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NOTES and COMMENTS

THE CONSTITUTIONALITY OF THE NATIONAL DEFENSE ACT

In the cases of the People of the Philippines vs. Tranquilino Lagman, G. R. No. 45893, July 13, 1938, and the people of the Philippines vs. Primitivo de la Rosa, G. R. No. 45293, July 13, 1938, the Supreme Court of the Philippines upheld the constitutionality of Commonwealth Act No. 1, commonly known as the National Defense Act. The defendants in the above-cited cases were prosecuted under Sec. 60 of the Act in question for having illegally refused to register for military service, notwithstanding the fact that they had reached the age of twenty years and had been notified to register. The defendants admitted the commission of the acts complained of but alleged that failure to register was due to the fact that the defendant Primitivo de Sosa, was an orphan of both parents and had an eight-year old brother who was dependent on him for support, while the defendant Tranquilino Lagman had a father to support, had no interest in military service, and did not want to kill or be killed. The defendant-appellants also impugned the constitutionality of the National Defense Law on the grounds that it deprived them of their employment without due process of law.

As regards the defense of having dependents to support, the Court held that these did not excuse them from military service, for under Sections No. 65 and 69 of Commonwealth Act No. 1, said appellants could have asked for the postponement of entering the military service or they could have asked for the proper pecuniary compensation to meet family needs.

Section 56 of the said Act provides:

"Deferments way likewise be granted by the acceptance Boards for those who are indispensable to the support of their dependent families, for agricultural reasons, and for certain key men in industry, commerce or agriculture; provided that such deferments shall not exceed one year, after which they shall not exceed one year, after which they shall be liable to such training in the same manner as that prescribed for any other citizen."

Sec. 69 provides:

"Where dependency was the cause for deferment and that condition continues after the termination of the period of deferment, the young man shall be liable to trainee instruction, and if drawn therefor he shall enter upon such instruction. During the period of his absence undergoing instruction, an allowance for the partial support of his dependent or dependents, who have no other means of support, shall be made by the Philippine Government. The corresponding acceptance board shall determine the dependent or dependents entitled to this allowance, which shall be fixed by Executive Order."

As regards the contention that the law is unconstitutional because it is a deprivation of property without due process, the Supreme Court said: "that the National Defense Law in establishing compulsory military service does not violate Act 2, Title II of the Philippine Constitution. On the contrary, it is but a fulfillment of the precept embodied in such Constitutional provision. The duty of the government to defend the State can be carried out only by means of an army. To leave the formation of that army to the will of the citizens would be to entitle the government to an excuse from the duty of protecting the State in case there are not enough men who would voluntarily form that army.

"The power of the state to establish such is an incident of its power to declare war and to maintain an army, which is necessary for the defense of the State and for the protection of the life, liberty and property of its citizens. A citizen may be compelled by force, if necessary, against his will, against his pecuniary interests, or even against his political and religious convictions to take his place in the nation's army and risk his life in its defense."

"Furthermore, compulsory military service is not a deprivation of property without due process of law because there is

no such thing as a property right in an office or employment. The validity of such compulsary military service still holds whether the need for national defense is actual or merely in preparation because the ultimate aim in both cases is the defense and protection of the State."

This is the first case involving the constitutionality of Commonwealth Act No. 1.

There is no doubt of the influence this decision will have in encouraging a more strict compliance with the National Defense Act. The duties of citizenship as yet are not clearly understood nor respected.

Article 2, Title II of the Philippine Constitution provides: "The defense of the State is a prime duty of the government, and in the fulfillment of this duty all citizens may be required by law to render personal military or civil service."

Prof. Sinco makes this comment on this provision:

"This principle merely restates the fundamental maxim that self-preservation is the first duty of the State. The duty of a citizen to render military or civil service is an obligation inherent in his membership in the political community. It, therefore, exists whether or not there is any statement in the Constitution to that effect." (Sinco, Philippine Government and Political Law, 4th ed. p. 159.)

"In the Constitution * * * it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good", and that government is instituted "for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class of men." Jacobson v. Massachusetts 197 U. S. 11, citing the case of Commonwealth v. Alger, 7 Cush 84.

Mr. Justice Harlan in the above-entitled case added further that any man, "may be compelled by force, if need be, against his will, and without regard to his personal wishes and his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot-down in its defense. It is not therefore true that the power of the public to guard itself against imminent danger depends * * * upon his willingness to submit to reasonable regulations established by constituted

authorities under the sanction of the State, for the purpose of protecting the public collectively against such dangers."

The right on the part of the State to compel military service is as old as the nations and their armies. Thus Vattel says that the right to call an army into existence does not count alone upon the volition and willingness of the citizen to do his duty. The premise of this proposition is so devoid of foundation that they leave not even a shadow of ground upon which to bear conclusion. It may not be doubted that the very conception of a just government and its duty to the citizens to protect them, postulates the duty of each member of the political community to render military service in case of need and the complementary right of the state to compel it. Vattel, Law of Nations, Book III, chapters I and II.

From the time governments were instituted among men, the arms-bearing population have had to meet the call of the nation in stress of war. The duty to respond rises above personal convenience or matters of mere money or business. Royse v. U. S. 47 St. Cl. 333.

In the United States, the Conscription Act of 1863, the Act of July 28, 1836, the Selective Draft Act of 1918, the National Defense Act of 1920 providing for compulsary military training and service, have all been upheld as constitutional. The validity of these statutes has been upheld under the express power given by the United Constitution to the United States government to raise and support armies. Royse v. U. S. 47 St. Cl. 333; Exp. Hill, 38 Ala. 429; Exp. Shinger 38 Ala. 237; Jeffers v. Fair, 33 Ga. 347; Walter v. Galtiu, 60 N. C. 310; Barber v. Irwin, 34 Ga. 27; Kneedler v. Lane, 45 Pa. St. 238; Exp. Coupland, 126 Tec. 386.

It should be noted however, that there is a difference in the phraseology of the American and Philippine constitutional provisions from which the power to compel military service is in part derived. The United States Constitution merely implies compulsory military service by the grant of the general power to declare war and raise armies. Cox v. Wood, 38 St. Cl. 421. The Philippine Constitution expressly provides that "all citizens may be required by law to render personal military or civil service." Sec. 2, Art. II.

On various occasions in the United States attempts have been made to limit the power of compulsion and coercion with the constitutional provisions ordinarily limiting the powers of

government. The Selective Draft Act of 1918 was attacked as unconstitutional on the ground that it authorized the President to make rules and regulations for its enforcement and therefore constituted an unlawful delegation of power. The act was, however, upheld. Frank v. Murray U. S. 1918 D-98. When it was once questioned as imposing involuntary servitude, the law was again upheld. 9 Fed. St. Ann. 376 S. D. L. In the case of Arver v. U. S. 245 U. S. 366, the Supreme Court of the United States held that the same Act did not violate the constitutional provisional provision guaranteeing religious liberty. The case of U. S. v. Brambridge, 1 Mason 71, also enunciated the doctrine that the power to compel military service is not limited by the minority of the persons drafted—nor by the right of parents to the control and custody of their children. The Supreme Court of the United States in the case of U. S. v. MacIntosh, (283 U. S. 605, citing the case of U. S. v. Schimmoer, 279 U. S. 649) has clearly and unequivocally recognized the broad and unrestrained power of the United States Congress to carry on war. Mr. Justice Sutherland, speaking for the Court, said that "the war power from its very nature, when necessity calls for its exercise, tolerates no qualifications or limitations unless found in the Constitution or in applicable principles of international law." There is a subordination of individual constitutional rights to the war power, and drastic powers wholly inadmissible in time of peace, are exercised to meet the emergencies of war. Thus, "the privilege of concientious objectors to avoid bearing arms comes not from the Constitution, but from acts of Congress; and under the war power, armed service may be required without regard to his objections or views in respect of the justice or morality of the particular war or of war in general."

The courts have unanimously and continously adhered to the rule that an "unqualified grant of powers gives the means necessary to carry it into effect." In the case of Martin v. Hunter's Lessees 1 Wheat. 304, Mr. Justice Story found occasion to say, "When a general power is vested in a plain and absolute language without exception or provision, for high, vital and imperative purposes which will be crippled by interpolating a limitation, the advocate of the restriction must be able to point out somewhere in the constitution a clause which declares a restriction. The inherent powers of a nation to make war for self-preservation, carrying with them all the means of making war

effective, the express power to declare war, to raise armies and support them, coupled with the express powers to pass all laws necessary to carry these powers into effect, all unite in sustaining the power to raise armies by coercion, and this in turn is sustained by the high, vital, and essential power of the grant." To the same effect are the following cases: Gibbons v. Ogden, 9 Wheat. 188; U. S. v. Stephens, 245 Fed. 961; Jeffers v. Fair, 33 Ga. 347; Kneedler v. Lane, 145 Pa. St. 238.

Since our law on national defense enumerates those exempted from registration or from trainee instruction (Secs. 58 and 59 respectively of Commonwealth Act No. I) then, in view of the foregoing rule of construction established by United States courts and following the familiar doctrine in legal hermeneutics that *"inclusio unius est exclusio alterius,"* the only persons exempted from the duty of registration or trainee instruction are those included within the express provision of the law—and no other.

The premise upon which the courts predicated their uniform conclusion of constitutionality being the existence of an express constitutional provision conferring the power to raise and support armies, the question may arise in this jurisdiction whether due to the absence of such express constitutional power to raise and support armies, such power does not exist. In answering this inquiry, it is enough to recall the principle already stated, that such right is inherent in a state. "This principle [that the defense of the state is a prime duty of government] merely restates the fundamental maxim that self-preservation is the first duty of the State." (Sinco, Philippine Government and Political Law, 4th ed. p. 159).

Every state has the essential right of self-preservation—an absolute right, based upon the right of existence, and limited in the exercise by the rights of other states to exist. A state may take measures necessary to maintain the conditions essential to its being, as in the protection of land and people. Under the right of self-preservation states have taken action to strenghten the means of defense and offense * * * and, in general, to maintain the national security and well-being * * *. As each state is the judge of what endangers its own existence and what measures may be necessary for its preservation, the action to be taken under given conditions is determined by policy, rather

than by principles of law, and such action is usually tempered by the fear of war or other measures of redress. Wilson, Handbook of International Law, Second Edition, p. 50.

The next query that may be presented is, "Is the Philippine Commonwealth a 'State'?" An essential feature of a 'State' is sovereignty and independence from external control.

It is an accepted principle that the Philippine Commonwealth is not an independent and sovereign entity. Thus, during the Commonwealth period, the United States and its representatives exercise powers over the Philippine Government incompatible with the idea of sovereignity and independence. (See Sinco's Philippine Government and Political Law, 4th Edition, Chapter XXIII).

However, it may be said that since the Philippines is an unincorporated territory and the Congress of the United States has the exclusive power and discretion to determine the extent of the powers of territorial governments, the Congress of the United States by passing the Tydings-McDuffie Act, which is in the nature of an enabling act, delegated full sovereign powers to the Philippine Constitutional Convention to frame a constitution, subject only to some special limitations. (Sinco, Idem. p. 82, 134.) For in the case of Benner v. Porter (19 Howe 235, 13 L. ed. 119, cited by Prof. Sinco in the above cited work, pp. 82-83) the U. S. Supreme Court held that a constitutional convention convened by virtue of an enabling Act has broad powers, being "the fountain of all political power, from which flowed that which was embodied in the organic law." We might then conclude that the Philippine Constitutional Convention had the power to provide for the establishment and maintenance of an army and navy and was therefore within its powers when it provided for compulsory military and civil service in Sec. 2, Title II of the Constitution.

But we may be further met with the limitations upon the sovereign rights of the Philippine Government, expressly embodied in the Tydings-McDuffie Law and in the Ordinance appended to the Constitution, one of which limitations is that "Foreign affairs shall be under the direct supervision and control of the United States" during the Commonwealth period. Does this limitation act to suspend the power of the Philippine Government to establish and maintain an army during the Commonwealth period? Is it not a fact that during the ten-year transition period, the United States controls foreign affairs and

that in international law, the Philippines is a part of the United States and that, therefore, it is the United States Government and not the Philippine Government is responsible for the protection of the Philippine territory from external aggression? If so, then is it not further true, that the basis of the right to maintain an army is the right of self-preservation, the right to defend against external aggression—that if the basis and foundation of the right does not exist then the right cannot remain—and that, therefore, since the Philippine Government is not called upon to defend itself against external aggression, the Philippine Government has no right or power to maintain an army nor compel military service?

The government of every state has the duty to the citizens composing the state to protect them in their life and property. The United States governs its territories through territorial governments. The acts of the territorial governments within the limits established by Congress are done for and in the name of the United States Government. If the premise that the United States has the duty to defend Philippine territory is right, then the United States can defend such territory through any instrumentality and by any means allowed by law. It can, therefore, empower the Philippine Government, which is but the product of its creation, to exercise the power to defend.

Thus the President of the United States among other things may call into the armed forces of the United States maintained in the Philippines all military forces organized by the Commonwealth Government. (Sinco, Philippine Government and Political Law, 4th ed., p. 433.)

Furthermore, self-preservation does not merely mean preservation from external aggression—but protection from internal dissension as well. Thus paragraph 2, section 11, Article VII of the Constitution provides that the President of the Philippines "may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under matial law."

The army, therefore, is not merely a force maintained for the occasion of public war—but also one for the maintenance of local peace and order, and a body to uphold the municipal laws.

And to hold the government of the Philippines incapable of preparing an army, in anticipation of ultimate Philippine Statehood, would be to render absurd and ridiculous all present plans of preparation, whether economic or social, for that particular end.

—F. E. MARCOS.