THE REGIME GOVERNING OUR PRIVATE SCHOOLS

The test case [1] on the constitutionality of the régime now governing our private schools has been decided. Our Supreme Court, in what now appears to be a momentous decision, found constitutional sanction for Commonwealth Act No. 180 and the rules and regulations issued in reliance thereon.

The decision touched significantly on a number of Constitutional provisions, particularly, of course, the first sentence of Section 5 of Article XIV.[2] The Court, hesitant to decide squarely the question, disposed of the petition for prohibition on the theory that there was no justiciable controversy presented before it. Citing a very recent opinion [3] of the United States Supreme Court, per Mr. Justice Frankfurter, the Court confessed:

> "Courts do not sit to adjudicate mere academic questions to satisfy scholarly interest therein, however intellectually solid the problem may be. This is especially true where the issues 'reach constitutional dimen-

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[1] Philippine Ass'n of Colleges and Universities, et al. v. Sec. of Education and the Bd. of Textbooks, G.R. No. L-5279, Oct. 31, 1955.

The main issue in this case was the constitutionality of Commonwealth Act No. 180 which was attacked by the petitioning colleges and universities as (1) depriving owners of private schools and colleges as well as teachers and parents of liberty and property without due process of law; (2) depriving parents of their natural right and duty to rear their children for civic efficiency; and (3) in so far as it conferred on the Secretary of Education unlimited power and discretion to prescribe rules and standards, an unlawful delegation of legislative power. The provisions of law prominently put in issue were §§ 1 and 6 of the Act:

> "§ 1. It shall be the duty of the Secretary of Public Instruction to maintain a general standard of efficiency in all private schools and colleges of the Philippines so that the same shall furnish adequate instruction to the public, in accordance with the class and grade of instruction given in them, and for this purpose said Secretary or his duly authorized representative shall have authority to advise, inspect and regulate said schools and colleges in order to determine the efficiency of instruction given in the same.
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> "§ 6. The Department of Public Instruction shall from time to time prepare and publish in pamphlet form the minimum standards required of primary, intermediate and high schools, and colleges granting the degrees of Bachelor of Arts, Bachelor of Science, or any other academic degrees. It shall also from time to time prepare and publish in pamphlet form the minimum standards required of law, medical, dental pharmaceutical, engineering, agricultural and special or vocational schools giving instruction of a technical, vocational or professional character."

This paper essays to point out that Commonwealth Act No. 180, as authority for the régime now governing our private schools, is unconstitutional and void.

[2] This provision reads: "All educational institutions shall be under the supervision of and subject to regulation by the State. . . ."

[3] Rice v. Sioux City Memorial Park Cemetery, Inc., U.S. Sup. Ct. Adv. Rep., May 23, 1955 (decided May 9, 1955).

> sions, for then there comes into play regard for the court's duty to avoid decision of constitutional issues unless avoidance becomes evasion . . . .'"

But while such is admittedly the proper attitude that courts should adopt towards "academic questions," the Supreme Court justices [4] revealed that they were not entirely uninterested in such questions. They decided "to look into the matter," expressing a fear that they may be charged of having "refused to act even in the face of clear violation of fundamental personal rights of liberty and property." By way of *obiter dicta*, the Court proceeded to show that there was no such clear violation of constitutional rights.

This paper finds the Court's discussion convincing when it stated that the State, as per provision of Section 5, Article XIV of the Constitution, has power of control over private schools, regulation being equivalent to control. But it begs to differ from the Court's manner of approaching the problem from this same premise.

At the outset, it is worthwhile noting the introductory observation made by the Court:

> "It should be understandable . . . that this Court should be doubly reluctant to consider petitioner's demand for avoidance of the law aforesaid" in view of the fact that "the Department of Education has, for the past 37 years, supervised and regulated all private schools in this country apparently without audible protest, nay, with the general acquiescence of the general public and the parties concerned."

Obviously, this comment was meant to further warrant the Court's reluctance to resolve the question squarely. Unfortunately, the Court had to quote from the *Corpus Juris Secundum* incompletely.[5] Incomplete quotations can sometimes be very revealing.

Since the Court nonetheless "looked into the matter," it stands profitable to look into the Court's *obiter dicta* too.

Even putting aside for a while the question of whether the statute (Commonwealth Act No. 180) is unequivocal or not, it can already be seen as an invalid delegation of legislative power. The legislature cannot delegate to executive agencies powers which it itself does not have.[6] It is again unfortunate to note that even the Court's authority, the great *Corpus Juris Secundum* of undoubted American vintage, is not impeccable on this matter. It seems to make an egreg-

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[4] Mr. Justice Bautista Angelo reserved his vote. Three justices—Messrs. Justices Labrador, Concepcion and J. B. L. Reyes—took no part.

[5] The complete quotation, the first sentence of which was the only one quoted by the Court, as far as pertinent, reads: "When an act has been long treated as constitutional and important rights have become dependent thereon, the court may refuse to consider an attack on its validity. Old age, however, cannot give validity to *a void statute*, nor will acquiescence for any length of time, nor any amount of practical construction prevent a court from *declaring void a statute which clearly contravenes the constitution*, although, . . . it is an element which may be considered and given great weight." 16 C.J.S. 204 (Emphasis supplied). And Commonwealth Act No. 180 is void. (See discussion in the text.)

[6] 16 C.J.S. 352.

ious contradiction in terms when it classifies as an invalid delegation of legislative power this case where the principal (Congress) has no power of the sort at all to be delegated. Yet, as our American constitutional authorities must have already thought, the vice of a statute is manifest enough—even without a more logical statement of such vice.

But the power of regulation is equivalent to the power of control and the Constitution in very explicit terms vests upon the State the power of regulation and supervision over all educational institutions, the Court goes on to argue its stand. That is correct. Principles of constitutional construction should not, however, be ignored.

One fundamental principle of constitutional construction is that the constitution must be construed in its entirety. And construing the Constitution in its entirety means, significantly and particularly, construing this power of regulation and supervision with the limitation found in the Due Process Clause. In more precise terms, this power of regulation (control) must be exercised conformably to the Due Process Clause. As in the case of the police power,[7] there is ever the necessity of maintaining a "check and balance" between police power and due process lest the police power should make the liberties guaranteed in the Constitution "just so much words."

The Court, however, strikes a very strange note at this point. Mr. Justice Bengzon, writer of the Court's opinion, referring to his opinion for the Court in *Montenegro v. Castañeda*,[8] dogmatizes: "An express power is necessarily more extensive than a mere implied power." The statement is subversive of generally accepted canons of constitutional construction. Such a distinction between the extent of an express power and that of an implied power cannot possibly hold water in view of the general rule of constitutional construction that in construing the Constitution, what is implied is as much a part of the instrument as what is expressed.[9] It would certainly be more conducive to adherence to the principles of constitutional construction to regard Section 5, Article XIV of the Constitution as a specific provision with respect to the police power (*as much a part of the Constitution*) as a general provision, the former being a mere emphatic recognition of the latter—and not a new power—with regard particularly to the State's power over educational institutions (private schools). That there have been many instances where the Constitution is repititious *even in its express provisions* can not be controverted. For did not Mr. Justice Bengzon himself observe in the very same case of *Montenegro v. Castañeda* one such instance of repititiousness?[10] Such repititiousness, however, should

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[7] Art. XIV. § 5 of the Constitution is nothing more than a mere recognition of the State's police power with respect to private schools. (Memorandum for the Petitioners submitted to the Supreme Court in connection with the Philippine Ass'n of Colleges and Universities' case, *supra*, by Counsels Dean Vicente G Sinco, Prof. Enrique M Fernando, and Ex-Sec. of Education Manuel V Gallego)

[8] 48 O G 3392 (1952).

[9] 11 Am. Jur. 666.

[10] As to the suspension of the writ of habeas corpus, there are two mutually-emphasizing Constitutional provisions: Art. III, § 1, cl. 14 and Art. VII, § 10, cl. 10.

not be construed mere tautology, for it is also an axiom that courts should avoid a construction which renders a provision meaningless and idle.[11] In the language of Chief Justice Marshall: "It cannot be presumed that any clause in the constitution is intended to be without effect.[12] Indeed, in construing the Constitution in its entirety, as is the proper recourse in order to ascertain the true intent and meaning of any particular provision,[13] the role of emphasis cannot be over-emphasized.

Therefore, in determining the validity under the Due Process Clause of the rules and regulations issued in reliance upon Commonwealth Act No. 180, recourse should be made to that "all-time reliable," the ultimate test—the test of reasonableness. How is this test to be applied?

> "It has been said that the scope of the term 'reasonable' as regards any situation must be measured having regard to the fundamental principles of human liberty as understood at the time of the formation of the Constitution, adapting the same to modern conditions, and that established customs—the conventionalities of the time—are also matters to be considered . . . ." [14]

It would seem trite to mention that in this era of "Democracy versus Communism," there is greatest demand for *thought-freedom* on the part of democracy-loving people. This practical question may then be asked: Is freedom to teach what one believes others should know *essentially* different from such other freedoms as the freedom of speech and the press, or from the freedom to peaceably assemble and petition the government for redress of grievances, or even from the freedom of religion? There is much sense in the conviction that freedom to teach is the most basic of all the freedoms, considering that the proper exercise, as well as the very preservation, of all liberties, depend largely upon the education of the citizens having such liberties. Education—which is the essence of the freedom to teach—is so important in a democracy that Mr. Justice Brandeis spoke of it as the price the American people should pay for embracing the democratic way of life.[15]

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[11] 11 AM. JUR. 665-666.

[12] Marbury v. Madison, 1 Cranch 137 (U.S. 1803).

[13] 11 AM. JUR. 661-62.

[14] 11 AM. JUR. 1074-80.

[15] Making a general criticism on American democracy, Mr. Justice Brandeis said: "The trouble with our democracy is that we have not been willing to pay the price—that is educate the electorate." (BRANDEIS, L. D., THE WORDS OF JUSTICE BRADEIS 65 [Goldman ed. 1953]). Mr. Justice Brandeis also said: "The educational standard required of a democracy is obviously high. The citizen should be able to comprehend among other things the many great and difficult problems of industry, commerce and finance, which with us necessarily become political questions. He must learn about men as well as things." BRANDEIS, L. D., BUSINESS, A PROFESSION 32, cited in THE WORDS OF JUSTICE BRANDEIS, *supra*. This being the case, how can we afford to leave the function of educating the citizenry exclusively to the State?

It necessarily follows that in the exercise of this most fundamental freedom of education, such latitude as is allowed the exercise of the other fundamental freedoms should likewise be allowed. That is the least that could be done if all the other liberties a.) really worth preserving. Otherwise, there would result—as has now resulted in the present régime—a self-contradiction: while an individual may speak, write and worship what he pleases within valid police power limitations, he may not teach what he pleases but only what the State allows. Moreover, it can well be reasoned out that freedom of education is as much guaranteed by the Due Process Clause as the other freedoms are guaranteed by the same clause or by more particular constitutional provisions.[16] Hence, it is the opinion that government supervision and regulation of private schools should necessarily be limited to: (1) the power to see that an educational institution does not teach or promote doctrines contrary to the criminal laws of the state, and (2) the power to prevent immoral or fraudulent practices on the part of the institution.[17]

Under the Court's holding, the individual is a mere creature of the State.[18] The rules and regulations [19] issued by the Secretary of Education in reliance upon Commonwealth Act No. 180 leave to

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[16] "The liberty mentioned in the (Due Process Clause) means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned." Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

The right to follow any lawful pursuit—as teaching—is one of the inalienable rights of a citizen. Cf. Schnaier v. Navarre Hotel and Importation Co., 182 N.Y. 83, 74 N.E. 561 (1905); Lochner v. New York, 198 U.S. 45 (1905); Slaughter-House Cases, 16 Wall. 36 (U.S. 1873); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Butchers' Union v. Crescent City, 111 U.S. 746 (1884).

[17] SINCO, V. G., PHILIPPINE POLITICAL LAW 488 (10th ed. 1954).

[18] "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[19] A sampling of these rules and regulations: (a) rules describing in *minute detail* the curricula of the different courses of study, such as law, medicine, liberal arts, business, education engineering, architecture, high school, elementary, secretarial and vocational course; (b) rules and regulations describing in *minute detail* the qualifications and particular degrees of teachers; (c) rules and regulations containing schedule of the salaries of teachers and their teaching loads; (d) rules and regulations concerning the admission of students and their conduct; (e) rules on the granting of recognition and the revocation of the same; (f) rules and regulations ordering and dictating the specific holidays which must be observed by schools; (g) rules and regulations on contributions which shall be collected by various persons from schools; (h) rules and regulations fixing the tuition fees and other fees to be paid by students; (i) rules and regulations requiring the form and execution of contracts between the schools and teachers and the details to be entered into in the contracts to be submitted to the Bureau of Private Schools for approval or disapproval; (j) rules and regulations fix-

owners of private schools nothing more than the naked legal title to property [20] and to teachers therein as little freedom to teach as the Secretary of Education may regard proper. It is proper to see further how these rules and regulations fare by the test of reasonableness as established by the United States Supreme Court in specific cases:

> "The real difficulty in considering the relationship of means to ends is not in the substantiality of the means but in whether the means are not more drastic than are justified by the ends. It is said that the legislature has the choice of means, and that the statute is not necessarily unconstitutional because the means may seem inexpedient or harsh . . . . But in spite of this declared tolerance, the dictum of Mr. Justice Brown in *Lawton v. Steele* (152 U.S. 133 [1888]), that the means must be 'reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals,' has afforded the Court an opportunity of exercising its discretion as to the permissibility of the means to carry out undoubted public ends. So it was held that the subsidence of surface occupied by dwellings could not be prevented by prohibiting the sub-surface owner from mining coal when by contract he had obtained the right to do so (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 [1922]); nor could sanitary bedding be assured by prohibiting the use of shoddy, when disinfecting would accomplish the same result (*Weaver v. Palmer Bros. Co.*, 270 U.S. 402 [1926]). Similar control by the Court over unduly drastic means is shown by the invalidation of the statute which to secure adequate wages for citizens took away the wages for aliens (*Truax v. Raich*, 239 U.S. 33 [1915]), or that which, in an effort to remedy the evils of employment agencies, practically abolished them (*Adams v. Tanner*, 244 U.S. 590 [1917]). . . ." [21]

The cases mentioned in the above quotation can very well be applied by analogy to the rules and regulations which have been issued by the Secretary of Education affecting the minutiae of the management of private schools, which apparently have been issued for the purpose of better educating those who seek training in the private schools.

Consider also Republic Act No. 139 which, under the same theory of control over private schools, provides:

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ing the period of school terms, the number of days of the school year, and prohibiting the holding of school sessions during certain times of the year; (k) rules and regulations *nicely* specifying laboratory equipment which a school must have before it may be permitted to open; (l) rules and regulations *nicely* regulating the use of textbooks and library books, their number, their kind, their nature for the different schools and courses offered; (m) rules and regulations requiring every school to adopt certain types of education and specific types of instruction, such as specific types of vocational education and the amount of vocational course in proportion to the amount of academic training. (As summarized in the Memorandum for the Petitioners, *supra* note 7.)

[20] Memorandum for the Petitioners, *supra* note 7.

[21] Brown, R. A., *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 954-55 (1927).

> **"The textbooks to be used in the private schools recognized or authorized by the government shall be submitted to the Board (Board of Textbooks) which shall have the power to prohibit the use of any kind of said textbooks which it may find to be against the law or to offend the dignity and honor of the government and people of the Philippines, or which it may find to be against the general policies of the government, or which it may deem pedagogically unsuitable."**

The "pedagogically unsuitable" part alone would qualify this statute as a suitable model for totalitarian countries.

A word more on the extent of the State's power of control over private schools. Very memorable are the so-called *Railroad Commission Cases* [22] because it was in these cases that the United States Supreme Court, speaking through Chief Justice Waite, angrily (in view of the irksome and destructive regulations that have been issued in reliance upon the doctrine of "business clothed with public interest") declared that this power to regulate is not a power to destroy, and limitation is not equivalent to confiscation.[23] Similarly, it may be put forth: this power to regulate private schools is not the power to regiment them because regimentation would defeat the very purpose of education, make robots out of our citizens, and contradict the other freedoms guaranteed in the Constitution.

The régime now governing our private schools, therefore, is made by possible by a statute which grants the Secretary of Education a very broad power of control—a power which, as already mentioned, is not even Congress's.[24]

Under the power granted by Commonwealth Act No. 180, the Secretary of Education has subtly (or otherwise) perpetrated a regimentation of our private schools which can only be duplicated by totalitarian countries.

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[22] 116 U.S. 307 (1886).

[23] Guthrie, W. D., *Constitutionality of the Anti-Trust Act*, 11 HARV. L. REV. 80, 89-91 (1897).

[24] This paper disagrees with any possible argument to the effect that only a power of control consistent with constitutional limitations should be deemed granted, so that while the rules and regulations issued in reliance upon Commonwealth Act No. 180 may be invalid, Commonwealth Act No. 180 itself is valid. The general tendency, quite recently, of courts here and in the United States, to recognize the delegability to executive bodies of practically every legislative power, it being enough that the delegation be conditioned by such elusive, if not all-embracing limitations as "public welfare," "necessary in the interest of law and order," "public interest," and "justice and equity and substantial merits of the case," etc., is, it is submitted, contrary to the doctrine of non-delegability of legislative powers. In such cases, the only limitation *in effect* on the delegation of legislative power is that the delegated power be exercised in accordance with constitutional limitations. As a result of this recent approach, there is hardly a legislative power that can not be delegated because there is always the tacit standard that the power be exercised consistently with the Constitution. Besides being void for being an invalid delegation of legislative power (because there is really no standard), it is submitted that Com. Act No. 180. even conceding *arguendo* that it is not objectionable on its face, is void because of its natural or practical operation. See 16 C.J.S. 229-32.

Where the private schools can hardly be the sustaining comfort of democracy, more so with the public schools. To expect our public schools (but not the State University, which is constitutionally guaranteed academic freedom) to be under a less regimented régime is to wallow in wishful thinking. In fact, a close comparison between public and private schools will disclose no substantial dissimilarity.[25]

At present, with ostensibly innocuous rules and regulations as to faculty, curricula, or school calendar, the danger to the other fundamental human liberties may not yet be felt. Until our Supreme Court realizes the implications of Commonwealth Act No. 180 and does something about it, Filipinos, reputedly fighters for their freedoms, may yet awake one day to find these liberties as mere ideals again.

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[25] And it has been aptly pointed out that there is an attempt by Congress, in Com. Act No. 180, to circumvent the constitutional axiom laid down in *Pierce v. Society of Sisters*, *supra* note 18, to the effect that the State has no power "to standardize its children by forcing them to accept instruction from public teachers only." Our Congress is unashamedly naive in doing indirectly what it cannot constitutionally do directly. See Memorandum for Petitioners, *supra* note 7.

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