philippine studies

Ateneo de Manila University • Loyola Heights, Quezon City • 1108 Philippines

Dr. Salcedo and "The Liberty of Education"

Joaquin G. Bernas

Philippine Studies vol. 9, no. 3 (1961): 520—525

Notes & Comment

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The *Philippines Herald* recently serialized (April 29, 1961; May 6, 13, 20, 1961) an address of Dr. Daniel M. Salcedo before the graduates of the Central Philippine University in Iloilo City. In it he expresses his views on the meaning of the natural right of parents to educate their children. When an Undersecretary of Education undertakes to expound such a fundamental aspect of constitutional-educational theory, his pronouncements on the subject cannot be overlooked.

Dr. Salcedo tells us that this "natural right means no more than their right before the institution of the regime of constitutions and of government;" that it "is the same as that ordained in the Constitution of which no person may be deprived." He continues:

> The natural right to education means, among other things, the right to follow any profession that one pleases, and liberty to teach as well as liberty to learn. It may include the right to use one's property for the attainment of education, to go anywhere and at any time in search of such education. In relation to the education of their children, the natural right of parents in the rearing of the youth for civic efficiency means these. And more. It also means the right to determine the contents of their education.

It seems however that Dr. Salcedo is more interested in telling his hearers what this natural right *does not mean.*

The Undersecretary takes pain to point out that this natural right "does not mean the right of any person to do as he pleases as if he were living in an island by himself, independent of social control and of the fetters of government imposed for the preservation of the social order." "It does not mean the liberty of parents to do as they please with their own education and that of their children." "It does not and could not mean that they could put up any kind of schools which would operate as they please..." "It could not mean and should not mean that they can determine absolutely and independently of the State, what is to be taught in said schools . . ." Finally, he tells us

that even without the specific regulatory provisions in the Constitution this natural right "is implicity subject to the power of regulation of the State for the promotion of health, safety, morals, and general welfare."

Anyone who admits the implications of human sociability and the objective of political association will not dispute Dr. Salcedo's contention that liberty in a political society is not absolute. But the question is not *whether?* but *how much?*. Educators accept as conclusive the constitutional provision prescribing state supervision and regulation of schools. They accept it on both constitutional and philosophical grounds. The debate, however, that has been raging between private educators on the one hand and education officials on the other centers on this paramount issue: How much supervision and regulation?

To this question, Dr. Salcedo's answer, in the concrete, must necessarily be: As much as the Department of Education is doing now, and as much as such Department will do as time and circumstances demand. And to this the private educator's response is not "Amen", but a question: Can you justify so much?

Is such a question irreverent? The question is perhaps frequently pronounced with an irreverent inflection, but in a free society such as ours it is a legitimate question. The individual is naturally free. Liberty is the normal state of the individual, constraint the exception. Hence, in a situation where a confict arises between liberty and constraint, it is constraint that must be justified. The burden of proving that in any given instance constraint is beneficial lies with those who seek the curtailment of liberty. This is sound political theory recognized by Philippine jurisprudence. Police power is essentially restrictive of freedom and courts always require that police power legislation justify itself by (1) its necessity: the interest of the public generally, as distinguished from those of a particular class, must require the restriction, and (2) its reasonableness: the means adopted must be reasonably necessary for the accomplishment of the purpose and not unnecessarily oppressive upon individuals. Hence, the question is legitimate: Can you justify so much?

Dr. Salcedo's address is not an apologia for any particular rule or regulation promulgated by the Department of Education or for any particular piece of legislation. It is an attempt in general terms to justify the present state of facts.

The reasoning, in effect, runs thus: The State has the duty of preserving the "way of life" "which we have chosen to adopt for our country and for our people." This duty is coupled with a general power of promoting a general objective, viz., "health, safety, morals, and general welfare." Implicit in the general power is the specific

power of supervision and regulation or schools; and this implicit specific power has been made explicit by Article XIV, Sec. 5 of the Constitution. Implicit likewise in the general objective are some specific objectives of education and these specific objectives have also been made explicit by the Constitution, viz., "to develop moral character, personal discipline, civic conscience, and vocational efficiency, and to teach the duties of citizenship" (Art. XIV, Sec. 5). Hence, the purpose of supervision and regulation is "not to standardize education... but to carry out faithfully the objectives of education set forth in the fundamental law. And this power of supervision and regulation has been vested by law in our country in the department of education."

The argument can be misleading. It suggests that it is the State which must "carry out faithfully" the objectives of education. It therefore makes the educational role of the State a primary one, whereas the Constitution is clear to the effect that the job of carrying out the educational objectives primarily belongs to the school (operating, of course, as the agents of the primary educators, the parents). "All schools shall aim to develop moral character, etc." It does not say, "The State shall aim etc." What then is the role of the State? "The natural right and duty of parents in the rearing of the youth for civic efficiency should receive the aid and support of the Government" (Art. II, Sec. 4). The role of the State is a subsidiary one. It gives *aid and support, subsidium.* It does not carry out the objectives of education. It helps carry out the objectives of education. The power of supervision and regulation must be understood in the light of the natural right of parents.

There is another passage in the Undersecretary's speech which disturbingly suggests that the State is the primary educator. The passage is this:

> Until it can be sure that it shall be able to meet adequately the educational needs of every community in the country, the State may find it necessary to depend upon the cooperation of civic-spirited citizens, and even those from overseas, who are now in our territory, for assistance.

The implication is that when the State becomes "sure that it shall be able to meet adequately the educational needs of every community in the country," then the educational role of "civic-spirited citizens", of private schools, shall have come to an end. The implication is disturbing not because the fulfillment of the vision is imminent, but because the vision in effect denies the natural right of parents. The Constitution however is clear on what it holds.

We are reminded of a portion of the speech of Dr. Laurel in his sponsorship of the Bill of Rights during the Constitutional Convention. It runs thus:

> Attention has been called by a leading political scientist of our country (Dr. Maximo M. Kalaw) to the necessity of formulating our Bill of rights no longer on the basis of inherent and natural rights of man—because this theory is now obsolete—

but rather on the basis of social rights, as the State is, in the modern theory, the creator or dispenser of rights. We should not, however, be allured by new and untried dogmas and theories in the formulation of our Bill of Rights, and again I suggest that we adopt a conservative attitude in this connection... Again, it were better that we "keep close to the shores; let others venture on the deep"...

And the Declaration of Principles clearly affirms that the right of parents *is* a natural one. We are also reminded of the statement of the chairman of the committee on the Declaration of Principles, Dr. Rafael Palma, to the effect that in case of conflict between a provision in the Declaration of Principles and any other provision in the Constitution, the Declaration of Principles should prevail (IX *Proceedings* 5374-5).

Are we now to conclude from all this that from the mass of circulars and memoranda that have issued from the office of the Department of Education we can point out some which transgress the limits set by the Constitution? In the relatively recent case of *PACU v Secretary of Education* we have seen the Supreme Court uphold the constitutionality of the "previous permit" system, of the power of the Secretary of Education to issue circulars and memoranda governing the maintenance of standards of efficiency, and of the "censorship" power of the Board on Textbooks. The decision was based on the police power of the State as made explicit by Art. XIV, Sec. 5. This decision, for some time yet to come, will be the salvation of many a Department ruling.

I say for some time yet to come because some day some new group of Justices will write off this decision from the Philippine *corpus juris*. This is because our constitutional law is a living law. It yields to dynamic development. It adjusts itself to the realities of current social conditions. This power of adjustment is particularly true of police power. Police power is so elastic that it has given rise to a judicially recognized theory that the principle of *stare decisis* has no application to an exercise of police power. As the U.S. Supreme Court has pointed out, a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory. These "later events" can be, in the context of our discussion, the emergence of competent private accreditation systems capable of "policing" private schools. But for the present our Supreme Court has taken the position, in *PACU v Secretary of Education*, that the realities of 1924, whose gloomy story one may read in the 677-page report of the Board of Educational Survey created under Acts 3162 and 3196 of the Philippine Legislature, still substantially subsist. Thus, if, for instance, that noble institution which so many years ago did so much good to our present Secretary of Education, the nationwide government examinations, should be judicially challenged, *PACU v Secretary of Education* will come into play. The decision could very well be: What was good enough for David, is still good enough for you!

The fact of the matter is that trying to strike down a police-power measure on constitutional grounds is extremely difficult. True it is that courts require two qualities in police-power measures: necessity and reasonableness. Necessity should include two elements: (1) the measure should be necessary for the common good, and (2) it should be necessary for the State to undertake the measure because no lesser entity can undertake or is undertaking it. Our Supreme Court recognizes the first element; it does not seem to recognize the second. As for reasonableness, the Court's chief interest is in the negative aspect of the term: the measure must not be unduly oppressive. Thus, the liberal attitude of the Supreme Court towards police-power measures is well expressed by Justice Malcolm, quoting Justice Holmes, in *Rubi v Provincial Board of Mindoro*: "constitutional law, like other mortal contrivances, has to take some chances." The reason for this is that police-power, like "political questions" or "policy making", properly comes under the province of the "political" departments—the executive and the legislative. Hence, in a system of a jealously guarded separation of powers, the wary attitude of the judicial department is understandable.

It is salutary, nevertheless, to be preoccupied with the constitutionality of the actions of government. Vigilance, after all, is the price of freedom. But such pre-occupation has its dangers, for it can lead to the acceptance of a false value. Mr. Justice Frankfurter made the point very well in the famous *Barnette* case when he said:

> The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional... Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law....

Our Supreme Court likewise has repeatedly reminded litigants that courts do not pass judgment upon the wisdom or advisability of a governmental measure. The proper concern of courts is only legality. Hence, a declaration of constitutionality is not a guarantee of sanity. A judicial vindication, therefore, of the constitutionality of every single circular or memorandum of the Department of Education would not mean total victory. The human spirit does not give up fighting off threatening fetters. From the judicial forum, the debate will pass on to the forum of practical wisdom.

At present, the debate on educational issues is far from finished; it is just beginning. And in the forum of practical wisdom there are no courts to put an end to debates. One of the qualities, therefore, which the policy makers of the Department of Education should have is an infinite capacity for sustained and intelligent argumentation. Governmental policies will continue to be criticized, and it will not do to dismiss such criticism as merely an attempt to hamper, to obstruct and to embarrass. (I am not, however, accusing the Undersecretary

of employing such tactics.) It is neither heroic nor rational to meet an argument by running away from it. It is the peculiar concern of the Department of Education to favor civic progress, and civilization is said to be formed by men locked together in argument.

Let me conclude this essay with an observation on nationalism, to the inculcation of which Dr. Salcedo exhorts teachers. Educators and parents do not resent government exhortation to what Dr. Salcedo calls enlightened nationalism. What they resent are attempts to lay down binding rules on how to produce nationalists. Dr. Salcedo does not do this in his speech. Suggestions, however, have come from official sources. We shall cite only one, the Flag Salute Regulation. The constitutionality of the rule was upheld in the recent *Gerona* case, but there is a certain hollow ring in Mr. Justice Montemayor's defense of the rule.

> ...in the field of love of country, reverence for the flag, national unity and patriotism they [men] can hardly afford to differ, for these are matters in which they are mutually and vitally interested, for to them, they mean national existence and survival as a nation or national extinction.

There is an overemphasis on the value of the flag salute as an instrument for inculcating "love of counrty and love of the flag, all of which make for a united and patriotic citizenry, so that later in after years they may be ready and willing to serve, fight, even die for it." The men who lost their lives in Bataan before the Flag Salute Rule never knew what they missed! For our part, we prefer the position taken by Mr. Justice Jackson and the majority of the U.S. Supreme Court justices in the *Barnette* case: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion..."

JOAQUIN G. BERNAS

The Purchase of Meralco

On June 8, 1961, in Wilmington, Delaware, a Letter Agreement was signed by A. F. Tegen, President of the General Public Utilities Corporation, and by Roberto Villanueva, Vice-Chairman of the Trustee Committee for Meralco Securities Corporation, stating the terms of sale of the Manila Electric Company to Meralco Securities Corporation by General Public Utilities Corporation.

Meralco Securities Corporation will acquire and hold the securities of Meralco. These consists of the following:

1) ₱8 million worth of First Mortgage Bonds, Series "A", 6%, due December 31, 1972.