goal.[120] Cases like *Meuller, Witters* and *Zobrest* are more consistent with the "non-preferential accommodation" doctrine, which would allow state aid to all religions, so long as such aid is neutrally based, and that no religion is preferred over another. This type of analysis is founded on the premise that any prohibition of state aid under the Establishment Clause must not have the effect of violating the individual's rights under the Free Exercise Clause.[121] The *Zobrest* Court moved toward the use of new standard - the neutrality standard. This standard utilizes an equal protection type of analysis to allow government to enact laws that apply equally to all religious and non-religious organizations. Perhaps in recognition of the substantial role

---

[117] Inskeep, *supra*, note 22, at 1240.

[118] 472 U.S. 38 (1985).

[119] *Id*, at 68-69.

[120] Inskeep, *supra*, note 22, at 1241.

[121] *Id*, at 1240. "...neutrality called for by the establishment clause appears to conflict with the neutrality required by the free-exercise clause...[D]oes the free-exercise clause require the state "neutrality" to subsidize...[students who] choose[to attend] a sectarian school, or does the establishment clause require the state to maintain "neutrality" by denying assistance to such students."

that religion plays in American society, the decision in *Zobrest* marks an evolution of Establishment Clause doctrine from a complete separation of religion and government to a substantial integration of the two.[122]

C. *Gurney V. Ferguzon*

The case of *Gurney v. Ferguson*[123] is a 1941 decision of the Supreme Court of the State of Oklahoma. The issue in this case was the constitutionality of an Oklahoma statute which provided that 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.[124] The statute assailed in *Gurney* was very similar to the one upheld by the U.S. Supreme Court in *Everson*. The Oklahoma Supreme Court struck down the challenged law, not on the basis of the Establishment Clause of the First Amendment, but rather on the basis of Art. 2 Sec. 3 of the Oklahoma 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 institutions as such.

This provision almost duplicates Art. VI, Sec. 29(2) of the Philippine Constitution. The Oklahoma Court held that the term "sectarian institutions" as employed in the aforementioned Constitutional provision, includes a sectarian or parochial school which is "owned and controlled by a church and which is avowedly maintained and conducted so that the children or parents of that particular faith would be taught in that school the religious tenets of the church."[125] Thus, Court held that free bus transportation to

---

[122] Dietrich, *Aobrest v. Catalina Foothills School District: Equal Protection, Neutrality and the Establishment Clause*, 43 CATHOLIC U.L. REV. 1238 (1994).

[123] 122 P 2d 1002 (1941).

[124] *Id*, at 1003.

[125] *Id.*

parochial school children falls under the kind of the state assistance proscribed by the Oklahoma Constitution.

The plaintiffs in this case argued that there was no real benefit or support for any sectarian school or institution because the benefits of the statute accrued to the individual child as distinguished from the school as an organization.[126] Rejecting the child-benefit theory espoused by the plaintiffs, the Court cited *Judd v. Board of Education*[127], stating:

> "It is true this use of public money and property aids the child, but it is not 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."[128]

D. Philippine Jurisprudence: *Aglipay V. Ruiz*

The leading authority in Philippine jurisprudence with regard to the principle of the separation of church and state is *Aglipay v. Ruiz*.[129] The Petitioner in this case sought the issuance of a writ of prohibition, to prevent the Director of Posts from issuing and selling postage stamps commemorative of the Thirty-third International Eucharistic Congress organized by the Roman Catholic Church.[130] the Director of Posts had announced his intention of ordering the issuance of such stamps under the authority of the power granted to him by Sec.

---

[126] *Id.*
[127] 278 N.Y. 200 (1938).
[128] Gurney, 122 P 2d at 1003-04 (1941).
[129] 64 Phil. 201 (1937).
[130] *Id,* at 203.

2 of Act No. 4052.[131] The respondent Director claims that the questioned issuance of the postage stamps was "...not inspired by any sectarian feeling to favor a particular church or religious denomination."[132] The only purpose for the issuance of the stamps was not to benefit the Roman Catholic Church, but rather to take advantage of an event of international importance to "...advertise the Philippines an attract more tourists to this country."[133] The petitioners on the other hand, contended that the proposed act of the Director of Posts was violative of Art. VI, sec. 13(3) of the Constitution.[134]

The Court upheld the proposed act of the Director of Posts, on the ground that it violated neither Art. VI, sec. 13(3) of the 1935 Constitution, nor the principle of separation of church and state.[135] The Court stated that the "Government 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."[136] Citing *Bradfield v. Roberts*, [137] the Court stated that the "...main purpose [of government acts] should not be frustrated by its subordination to mere incidental results not contemplated."[138]

---

[131] *Id*, at 207. Act No. 4052 Sec. 2 reads that the Director of Posts, with the approval of the Secretary of Public Works and Communications, is hereby authorized to dispose of the whole or any portion of the amount herein appropriated in the manner indicated and as often as may be deemed advantageous to the Government.

[132] *Id*, at 209.

[133] *Id.*

[134] *Id*, at 205. Art VI, sec. 13(3) of the 1935 Constitution is substantially similar to Art. VI Sec. 29(2) of the 1987 Constitution. "No public money or property shall ever be appropriated, applied, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or for the use, benefit, support of any priest, preacher, minister, or other religious teacher or dignitary as such, except when such priest, preacher, minister, or dignitary is assigned to the armed forces or to any penal institution, orphanage, or leprosarium."

[135] *Id*, at 207. The Court did not refer to Art. VI sec. 7 of the 1935 Constitution which contained the Establishment Clause. Instead, the Court stated that the prohibition in Art. VI sec. 13(3) was a direct corollary of the principle of separation of church and state.

[136] *Id*, at 209.

[137] 175 U.S. 295; 20 S.Ct. 121.

[138] Aglipay, 64 Phil. at 210 (1937).

III. R.A. 6728: "GOVERNMENT ASSISTANCE TO STUDENTS AND TEACHERS IN PRIVATE EDUCATION" (GASTPE)

Traditionally, government has limited its involvement in the educational system to that of establishing and maintaining public educational institutions. Any government intervention with regard to private schools would be limited to regulating academic standard and tuition fee. In recent years however, government has found it increasingly necessary to modify its involvement vis-à-vis private educational institutions to include that of providing private schools with financial assistance. There is no better proof of this than Art. XIV sec. 2(3) of the Constitution and Republic Act 6728. This change in attitude on the part of government may be attributed to the following factors:

> (1) A recognition on the part of government that private schools perform a very important public function. The co-sponsors of House Bill 24758 which eventually was enacted into law as Republic Act of 6728 were very emphatic in pointing out that private schools are an indispensable part of the educational system.[139] The Constitution itself declares that private and public educational institutions are to play complementary roles in Philippine society.[140] The State is aware that it cannot rely solely on the public school system to comply wit the Constitutional mandate of providing quality education to all.[141]
>
> (2) A recognition on the part of government that there is a direct correlation between financial capability and education standards. Quality education is expensive.[142] To compound this problem, private educational institutions are subject to government regulation with regard to the charging of tuition fees. Unlike other private business enterprises, private schools generally find it more difficult to cope with the increasing cost of operations because of government restrictions on its capacity to earn from its primary source of income, i.e. tuition fees.[143]

---

[139] House of Representatives, *supra,* note 3 at 555.

[140] Art. XIV Sec. 4(1).

[141] Art. XIV Sec. 1.

[142] House of Representatives, *supra,* note 3, at 557.

[143] *Id,* at 558, Representative Ramon Bagatsing Jr. of Manila, in his sponsorship speech for H.B. 24758, stated that "...private schools are in a quandary, already faced with the present

> (3) A realization on the part of government that it is actually more cost-efficient to subsidize private educational institutions, than it is to establish and maintain more public schools. The average per capita cost of education in many public schools is higher than that of private schools.[144]

Republic Act 6728, otherwise known as the "Government Assistance to Students and Teachers in Private Education (GASTPE) Act" was passed into law on 10 June 1989. By the very terms of its Declaration of Policy in Sec. 2, GASTPE was enacted to implement the mandate of the Constitution to promote and make quality education accessible to all.[145] The same provision of GASTPE further recognizes the complementary roles of public and private education in the educational system, as well as the need to improve the quality of private education by maximizing the use of its existing resources.[146]

A. Salient Features of R.A. 6728

The grant or denial of financial assistance under GASTPE shall depend on compliance with the criteria set under Sec. The factors to be considered in making such a determination shall include: (1) Regional socio-economic needs; (2) The academic qualifications of the applicant; (3) The financial needs of the student; (4) The financial and academic qualifications of the school wherein the student-applicant is enrolled or plans to enroll; (5) National development needs, i.e. whether or not the course wherein the student is enrolled or plans to enroll is among those identified by the State Assistance Council as "priority courses."

---

serious economic crisis...a mess aggravated by [the] stringent government regulations on tuition fee increase."

[144] *Id,* at 563. Representative Carlos Padilla of Nueva Vizcaya, Chairman of the House Committee on Education and Culture, stated that where a public high school would need an annual appropriation of P1.5 million for 500 students, the government will spend only P60,000 if it sends the same number of students to a private school under the Education Service Contracting Scheme. *See* Pena, *supra*, note 5, at 25.

[145] CONST., Art. XIV, Sec. 1.

[146] R.A. 6728, Sec. 2.

Section 4 of R.A. 6728 enumerates the types of assistance to be extended by government to students, teachers or institutions in private education.[147]

1. Tuition fee supplement for students in private high schools

The law provides that government shall extend financial assistance for tuition for students in private high school through a voucher system.[148] Under this provision of R.A. 6728, a student enrolled in a private secondary school shall be provided with a voucher equal to two hundred ninety pesos (P290.00). The student then presents this voucher to the school during enrollment as payment for tuition and other fees. The government, upon presentment of the voucher, shall reimburse the school within sixty (60) days from the close of the registration period.

To be entitled to "voucher assistance", the student applicant must: (1) be enrolled in a school that charges less than one thousand five hundred pesos (P1,500) per year in tuition and other fees during 1988-89 or such amount in subsequent years as may be determined from time to time by the State Assistance Council (SAC); and (2) reside in the same city or province in which the high school is located unless the student has been enrolled in that school [located in a place other than that where he resides] during the previous academic year.

The law requires that the money extended as financial assistance under the voucher system shall be used in accordance with the following proportions: (1) seventy percent (70%) shall go to the payment of salaries, wages, allowances and other benefits of teaching

---

[147] *Id,* Sec. 4, "...Assistance to private education shall consist of: (1)Tuition fee supplements for students in private high schools, including students in vocational and technical courses; (2) High School Textbook Assistance Fund...; (3) Expansion of the existing Educational Service Contracting (ESC) Scheme; (4) The voucher system of the Private Education Student Financial Assistance Program; (5) Scholarship grants to students graduating as valedictorians and salutatorians from secondary schools; (6) Tuition fee supplements to student in private colleges and universities; (7) Educational Loan Fund; (8) College Faculty Development Fund.

[148] *Id,* Sec. 5.

and non-teaching personnel except administrators who are principal stockholders; (2) twenty percent (20%) shall go to the improvement or modernization of buildings, equipment, libraries, laboratories, gymnasia, and similar facilities and to the payment of other costs of operations. The law prohibits the direct use of government subsidy for payment of salaries of teachers of non-secular subjects.

Private school beneficiaries are required to maintain a separate record of accounts for all assistance received from government. The law further requires that this record be made available for periodic inspection by the Department of Education, Culture and Sports.

2. High School Textbook Assistance Fund

Under this program, students in private secondary schools shall be provided with financial assistance for the purchase of high school textbooks.[149] This program shall be made available only to students enrolled in private high schools charging less than one thousand five hundred pesos (P1,500.00) per year for school year 1988-89, or such amount in subsequent years as may be determined by the State Assistance Council. The law requires that the textbooks to be purchased must be included in the list approved by the DECS, and must be in support of the implementation of the Secondary Education Development Program. The law further provides that the fund shall not be used for the purchase of books that will advance or inhibit sectarian interests.

3. Expansion of the Existing Educational Service Contracting Scheme (ESC)

The Educational Service Contracting Scheme is a program in which the government enters into contracts with private schools, for the accommodation in such schools of excess students from public high schools.[150] The government, through the Department of Education Culture and Sports (DECS) shoulders the tuition and other fees of these students, which it pays directly to the private high school at the

[149] *Id,* Sec. 6.
[150] *Id,* Sec. 7.

end of the schoolyear. The law provides that the amount of subsidy or assistance under the SEC shall not exceed the amount determined as per student cost in public high schools.

The government shall also enter into similar contracts with private schools in communities where there are no public high schools. The tuition and other fees of students who enroll in private schools under the ESC shall likewise be shouldered by the government.

4. The Voucher System of the Private Education Student Financial Assistance Program (PESFA)

A voucher system shall also be provided for students enrolled in private colleges and universities.[151] "Voucher subsidy" shall be available only to students who are enrolled in private universities charging an effective per unit tuition rate of eighty pesos (P80) or less, or such amount in subsequent years as may be determined by the State Assistance Council. The amount of the voucher shall be the equivalent of the tuition fee increase for the year during which the student shall re-enroll.

The law prescribes certain requirements that the private school must comply with before it can raise tuition fees. The law provides that the private college or university cannot increase tuition fees unless it complies with the consultation and transparency requirements in Sec. 10 of R.A. 6728. Furthermore, private schools falling within this program cannot increase their tuition fees by more than twelve pesos (P12.00) per unit.

To be eligible for voucher assistance, the student must be enrolled in a priority course as determined by the Department of Education Culture and Sports (DECS). The same provisions with regard to periodic with regard to periodic inspection and allocation of subsidy received under the high school voucher system shall apply to private colleges and universities receiving government subsidy under the PESFA voucher program.

---

[151] *Id*, Sec. 9.

5. Education Loan Fund: Study Now, Pay Later Plan (SNPLP)

This program provides for the creation of a Students' Loan Fund to be administered by the Department of Education Culture and Sports (DECS).[152] The fund shall be used to finance educational loans to cover matriculation and other school fees and educational expenses for textbooks, subsistence and board and lodging.

The amount covering payments for tuition, matriculation, and other school fees shall be paid directly to the private school in which the eligible student under this program is enrolled. The student-debtor shall then pay back the loan after completion of his studies, and only after the student had been employed for at least two (2) years.

The law provides under Sec. 11(d) that the Social Security System Fund shall make low interest educational loans available to private educational institutions for school buildings and/or improvement of their plants and facilities.

6. College Faculty Development Fund

The law provides for the creation of a College Faculty Development Fund to be administered by the Department of Education Culture and Sports (DECS).[153] the fund shall be used to finance scholarships for graduate degrees and non-degree workshops or seminars for faculty members in private schools.

The law requires that the scholarship be in any of the priority courses as determined by the Department of Education Culture and Sports(DECS). The law further mandates that the fund cannot be awarded to promote or inhibit sectarian purposes.

---

[152] *Id,* Sec. 11.
[153] *Id,* Sec. 11.

7. General Provisions of R.A. 6728.

The law provides for the creation of a State Assistance Council which shall be responsible for policy guidance and direction, monitoring and evaluation of new and existing programs, and the promulgation of rules and regulations.[154] The Department of Education Culture and Sports (DECS) will be responsible for the day to day administration and program implementation.[155]

IV. AN ANALYSIS ON THE CONSTITUTIONALITY OF R.A. 6728

The review of American and Philippine jurisprudence presented in Section II of this paper shows how the complexity of the issue of government aid to sectarian educational institutions has prompted the Courts to resort to "tests" to determine its constitutionality. The focus of the next section will be on an analysis of the constitutionality of R.A. 6728 based on three of the more important "tests" introduced in the American and Philippine cases: (1) The constitutionality of R.A. 6728 vis-à-vis Art. VI Sec. 29(2) of the Philippine Constitution; (2) The constitutionality of R.A. 6728 under the *Lemon v. Kurtzman* test; and (3) The constitutionality of R.A. 6728 under the *Zobrest v. Catalina Foothills* test of neutrality.

A. The constitutionality of R.A. 6728 *vis-à-vis* Art. VI Sec. 29(2) of the Philippine Constitution

1. A case for unconstitutionality

The Philippine Constitution mandates the real and absolute separation of church and state. The basic provision for this principle is Art. II, Sec. 6 which states that: "The separation of Church and State shall be inviolable." The companion provision of the separation clause is Art. III Sec. 5 which contains the Establishment and Free Exercise Clauses. These provisions were copied from similar clauses under the U.S. Federal Constitution.

---

[154] *Id.* Sec. 14.
[155] *Id.*

However, unlike its American counterpart[156], 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..."[157]

A provision in the Oklahoma State Constitution, substantially similar to Art. VI sec. 29(2) was the basis of the Oklahoma State Supreme Court's ruling in *Gurney v. Ferguson.* The Court held that the act of the State government of providing private school students with free bus service to and from parochial schools constituted "direct aid" to such schools, in violation of Art. 2 Sec. 5 of the Oklahoma State Constitution.[158] The Court held that the expenditure of public funds for the purpose of providing free bus transportation to students of public schools, "in its broad and true sense...[is one made]... in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions."[159] This same program may not constitutionality be extended to students of private parochial schools, since the State has "...no authority to maintain a sectarian school."[160]

The Oklahoma Court rejected the plaintiff's theory that there was really no benefit extended to the sectarian schools under the busing program since the actual benefits accrue to the individual child and not to the sectarian school as an institution.[161] Adopting the theory that a student is an essential part of any school[162], the Court opined that any state assistance that would be benefit tot he sectarian school.

It is on the basis of Art. VI sec. 29(2) that Professor Perfecto Fernandez has unequivocally opined that any form of state aid to

---

[156] Pena, *supra*, note 5, at 34.
[157] CONST. Art VI, sec. 29(2).
[158] Gurney, 122 P 2d at 1004.
[159] *Id.*
[160] *Id.*
[161] *Id, at* 1003.
[162] *Id.*

sectarian educational institutions is prohibited by the Constitution.[163] He shares the view of Justice Blackmun, in his dissent in *Committee for Public Education and Religious Liberty v. Regan*[164] that schools are "integral units of every church." Any assistance to the educational function of such schools results in aid to the sectarian institution "as such", which in turn necessarily results in aid to the church as a whole.[165]

Professor Fernandez was not unaware that, if viewed collectively, the provisions of sections 1-5 of Art. XIV would seem to suggest that state support of private schools is allowed under the Constitution. He is of the view that since Art. VI sec. 29(2) is prohibitory in nature, it should prevail over the permissive character of Art. XIV sections 1-5.[166] His conclusion is that a correct and constitutional interpretation of the provisions of Art. XIV sec. 2(3), would exclude sectarian educational institutions from the coverage of "private schools" entitled to government financial support.[167]

Under a *Gurney* type of analysis, even the intervention of the "private choice"[168] of the individual student will not be sufficient to remove the taint of unconstitutionality of the type of aid provided under R.A. 6728. As stated earlier, the *Gurney* Court rejected the "child-benefit theory" espoused by the plaintiffs. Even assuming that *Gurney* is not adopted by our Supreme court in the event that it is called upon to determine the constitutionality of R.A. 6728, the kind of

---

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

[164] 100 S. Ct. 840 (1980).

[165] Fernandez, *supra*, note 163.

[166] *Id.* Fernandez states: "...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."

[167] *Id.*

[168] Meuller, 463 U.S. 388 (1983).

government assistance provided under GASTPE may still be deemed to be "indirect assistance" to private sectarian institutions, likewise prohibited under Art. VI sec. 29(2).

2. A case for constitutionality

Pro-government assistance proponents may invoke the Philippine Supreme Court's ruling in *Aglipay v. Ruiz*[169] to support their argument that R.A. 6728 should be upheld as constitutional. There is no dispute that the provision of subsidy and assistance to students is an activity that may "...legitimately be undertaken by appropriate legislation."[170] In fact, the Constitution itself mandates that government promote and provide quality education to all citizens.[171] Following *Aglipay*, R.A. 6728 should not be struck down as unconstitutional solely on the ground that "incidental benefits"[172] not interested by the legislature, may accrue to sectarian institutions.

It must be noted that the *Aglipay* ruling was based on Art. VI, sec 13(3) of the 1935 Philippine Constitution. This provision practically duplicates Art VI sec. 29(2) of the 1987 Constitution, and Art. 2 sec. 5 of the Oklahoma Constitution. The latter was used by the Court in *Gurney* as the basis of its ruling.

It is difficult to state categorically at this point that the *Aglipay* and *Gurney* rulings are conflicting, since the factual circumstances of the two cases are very dissimilar. It is likewise difficult to conclude that the Philippine Supreme Court will follow its ruling in *Aglipay* in the event that it is called upon to determine the constitutionality of R.A. 6728. The *Aglipay* ruling is not squarely in point. The type of government activity assailed in *Aglipay* is very different from the kind of government activity provided for in R.A. 6728.

There may even be merit to the argument that the benefits that accrue to sectarian institutions under R.A., 6728 are not of the

---

[169] 64 Phil. 201 (1937)
[170] *Id*, at 209-10.
[171] CONST., Art XIV sec. 1.
[172] Aglipay, 64 Phil. 1t 210.

"incidental" kind as would make the *Aglipay* ruling applicable. For instance under the "voucher system" for both high school and college, the "Study Now Pay Later Plan", and the Educational Service Contracting Scheme programs, actual payments of subsidy are made to the sectarian educational institutions. This kind of actual and material benefit is vastly different from the intangible and rather attenuated benefit of "publicity" that accrued to the Roman Catholic Church in *Aglipay*.

B. The Constitutionality of R.A. 6728 under the *Lemon v. Kurtzman* test.

Under *Lemon v. Kurtman*, a statute that purports to provide any from of benefit to a sectarian institution, to be upheld as constitutional under the First Amendment, should comply with the three-pronged test introduced by the Court therein. First, that the statute must have a secular legislative purpose; Second, that the statute's principal and primary effect is one that neither advances nor inhibits religion; and Third, that the statute does not foster "an excessive entanglement" between government and religion.[173]

1. Secular Legislative Purpose

The undertaking to provide its citizens with more opportunities for education is a legitimate and secular activity that government may engage in. There is no disputing the fact that R.A. 6728 has secular legislative purpose. This may be gleaned from the statute's Declaration of Policy which states that the law was enacted in compliance with the Constitutional mandate to promote and make quality education accessible to all Filipino citizens.[174]

The Philippine Supreme Court will probably find that R.A. 6728 complies with the first prong of the *Lemon* test, in that it has a

---

[173] Lemon, 403 U.S. at 612-12 (1971).

[174] R.A. 6728, sec. 2. The implementing rules and regulations of R.A. 6728 require that the distribution of slots to be made available to student applicants under the High School and College Voucher programs and the Study Now Pay Later programs shall be directly proportional to the incidence of poverty in such regions. Department of Education Culture and Sports, Memorandum No. 159 series of 1994.

secular legislative purpose. The Supreme Court, like its American counterpart, will most likely be reluctant to attribute unconstitutional motives to the legislature, particularly in cases where a plausible secular purpose may be discerned from the fact of the statute.[175]

2. That the statute's principal or primary effect must be one that neither advances nor inhibits religion.

The current controlling doctrine in American jurisprudence with regard to the effects prong of the *Lemon* test, is the "private choice" doctrine introduced by the U.S. Supreme Court in the case of *Witters v. Washington Department of Services*[176]. In *Witte*rs, the American Supreme Court stated that in cases where the subsidy or aid, ultimately flows to the religious institution "only as a result of the genuinely independent private choice of the student", then the grant of such aid or subsidy does not violate the effects prong of the *Lemon* test.[177] It would seem therefore that the "private choice" principle completely surmounts the primary effect prong of *Lemon*. "Once the choice of a private individual is interposed between the government providing the aid and the private religious school receiving it, the fact that the aid sponsors both secular and religious activities is seemingly inconsequential."[178]

The *Witters* Court gave three factors to consider in determining if the primary effect prong of *Lemon* has been violated by an assailed statute: *First*, whether the aid or subsidy ultimately flows to the private religious school as a result of a student's individual choice to support such school; *Second*, whether the aid provided is non-preferential in nature, *i.e.* that it is provided without regard to the sectarian / non-sectarian, or public/non-public nature of the benefited institution; *Third*, whether the statute creates any financial incentive for the aid recipients to pursue a sectarian education.[179]

---

[175] Futterman, *supra*, note 16, at 726.
[176] 474 U.S. 481 (1986).
[177] *Id*, at 488.
[178] Futterman, *supar*, note 16.
[179] Witters, 474 U.S. at 487-488.

The deliberations of the legislature on House Bill 24758[180] reveal that no benefit to sectarian institutions, whether direct or indirect, was contemplated under GASTPE. Representative Carlos Padilla, principal sponsor of GASTPE, stated that the "...bill would provide assistance not to the schools, but to the students."[181] According to Representative Padilla, although direct subsidy to the schools was the original intention of the bill, the same had to be revised in order to avoid any taint of unconstitutionality. In fact, the title of the bill was changed from "Assistance to Private Schools" to "Assistance to Students in Private Schools".

The same intention of providing assistance directly to the students and not to the private educational institutions may be seen from the language of Art. XIV, sec 2(3) of the Constitution:

> "Establish and maintain a system of scholarship grants, student loan programs, subsidies, and other incentives, which shall be available to deserving students in...private schools, especially the underprivileged."

Commissioner Christian Monsod explained that what was intended under this provision was the establishment of a comprehensive system to help the poor students directly, and "...not the schools or rich students who can afford.[182]

The "private choice" principle under *Witters* may be applied to validate the High School and College Voucher Systems, the Study Now Pay Later Plan, and the College Faculty Development Fund. In each of these cases, although subsidy is actually paid directly to the private school[183], the individual students' "private choice" is interposed

---

[180] House Bill 24758 was later enacted into law as R.A. 6728.

[181] House of Representatives, *supra,* note 3, at 563. Rep. Padilla further states that: "...the assistance is given to the students and this is what the Constitution mandates us to do. Therefore, it is aid to the student in connection wit the pursuit of education, and not to a religious institution..." *Id,* at 568.

[182] 4 Records fo the 1986 Constitutional Commission (1986).

[183] R.A. 6728, sec. 5(a) for the High School Voucher Program; sec. 9 for the College Voucher System; sec. 11(b) for the Study-Now-Pay-Later Plan; and sec. 13 for the College Faculty Development Fund.

between the government providing the aid and the sectarian school receiving it.

With regard to the High School Textbook Assistance Fund, subsidy for the purchase of textbooks is given directly to the student-beneficiary, and is not coursed through the sectarian school where such student is enrolled. Similar programs were upheld by the U.S. Supreme Court in the cases of *Board of Education v. Allen*[184], *Meek v. Pittenger*[185] and *Wolman v. Walter*[186]. Although the latter two cases strictly applied *Lemon*, the textbook programs assailed therein were nevertheless upheld because "...the benefit was to the parents and the children, not to the parochial schools."[187]

It is unlikely, however, that the Educational Service Contracting Scheme will be upheld as constitutional. In this case, the government contracts directly with private schools, and payment for tuition is made directly to the schools with which the government contracts.[188] There is no interposition of any "private individual choice" as would place the program within the purview of the U.S. Supreme Court's ruling in *Witters*. Subsidy in such a case, flows directly from the government to the recipient sectarian institution.

It may be argued that in the case of the Educational Service Contracting Scheme, what is actually received by the school is not of the nature of "subsidy" in the strict sense of the word, but rather, payment for tuition fees for students actually enrolled in such school. The real and actual beneficiaries of this program are the students and not the educational institution. The latter does not get anything more than that which it would have received from any student as payment for tuition fee and other charges. In other words, no additional source of income is created in favor of the school, since the money is received by it as payment for tuition fees. This kind of argument does not take into consideration the fact the school may actually enjoy a different

[184] 392 U.S. 236 (1968).
[185] 421 U.S. 349 (1975).
[186] 433 U.S. 229 (1977).
[187] Pierce, *supra*
[188] R.A. 6728, sec. 7.

kind of benefit, i.e. the benefit of having an increase in the number of enrollees. In the words of one legal commentator, the program may have the effect of providing such schools with an "enrollment boost,"[189] which it would not have otherwise enjoyed had the government not intervened. Even the Department of Education Culture and Sports acknowledges that one of the objectives of the programs under GASTPE is to "...assist private colleges and universities... by providing them with enrollees..."[190]

Two other provisions of R.A. 6728 may be struck down as unconstitutional under the "effects" prong of *Lemon*. The first is Sec. 5 par. (2) which provides that the proceeds received by the school under the High School and College Voucher systems shall be apportioned in such a manner that, twenty per cent (20%) of the money received shall go to the "...improvement or modernization of buildings, equipment, libraries, laboratories, gymnasia, and similar facilities, and to the payment of other costs of operation." It should be noted that no qualification is made as to the nature of the expenditures that may be made under this provision. The law does not state for instance, that the books to be purchased for use in the libraries or the facilities to be improved or modernized, using these funds, shall only be those that are secular in character. As such, the funds provided under this provision may actually be diverted to benefiting the sectarian aspect of the parochial schools. The second provision which may be found to be violative of the "effects" prong is Sec. 11 par.(d) which provides that the Social Security System shall make available to private educational institutions, "...low interest loans" for "...school buildings, and/or improvements of their plants and facilities." This provision allows for direct transfer of funds from a government owned and controlled corporation to a sectarian educational institution. Such direct flow of funds, albeit in the form of loans, is direct benefit flowing from government to the sectarian institution. The fact that the loan will have to be repaid is beside the point. A loan extended to a sectarian school provides it with funds which it may then use for whatever purpose it deems necessary or beneficial. It should likewise be noted that R.A. 6728 makes not restrictions as to the manner by which funds

[189] Weischaar, *supra*, note 28 at 566.
[190] Department of Education Culture and Sports, Order No. 28, series of 1989.

received under this program are to be used. Thus, a sectarian school that receives a loan from the Social Security Fund under this program may use the money for religious purposes, without violating R.A. 6728.

3. That the statute does not foster an excessive government entanglement with religion.

Under *Lemon v. Kurtzman*, impermissible government entanglement may take any of three forms: (1) administrative; (2) substantive; and (3) political. This section of the paper will focus on the first two kinds, i.e. administrative and substantive entanglement between government and religion. There is impermissible administrative entanglement when the statute provides for "comprehensive, discriminating and continuous state surveillance" of the use of public funds by the private sectarian institution.[191] Excessive substantive entanglement pertains to the fusion or intertwining of the secular and religious character of a sectarian educational institution in such a manner that it is no longer possible to determine that state aid is being used only for "secular purposes."[192]

It should be noted at the outset that based on the deliberations of the legislature, the matter of excessive government entanglement with religion was not even raised in the discussions on possible constitutional objections to R.A. 6728.[193]

a. Administrative entanglement

The provisions of the R.A. 6728 give rise to administrative entanglement between government and the sectarian educational institution in each of the following cases: (1) the High School Voucher program; (2) the College Voucher Program; (3) the Study Now Pay Later Plan; (4) the Educational Service Contracting Scheme; and the (5) College Faculty Development Fund. In each of these cases, the law provides for direct payment of subsidy to the sectarian institution. One need not venture into speculation to conclude that in such a case

[191] Lemon, 403 U.S. at 615 (1971).
[192] *Id*, at 615-20.
[193] House of Representatives, *supra*, note 3.

of direct payment of subsidy, the government will naturally require the private educational institution to comply with certain accounting and auditing requirements. The question of whether or not the kind of administrative entanglement that results from such accounting procedures is "impermissible and excessive" may not be answered at this point. The determination that the entanglement between government and religion is minimal or excessive is a question of degree and is subject to the Court's appreciation of the surrounding factual circumstances.

Another possible source of excessive administrative entanglement between government and religion is the requirement under the law for "periodic inspections" by the Department of Education Culture and Sports (DECS) of schools covered by the High School and College voucher programs.[194] These periodic inspections are required for the purpose of ensuring that the funds received by the private school under the voucher programs are used in accordance with the percentage allotments provided for in sec. 5 (2) of R.A. 6728. On its face, it would seem that the kind of inspection provided for here is of the "comprehensive, discriminating and continuing" kind that may give rise to impermissible or excessive administrative entanglement.

b. Substantive entanglement

Impermissible substantive entanglement may result in the High School Voucher program of R.A. 6728.

R.A. 6728 provides that the subsidy given to sectarian schools under the High School Voucher program shall not be used directly for salaries of teachers of non-secular subjects.[195] It may be argued, however, that in the case of primary and secondary sectarian schools, the religious and secular aspects of education are so pervasively intertwined that it is often difficult, if not impossible to separate the two.[196] The U.S. Supreme Court has noted that "...religiously affiliated elementary and secondary schools tend to be pervasively

[194] R.A. 6728. sec. 5 (2) and sec. 9 (d).
[195] *Id,* sec. 5(2).
[196] Meek, 421 U.S. at 365. (1975).

sectarian and have as a substantial purpose the inculcation of religious values.[197] In such a case, it would therefore be difficult to ensure that state aid that is provided to these sectarian institutions for secular purposes is not in fact used in the furtherance of the school's religious objectives.

The same concern may not generally be extended to the case of religiously affiliated colleges and universities. Students in institutions of higher learning, are less "impressionable" and thus less likely to be subjected to religious indoctrination.[198]

In *Tilton v. Richardson*[199], the U.S. Supreme Court also relied on the adherence of institutions of higher learning to the principles of academic freedom. Therefore, with regard to religiously affiliated colleges and universities, substantive entanglement may generally not be expected, since religious instruction and secular education are indeed separable.

c. The Zobrest v. Catalina Foothills test of neutrality

In *Zobrest* the U.S. Supreme Court used an "equal protection" type of analysis to test the constitutionality of a law purporting to grant state aid to sectarian institutions. Under this test, the Establishment Clause is not violated by a statute that "...neutrally provides benefits to a broad class of citizens defined without reference to religion, even if sectarian institutions also receive an attenuated financial benefit."[200] The *Zobrest* test is more consistent with the doctrine of "non-preferential accommodation", which would allow state aid to sectarian institutions, as long as such aid is provided under a "neutrally based" statute that neither prefers one religion over another, nor discriminates between religious and non-religious institutions.

---

[197] Nyquist, 413 U.S. at 768 (1973).
[198] Weischaar, *supra*, note 18 at 567.
[199] 403 U.S. 672 (1971).
[200] Zobrest, 113 S. Ct. at 2466 (1993).

It is quite obvious that R.A. 6728 will pass a *Zobrest* type of analysis. The law itself is neutrally based in that the benefits are extended to all private institutions, without regard to whether such institutions are sectarian or non-sectarian. Furthermore, the law itself does not discriminate between the sectarian institutions in accordance with the particular denomination to which such educational institution is associated with. No preference is made to any one particular religion over others.

As already noted earlier, under this type of analysis, no further inquiry is made on whether the statute purporting to provide government assistance to sectarian institutions will foster any excessive entanglement between government and religion. The analysis ends at the determination that the statute itself is neutrally-based.

It is doubted if the Educational Service Contracting will pass even the *Zobrest* test of neutrality. The Educational Service Contracting Program provides for direct government payment of tuition fee and other charges to private schools. It is this writer's opinion that a program which provides for direct government financial subsidy or assistance to private sectarian schools will not pass the *Zobrest* test, no matter how neutrally based the statute might be on its fact. The benefit accruing to the sectarian school in such a case is no longer of the "incidental" or "attenuated" kind that the *Zobrest* Court stated as permissible.

V. CONCLUSION

The determination of whether Republic Act 6728 is constitutional or not will depend on what the Supreme Court perceives is the proper role that religion should play in Philippine society. The review of American jurisprudence shows that the American Supreme Court itself was wavered between adopting a stance of "strict separation" between Church and State to one of "non-preferential accommodation" of the Church in relation to government. The latter concept treats religious organizations as any organization that serve a function in society, thus the need to accommodate Church established educational institutions in a non-preferential manner. The "strict separationists" adopt the more traditional view of religion as a possible

source and cause of tyrannical government, thus the need to erect a high and impenetrable wall between the Church and the State.

The choice between "strict separation" and "non-preferential accommodation" is crucial, because this will determine the kind of test that the Court will adopt in ruling on the constitutionality of R.A. 6728. The statute will most likely be struck down under a strict application of the *Lemon* test. The analysis presented earlier shows that GASTPE will most likely fail the "primary effects" and the "entanglement" prongs of *Lemon*. A different result may be expected if R.A. 6728 is viewed under a *Zobrest* type of analysis; the statute will most likely be upheld as constitutional. Providing subsidy to students enrolled in private educational institutions is an activity that the government may lawfully enter into. In fact, the same is mandated by the Constitution. Furthermore, the subsidy program of R.A. 6728 is neutrally based. The aid is available to all students and teachers in the private school system, regardless of whether the school they are enrolled in is secular or sectarian.

The fact that our Constitution contains a provision prohibiting government from providing "direct or indirect subsidy to sectarian institutions" in Art. VI, sec. 29(2), will present our Supreme Court with a problem that its American counterpart never had to take into consideration. With regard to this provision, *Aglipay* does not really provide us with sufficient basis to speculate on whether R.A. 6728 will be upheld or struck down. The factual situation before the Philippine Supreme Court in that case had nothing to do with government financial assistance to private sectarian schools. Furthermore, it is submitted that it is not very likely that the Supreme Court will find that the kind of assistance extended to sectarian schools under GASTPE may be characterized as "indirect benefit" similar to that involved in *Aglipay*.

A determination of the constitutionality and validity of R.A. 6728 should always be viewed in the context of the Constitutional mandate and societal need of making quality education accessible to all Filipinos. The government, in effect, admits that any program that seeks to upgrade the over-all standard of education in Philippine society must necessarily entail some form of financial assistance to private educational institutions, whether secular or sectarian. The public school system is not capable of meeting the requirements of the

Constitutional mandate under Art. XIV sec. 1. Perhaps if viewed in this context, the Court may yet adopt the more liberal "test" introduced under *Zobrest* and uphold R.A. 6728 as constitutional.

- o0o -