Notes and Comments

Art. III, Sec. I (7), Philippine Constitution Construed - Compulsory Flag Salute Violates Religious Freedom

IN an opinion rendered on August 11, 1948, the Secretary of Justice ruled that "school authorities can not force a student to salute a flag if that is against his religious scruples; nor can they lawfully expel a pupil from school for refusing to comply with such requirement on the ground that to salute the flag is contrary to his religious conviction. Persuasion—not compulsion—is the teacher's only means to attain the end." [1]

This opinion was handed down in answer to an inquiry from a school principal in Bohol as to whether school authorities could compel a pupil in a barrio school to salute the flag during flag ceremonies. It appears that the pupil concerned refused to salute the Filipino flag because it was "against her religious belief to do so, she and her parents being members of a religious sect known as Jehovah's Witnesses, whose religious beliefs include a literal version of Exodus 20:4, 5 which says: 'Thou shalt not make unto these any graven image . . .; thou shalt not bow down thyself to them, nor serve them.' They consider that the flag is an 'image' within this command." [2] The pupil referred to would rather quit school than be coerced into saluting the flag.

Although probably this is a case of first impression in the Philippines involving Jehovah's Witnesses, this is not so in the United

[1] Opinion of the Secretary of Justice No. 225, s. of 1948. *Cf.* Opinion of the late Justice Abad Santos, then Sec. of Justice in 1940 as quoted in part in Bureau of Education Circular No. 61 s. 1940, entitled "Saluting the Flag is Required": "There is no constitutional or statutory provision in the Philippines which makes it a personal right on the part of its citizens to demand entrance into the public schools. The right to enter the public schools is, therefore, merely a political privilege given to those who are able to comply with the requirements imposed by the competent school authorities. (See 56 C.J. 807).

"In view thereof, and in line with the constitutional mandate that 'all schools shall aim to develop . . . civic conscience . . . and to teach the duties of citizenship,' it is my opinion that the school authorities concerned may promulgate a regulation, in accordance with the law, requiring all pupils in public schools to salute the flag and providing that pupils who refuse to comply with such requirement may be barred from admission to, or expelled from, the public schools."

[2] *Ibid.*

States where American jurisprudence is replete with numerous cases [3] where members of this sect in one way or another have caused no small amount of vexation to public authorities by reason of the exercise and enjoyment of their religious worship and profession.

The Secretary of Justice based his opinion on our Bill of Rights,[4] which guarantees to every one "the free exercise and enjoyment of religious profession and worship, without discrimination or preference." (Art. III, Sec. 1 [7], Phil. Const.)[5] He is also of the opinion that "Schools may properly include in their daily program flag ceremonies during which students salute the flag of the Philippines. Such practice is calculated to inspire in the pupils love of country and reverence for its institutions" [6] as long as it is done voluntarily.

It is worthwhile to note that our provision on religious freedom was adopted from the Jones Law, which in turn had its origin in the United States Constitution.[7] "The United States Constitution

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[3] See Lovell v. Griffin, 303 U.S. 444; Schneider v. New Jersey, 308 U.S. 147; Minersville School District v. Gobitis, 310 U.S. 586; Cantwell v. Connecticut, 310 U.S. 296; Cox v. New Hampshire, 312 U.S. 569; Jamison v. Texas, 318 U.S. 413; Jones v. Opelika, 316 U.S. 584; Largent v. Texas, 318 U.S. 418; West Va. St. Board v. Barnette, 319 U.S. 141; Murdock v. Penn., 319 U.S. 103; Prince v. Mass. 321 U.S. 158; March v. Ala., 66 S. Ct. Rep. 276.

[4] "It should be stated that what is guaranteed by our Constitution is religious liberty, not mere religious toleration. Religious freedom, however, as a constitutional mandate is not inhibition of profound reverence for religion and is not a denial of its influence in human affairs. Religion as a profession of faith to an active power that binds and elevates man to his Creator is recognized. And, in so far as it instills into minds the present principles of morality, its influence is deeply felt and highly appreciated. When the Filipino people, in the preamble in their Constitution, implored "the aid of *Divine Providence*, x x x", they thereby manifested their intense religious nature and placed unfaltering reliance upon Him who guides the destinies of men and nations. The elevating influence of religion in human society is recognized here as elsewhere. In fact, certain general concessions are indiscriminately accorded to religious sects and denominations." (Aglipay v. Ruiz, 64 Phil. 201, 206.) Even the Rev. Penal Code considers crimes against religious worship, Arts. 132 and 133, as crimes against the fundamental laws of the state.

[5] "The Spanish Constitution of 1869 and 1876 established a state religion for Spain but guaranteed free practice of any other. (U.S. v. Balcorta, 25 Phil. 273). Said Constitutions were not made applicable to the Philippines. It was the Treaty of Paris of December 10, 1898, which first introduced religious toleration in our country (Art. X). President McKinley's Instructions to the Second Philippine Commission reasserted this right which later on was incorporated in the Philippine Bill and in the Jones Law." Speech of Delegate Jose P. Laurel before the Constitutional Convention, Nov. 19, 1934 as Chairman of the Committee on the Bill of Rights, Appendix J, Jose Aruego, *The Framing of the Philippine Constitution*, (1937) University Publishing Co., Manila, p. 1046.

[6] Op. No. 225, *supra*.

[7] "The Philippine Bill of Rights in Section 3 of the Jones Law, reproduced from similar provisions in American constitutions, both Federal and State, is well-nigh precise and comprehensive. The Committee on Bill of Rights has had a relatively facile work in this connection, namely that of adoption and adaptation. Modifications and changes in phraseology have been avoided whenever possible. The principles have been left couched in a language expressive of their historical background, nature, extent and limitations as construed and interpreted by the great statesmen and jurists who have vitalized them in the course of time." Speech of Delegate Jose P. Laurel, *supra*, p. 1041.

as originally drafted contained no guaranty of religious or intellectual liberty,[8] except that it forbade any religious test oath and give immunity to members of Congress for anything said in debates." [9] And "it took a long time for the United States Supreme Court to recognize that religious freedom was part of the due process guaranteed by the Fourteenth Amendment against state action."[10]

Religious freedom "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." [11] "No man can do exactly as he pleases. Every man must renounce unbridled license. The right of the individual is necessarily subject to reasonable restraint by general law for the common good." [12] "The State has . . . no competence to pronounce upon religious truth, and for the sake of religious truth it must remain out of the discussion. But when a religious movement offends public order, morals, or sanity,[13] the state must 'by its fruits' judge it in error and limit freedom for the sake of freedom." [14]

"Grossly unpatriotic language may be punished for the same reasons: The man who talks scurrilously about the flag commits a crime, not because the implications of his ideas tend to weaken the Federal Government, but because the effect resembles that of an injurious act such as trampling on the flag, which would be a public nuisance and a breach of the peace." [15]

The Secretary of Justice also cited *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 [16] to support his opinion. The American Supreme Court in a 6 to 3 decision held in this case

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[8] "The Constitution in its primary form failed to affirm toleration not because its authors doubted the principles involved but because they took it for granted." William Haller, *The Puritan Background of the First Amendment*, p. 131 in *The Constitution Reconsidered*, Edited by Conyers Read (1938) Columbia Univ. Press, N.Y.

[9] Zechariah Chafee, Jr., *Free Speech in the United States*, (1941), Harvard Univ. Press, Cambridge, Mass, pp. 4-5.

[10] Osmond K. Fraenkel, *Our Civil Liberties* (1944), The Viking Press, N.Y., p. 53.

[11] Cantwell v. Conn., 310 U.S. 296; 303-304.

[12] Rubi v. Prov. Bd. of Mindoro, 39 Phil. 660, 706.

[13] Thus, "If a man is impelled by his faith to commit polygamy, thuggery, or widow-burning, the Constitution will not protect him." Chafee, *Free Speech in the United States*, supra, p. 405.

[14] William E. Hocking, *Freedom of the Press*, (1943), Univ. of Chicago Press, Chicago, Ill., p. 117.

[15] Chafee, *Free Speech in the U.S., supra*, p. 150.

[16] This case overruled the earlier case of Minersville School District v. Gobitis et. al, 310 U.S. 586, where the Court in an 8 to 1 decision upheld the flag salute statute. Justice Frankfurter who delivered the majority opinion held that the flag salute law did not infringe the due process clause of the 14th Amendment since the "ultimate foundation of a free society is the binding tie of cohe-

that "To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind" [17] and that such action of the State Board transcended constitutional limitations and invaded the sphere of the intellect and spirit. It further said that "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." [18]

In the *Barnette case,* Justice Frankfurter delivered the dissenting opinion [19] wherein he reiterated his previous stand in the *Gobitis* case and further expanded his views. He held that "saluting the flag suppresses no belief nor curbs it" since "all channels of affirmative expressions" were "open to both child and parent" so that he believed that there was a necessity for judicial self-restraint, especially when deciding constitutional questions of limitations on government.

By thus giving the civil liberties a preferred position among other competing values in the scheme of our way of life, we hope to be nearer by way of winning the object which we have been seeking for all these years—Liberty. These words of that eminent jurist, Judge Learned Hand, brings us enlightenment: "I wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it. No constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."

—L.L.R.

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sive sentiment" and that such sentiment could be fostered by the statute because the flag is a symbol of national unity. He declared that what the school authorities were really asserting was the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parents, which attempt he thought the State was at a disadvantage in competing with the parent's authority. He further took the position that state legislatures and school boards were the appropriate agencies to determine the propriety of the means used to promote national sentiment. Therefore, he could not see any reason for excercising judicial interference.

[17] Justice Jackson who spoke for the majority was of the belief that "the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas x x x. A person gets from the symbol the meaning he puts into it, and what is one man's comfort is another's jest and scorn."

[18] Justice Jackson believed that "Compulsory unification of opinion achieves only the unanimity of the graveyard."

[19] Prof. George D. Braden cites this dissent as an example of the shaping of Justice Frankfurter's objective theory in constitutional law. See his article, "The Search for Objectivity In Constitutional Law, *The Yale Law Journal,* Vol. 57, (Feb. 1948) 571, 582).