THE CASE FOR AUTONOMY FOR PRIVATE HIGHER EDUCATION

(*Continued from the December* 1966 *Issue*)

This discussion of the freedom of private schools from government control may be further reinforced by one other decision of the United States Supreme Court which involved a law so closely identical to the present Philippine statute and regulations on the subject as to make one think that it may have served as the model of the latter. That was the decision in the case of *Farrington v. Tokushige* (273 U. S. 284). The law was passed by the legislature of Hawaii for the regulation and supervision of private schools conducted in language other than English or Hawaiian. The main difference between the two measures is that the Philippine statute is not simply applicable to foreign language private schools but to all private schools without distinction. In other words, our law is more comprehensive. The Hawaiian law was declared unconstitutional first by the United States District Court which held that it violated the due process clause because it deprived the owners and managers of private schools of their constitutional right to liberty and property. On appeal, the United States Supreme Court upheld that decision and declared that the provisions of the law and regulations were parts of a deliberate plan to place private schools under a "strict governmental control" and thus violated the due process clause protecting the rights of owners, parents, and children in respect of attendance upon

schools as announced in the cases of Meyer v. Nebraska (262 U. S. 390), Bartels v. Iowa (262 U. S. 404), and Pierce v. Society of Sisters (268 U. S. 510).

A general summary of the provisions of the Hawaiian statute could impress us with their close similarity to those of our own law and regulations on such subjects or features as the following:

1. That no private school may be conducted in Hawaii without a written permit from the department of public instruction.

2. Tha classes shall be held only during certain hours of the day and week and only for so many weeks in a year.

3. That the department of public instruction has power to prescribe by regulations the subject and courses of study of all the private schools, and the entrance and attendance, requisites or qualifications of education, age, school attainment, demonstrated mental capacity, health and otherwise, and the textbooks to be used.

4. That in every school no object of study shall be taught, nor courses of study followed, nor entrance nor attendance qualifications required, nor textbooks used, other than as prescribed or permitted by the department of public instruction.

5. That the department of public instruction has power to appoint one or more inspectors of the private schools who shall have the right to visit such schools and to inspect the buildings, equipment, records, and teaching thereof and the textbooks used.

6. That if the department is at any time satisfied that the holder of a permit to run a school or to teach therein has violated or failed to observe any provision of the act or the regulations, the department may revoke the permit.

After pointing out in detail these features of the Hawaiian statute and regulations governing the schools concerned, the Supreme Court declared:

> "The foregoing statement is enough to show that the School Act and the measures adopted thereunder go far beyond mere regulations of privately supported schools where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest. They give *affirmative direction* concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbook. Enforcement of the act probably would destroy most, if not all of them, and certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say harmful."

As previously indicated, the Philippine statute is substantially similar to the Hawaiian statute especially (1) in so far as it requires all private schools to secure a permit from the Department of Education before they may be opened, and (2) in so far as it "*gives affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teaching, curriculum, and textbooks.*" The Court categorically declared that these features constitute a direct invasion of the property rights of the owners and "deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say harmful."

It stands to reason that if a system of regulation amounting to control is unconstitutional when applied to private foreign language schools, it is doubly so

when applied to our own private schools, run by our own citizens, and devoted to the education of our own people.

The ruling in this case of *Farrington v. Tokushige* prohibiting the government to exercise control over private schools is cited and expounded by Justice Felix Frankfurter in the course of his opinion in the case of *West Virginia State Board of Education v. Barnette* (319 U. S. 624, 657-658) in which he pointed out the universally accepted rule that the state may control *public schools because they are its own property* but that it has no right to control private schools because they not belong to it. On this particular subject the distinguished jurist had this to say:

> "Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to school of their own choosing but the state has no right to bring such schools 'under a strict governmental control' or give 'affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks.' (Farrington v. Tokushige, 273 U. S. 284, 298.)

The Philippine statute has, in effect, transferred the academic control and administrative management of the private schools and colleges from the hands of their owners to the hands of the government without

the consent of the former. The inescapable conclusion is that such an act is a plain deprivation of property without due process of law.

The illustrious jurist, Justice Benjamin Cardozo, one of the greatest judges and legal scholars America has ever produced, in his book entitled *The Paradoxes of Legal Science*, makes some pertinent observations on the constitutional development of the concept of liberty, how it has grown in scope and significance from specific and narrower bases to a much larger and comprehensive foundation which supports the protection of freedom in a much wider field of human activity including teaching and learning in private schools. To avoid any possible misconception of his thoughts in this connection, his exact words are here quoted as follows:

> "The concept of liberty in our constitutional development has undergone a steady and highly significant development. The individual may not only insist that the law which limits him in his activities shall impose like limits upon others in like circumstances. He will also be heard to say that there is a domain of free activity that may not be touched by government or law at all, whether the command be special against him or general against him and others. By express provision of the constitution, he is assured freedom of speech and freedom of conscience or religion. These latter immunities have thus the sanctions of a specific pledge, but they are merely phases of a larger immunity which finds expression in the comprehensive declaration that no one shall be deprived of liberty without due process of law...
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> "A few typical instances will serve to point my meaning. The government may not prohibit the teaching of a foreign language in private schools and colleges. (Meyer v. Nebraska, 262

U. S. 390.) For the same reason, *we can safely say, it may not prohibit the teaching in such places of other branches of human learning.* It may not take unto itself exclusively the instruction of the young and mould their minds to its own. (Pierce v. Society of Sisters, 268 U. S. 510). *Restraints such as these are encroachments upon the free development of personality* in a society that is organized on the basis of the family. We reach the penetralia of liberty when we throttle the mental life of a group so fundamental."

Another aspect of the Philippine statute affecting its validity concerns the broad discretion given to the Secretary of Education to promulgate rules and regulations of a positive nature purposely intended to improve *standards of education and the efficiency of instruction* in the private schools without specifically defining these terms. Assuming that the legislature could enact measures on the subject, nevertheless it is not authorized to delegate this power to administrative officials in broad and unlimited terms. This subjec was involved in the case of *Packer Collegiate Institute v. University of State of New York* (298 N. Y. 184). The plaintiff, a private nonsectarian school for girls, challenged the validity of a New York statute on the ground that it unlawfully delegated legislative powers to the Board of Regents of New York by vesting them with plenary authority to prescribe regulations for the registration of any private school. The particular portion of the statute which was attacked on the ground of unconstitutionality provides: "No person or persons, firms or corporation, other than the public school authority or an established religious group, shall establish or maintain a nursery school and/or kindergarten and/or elementary school...unless the school is *registered under regula-*

tions prescribed by the board of regents." (Italics supplied).

It was admitted that the plaintiff school, by reason of its character and standing, would be entitled to a license if it should apply for it from the board of regents, the government office entrusted by the statute to grant licenses to private schools. But that school refused to apply for a license because of its claim that the statute was invalid and unconstitutional. Without wasting words and unnecessary reasoning, the Court of Appeals of New York, the highest judicial tribunal of the State of New York, on July 16, 1948, declared the statute unconstitutional as it was an "attempt to empower an administrative officer, the State Commissioner of Education, to register and license private schools, under regulations to be adopted by him, with no standards or limitations of any sort."

The statute being an invalid delegation of legislative powers, the Court stated that it was unnecessary to discuss the validity of the regulations issued by the Commissioner of Education. But to show the danger of placing an undefined power in the hands of an administrative official, the Court pointed out, that "the Commissioner, left without legislative guidance, proceeded to legislate, broadly and in many different areas. Summarized, those regulations provide that each such school shall apply for registration under forms prescribed by the commissioner, who shall determine the school's eligibility for registration on the facts presented; that registration shall be given only for a number of children to be specified by the commissioner, but not fewer than six children; that the program, curriculum and financial resources of school must meet standards to be approved by the commissioner; that the qualifications of the teachers shall be up to those of the public school; that the

number of children per teacher shall not be too large for proper education; that there shall be adequate equipment and space, adequate provisions for health and sanitation and fire escapres, adequate opportunities for parent education and adequate record-keeping; that the schools shall be in session approximately the same number of days as the public schools, and that no school shall be registered if it puts out misleading advertising. A comparison of those regulations with the bare and meager language of the statute forces the conclusion that, however good or bad the commissioner's rules may be, they were not controlled, suggested or guided by anything in the statute."

The Court explained the nature of the right of private schools and of the limitations of the power of the legislature to regulate such school in the public interest. It says on this point: "This is no small or technical matter we deal with here. *Private schools have a constitutional right to exist, and parents have a constitutional right to send their children to such schools.* (Italics supplied) Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary, (268 U. S. 510). The Legislature, under the police power, has a *limited right* to regulate such schools in the public interest. Pierce v. Society of Sisters supra: Meyer v. Nebraska, 262 U. S. 390."

The fact that under the Constitution the government may regulate and supervise private schools does not mean that it can do so in any manner and form however unreasonable, oppressive, violative of constitutional rights, or prohibitory of acts that are in themselves harmless and useful. It is true that the maintenance and conduct of private schools may be used to commit fraudulent cases or to mislead the credulous as it has been actually done in some instances. But, as the Supreme Court of the United

States correctly stated in declaring unconstitutional and void a statute which prohibited employment agencies from demanding from any person fees for securing an employment for him, *the mere fact that abuses crop up in connection with a business may not justify "destruction of one's right to follow a distinctly useful calling in an upright way."* For, as the Court said in that case, there is "no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to everyone of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest." (Adams v. Tanner, 244 U. S. 590)

Regulation and supervision, therefore, must be reasonable and must not be destructive of the rights of the individual to liberty and property. Statutes for such purposes must state clearly the prohibited acts that are in fact fraudulent, vicious, and undesirable. A statute of the nature here discussed goes beyond these constitutional limits. It vests in the administrative official unlimited power to issue restrictive rules covering all aspects of the organization, the conduct, the financing, and the life of private schools and colleges, the liberty of the teacher to teach, and the natural right of parents to rear their children in the manner they believe wise and proper. The power thus vested is no longer a power of regulation but a power of control, practically complete and absolute, a power which can be exercised to suppress constitutional rights.

It is quite clear that under the Constitution there are definite boundaries between the right of the owner and the teacher of a private school, on the one hand, and the authority of the government over such schools, on the other. It may be safely said that to the owner and teacher belongs the *control and direction* of the

private school; and to the government belongs the *supervision* over it so it may desist from doing fraudulent acts or from committing what is obviously harmful to its students and the public.

A review of the different legislative steps which eventually resulted in the adoption of the system of supervision and regulation of private schools and the circumstances which gave rise to it may be of help in understanding the present state of governmental control over private education. It may also enable us to determine the desirability or the disadvantages of restriction on the freedom of education in this country.

The law passed by the Philippine Commission on January 21, 1901, as Act No. 74, establishing the public school system of the country provided in its Section 25 that nothing in the enactment should be "consrued in any way to forbid, impede, or obstruct the establishment and maintenance of private schools." In those early years of the American occupation the private schools were still run after the Spanish model. The Spanish language continued to be used in the existing institutions of higher education. Their students and graduates were not trained in the American methods of instruction; and they hardly had enough knowledge of English to meet the entrance requirements of the newly organized University of the Philippines and other government colleges or to qualify for civil service positions. Under such conditions there was much disatisfaction with their courses and methods of instruction. The result was that in 1907, in the first session of the Legislature following the creation of the Philippine Assembly, bills were presented for the purpose of placing private schools under compulsory government supervision. But such legislation was not considered necessary by the American administration as it was believed that the pertinent provisions of the corporation law were sufficient

to carry out what the Assembly had in mind without provoking unnecessary trouble and bad feeling.

But public disatisfaction with the performance of most private schools could not be wholly ignored. Some colleges began to realize the necessity of improving their standards of instruction; and as the government discovered that they actually reformed their courses and methods, they received official authorization to confer degrees and award diplomas. Seeing these results, more institutions decided to apply for government supervision of their courses of study, methods of teaching, textbooks, and equipment in the expectation of receiving similar privileges. (Report of Phil. Comm. 1908, part 2, p. 779). Consequently, the Department of Public Instruction's curricula and plans of study began to be voluntarily and uniformly adopted by private institutions for the sake of acquiring the privilege of awarding officially recognized degrees and diplomas to their graduates. Any of these gave a sort of an advantage to its holder as it permitted him to transfer to any public school with the right to have his record in the private institution accepted and approved.

But as Filipinos acquired greater knowledge and mastery of higher education and its administration, the practice or rule of prescribing a uniform schedule of courses, teaching methods, and other instructional ideas has obviously discouraged initiative and experimentation in the aducational activities; and it has prevented diversity and flexibility of educational plans. Without being consciously and widely felt, it has created a real danger to individual freedom, made authoritarianism superficially advantageous, and insidiously preserved the colonial spirit of intellectual parasitism. The Filipino newspapers at that time showed a remarkable grasp of principle and moral independence when they criticized the action of the

Department of Public Instruction as a threat to the freedom of education. For instance, *La Vanguardia* in a singularly perceptive editorial of May 22, 1912, made the following comment and protest:

> "The government, for the purpose of impelling all studious youths toward official schools, has surrounded the latter with certain guarantees and privileges in which private schools barely participate. The Department of Public Instruction has drawn up a course of study for all schools, as the condition *sine qua non* for their recognition, and the government is an Argus in spying out the slightest slip of private schools in order to withdraw the recognition given them. Is not this an offense against the freedom of education? Thus, the tendency is to make private schools disappear little by little in order to leave a wider field for official schools and in this way to be able to embed in the brains of our youth the ideas of the government." (Translation by Governor Forbes).

The thought expressed by this editorial of the *La Vanguardia* was not understood by Governor-General Cameron Forbes, whose previous personal experience was confined to business and banking matters. Without a sufficient background of educational experience and with a meager knowledge of academic problems, he referred to the system adopted by the Department of Public Instruction as an "admirable arrangement." But years later, it is remarkable how the ideas of the *Vanguardia* were practically upheld in their essence by those decisions of the United States Supreme Court which have been previously discussed in this paper. The basic theme of those ideas correspond to the views expressed by liberal thinkers and progressive writers in America, England, and continental Europe, as will be later shown in this paper.

(*To be continued*)