

MINISTÉRIO DA EDUCAÇÃO E CULTURA
UNIVERSIDADE DO RECIFE
FACULDADE DE DIREITO

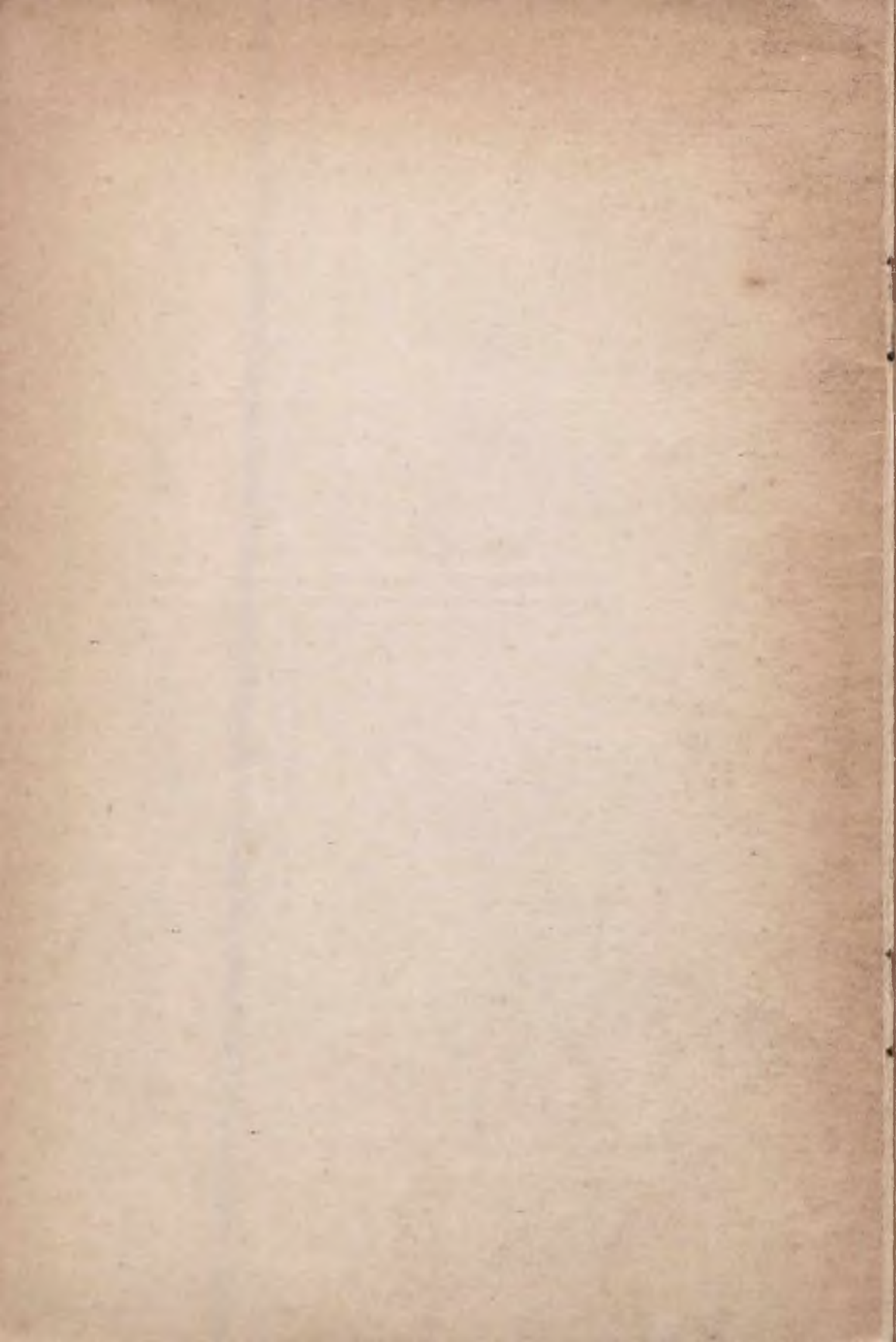
JUDICIARY AND EDUCATION

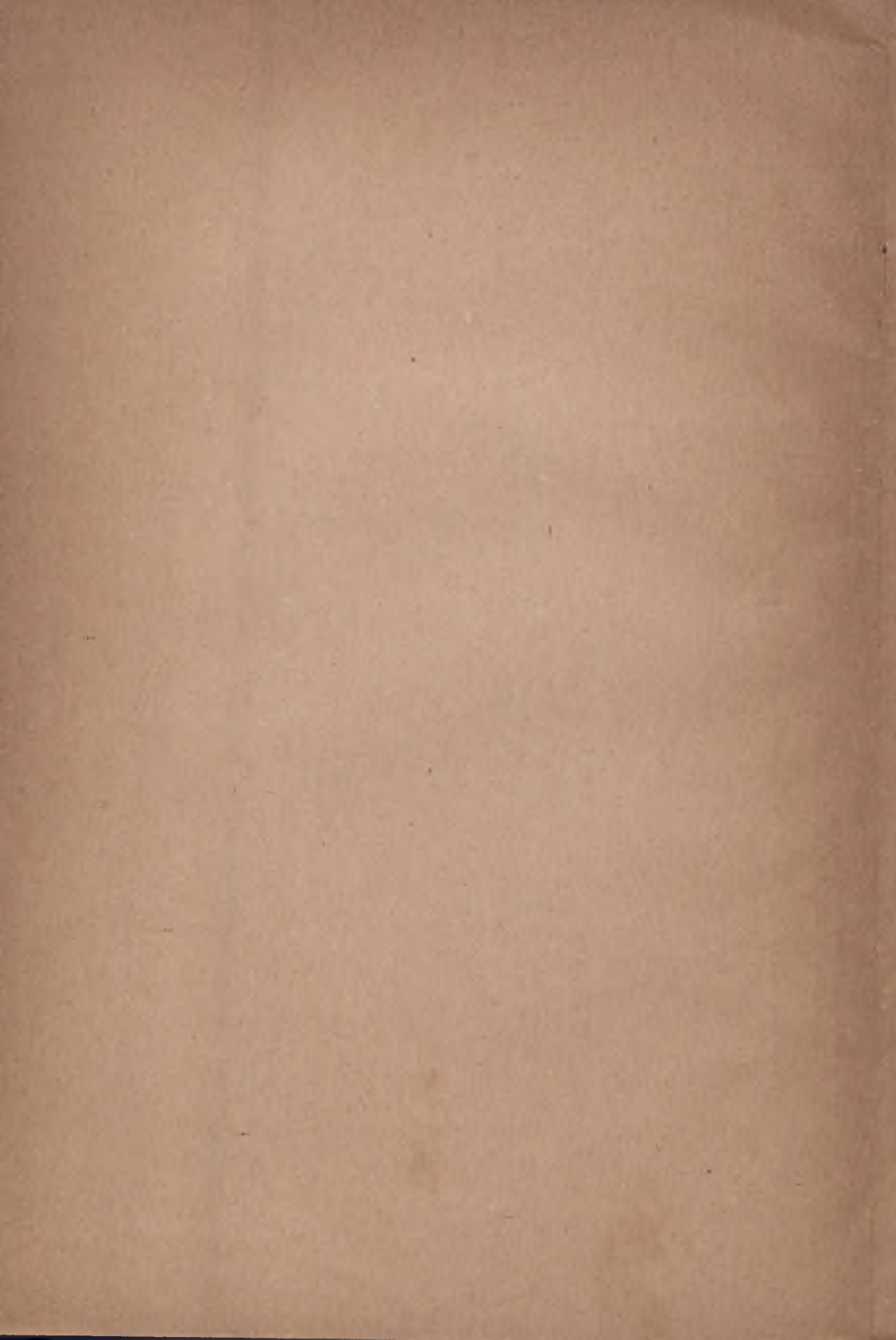
DR. KOTARO TANAKA

Chief Justice of the Supreme Court of Japan — Member
of the Japan Academy — Professor emeritus of the
Tokyo University

SEPARATA DO VOL. I DOS ESTUDOS JURÍDICOS EM HONRA DE SORIANO NETO
RECIFE * PERNAMBUCO * 1962

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Judiciary and education belong to different categories of the national administration. The judiciary belongs to a separate and distinct branch of the Government, independent of the executive and legislative branches; but education, in its broad sense, is a part of the executive function of the Government. The purpose of the judiciary is to restore order and normalcy. When the tranquility of society is disturbed by criminal acts or violence, or by disputes over rights and obligations in human relationships. Education, on the other hand, has as its aim the promotion of moral well-being and the raising of the cultural standards of society; its immediate goal lies in the moulding, guiding and perfecting individual character. The raising of the social and cultural levels of the nation is an indirect result of education.

The basic mission of the judiciary is the realization of law and order, and its object is the same, whether it is engaged in maintaining law and order in society by punishing the individual for his crime or in settling legal disputes among citizens. The mission of education is somewhat different in that it is characterized by having men and women of great

learning, liberal ideas and high principles endeavor, through teaching and example, to develop character.

Of course legal problems arising out of human relationships have their own characteristics, which characteristics become rather abstract when referred to the judiciary. While the application of law is general, there is a tendency to categorize men and their relationships; education is a private and personal relationship between the educator and those to be educated. This personal relationship is inevitable even though the collective nature of group education tends to mould people into certain categories, since it is fundamentally objective and universal.

In this sense the judiciary maintains an inseparable relationship with the State since its primary function is the preservation of law and order, and it cannot pursue its mission without taking into consideration the position of the State. For this reason the function of the judiciary is exclusively reserved to the State. The State also is deeply concerned with the question of education and is actively engaged in promoting education from the point of view of the public welfare. To implement this the State promulgates various rules concerning the organization of the educational system, but the State does not take over the entire field of education under its exclusive control. In the modern state, while the national and public schools maintain a dominant place in the sphere of education, an important role is played by private schools. The effect of family education cannot be too strongly stressed since family education is the foundation of all education and is based upon the inherent obligation of parents to provide training and education for their children.

In a fascist or communist state, education, like the judiciary, is exclusively controlled by the State. The principles of education are standardized in accordance with the current political dogma; personal and private relationship between the educators and the educated disappears and all individuality is destroyed. In a democratic country, on the other hand,

education is basically regarded as a private and individual matter, and even though it may be conducted by the State or by local autonomous bodies as their enterprise, the relationship between the educator and the educated remains fundamentally a private and personal one.

In a democracy the most basic and formative education is that which is given by parents to their children, and the educational institutions, whether they be national, public or private, as considered to be the trustees of the parents in this respect. I do not here intend to discuss the rights of parents to educate their children. It is sufficient to say here that such a right exists under the natural law and as such, should be protected by the Constitution. In some democratic countries, this right is expressly protected by the Constitution.

These differences between education and judiciary do not necessarily deny the fact that there does exist a striking similarity between them. It appears that very few scholars pay any attention to this point. While the differences I have pointed out go to the fundamental relationship between education and the judiciary, there are striking similarities inherent in their nature. The fact that they are given similar political consideration is based upon the fact that they have many things in common; they both maintain certain autonomy and enjoy a wide range of independence. In spite of the fact that the judiciary executes the power of the state and is monopolized by the state, it is remarkable that it is able to maintain its independence from the state. Paragraph 3 of Article 76 of the Constitution of Japan of 1945 (the new Constitution) declares that: "All judges shall be independent in the exercise of their conscience..." and clearly establishes the independent status of the judges, though as a matter of fact, this principle was also recognized in the old Constitution. In this respect there is no difference between the old and the new constitutions of Japan. Further, both the old and the new constitution contain similar provisions, guaranteeing the status of

the judges, as contained in Article 78 of the new Constitution and paragraphs 2 and 3, Article 58 of the old Constitution. One of the chief differences between the new and the old constitution is that under the new constitution, the courts are more clearly separated from the executive department in order to insure and secure more perfect independence of the judiciary. Under the new constitution the courts also manage their own judicial administration, as set forth in paragraph 1, Article 77 and Article 80. Further, the judges are contra-distinguished from ordinary government officials in that instead of the usual salary, they are given considerable remuneration which cannot be decreased during their term of office. (Paragraph 6, Article 79 and paragraph 2, Article 80 of the new constitution). The independence of the judiciary is thus further secured.

Similarly, education is guaranteed independence by special provisions in the Basic Education Law of 1947. Unlike the judiciary, however, the Minister of Education holds a cabinet post under the executive department. Within this framework, however, the Education is allowed a certain degree of autonomy. Paragraph 1, Article 10 of the Basic Education Law provides that: "Education shall be conducted, without being subject to undue control of another, owing its responsibility directly to the peoples as a whole". Autonomy in education was recognized under the old system as a custom in state universities. This was especially true in matters relating to the election of presidents, deans, professors and assistant professors; guarantee of the status of educators during their tenure of office and within the age limit prescribed by the school; selection of courses; establishment and abolishment of chairs, etc. Under the new system, however, the scope of school autonomy was enlarged. Government control was

on curtailed to the minimum and school administration was transferred from the prefectural governors and local officials to the newlycreated boards of education. The Special law concerning Educational Public Service incorporated the pre-existing customs and practices and provided for the treatment of presidents and professors of universities regarding their appointment, status and discipline, etc.

Thus the independence of the court and the guarantee of the status of judges resemble the autonomy of the universities, and the guarantee of the status of professors, including assistance professors. These similarities are obviously rooted in the fact that they both are required to act independently of politics or government administration — courts and judges being taxed with the mission of maintaining peace and order; and university professors with the pursuit of truth and education of students. These missions are universal and eternal and must be carried out without interference from the government or any other external force.

By their very nature, both the Judiciary and the Education transcend governmental or political consideration. The mission of the Judiciary is to establish and maintain law and order, and the mission of the Education is to produce an enlightened and stable citizenry. In this sense they lay the very cornerstone of society, and it is imperative that the State recognize the importance of the judiciary and education since to treat them superficially would mean national suicide.

In view of the special nature of these two departments of the government, it is essential that they be above all political consideration and conversely, they should not intervene in political matters. It is natural to expect that the judges should not be permitted to interject political consideration in the execution of their duties or in the application of law. Under the Court Organization Law they are prohibited from beco-



ming members of the National Diet or of local assemblies; or to engage actively in political campaigns. Under the Basic Education Law the schools cannot support any particular political party or provide political education in opposition to any political party, or to engage in any political activities. Thus; educators are not only prohibited from engaging in political activities within the compound of educational institutions, but such activities outside the school would also be incompatible with the mission of education, though it might not be in direct contravention to the law. Since members of the judiciary and educators are exempt from interference on the part of political groups or the administration, it is only natural that they must remain absolutely neutral and refrain from using their position to intervene in political affairs. If they were permitted to interfere in the political affairs of the country, we would have a repetition of the chaotic conditions caused by the intervention of the military in pre-war years, and all the reforms of the new constitution would be destroyed.

I have tried to explain that both the judiciary and education have a common mission and have also tried to show that politically, they are handled in the same manner. They are dependent on each other, since in a community where there is no law and order, education is impossible. Let me explain this situation by the use of a figure of speech: The court is like a clinician who diagnoses and supplies treatment to restore the health of individuals; while educators are like the public health officer who applies preventive medicine techniques to preserve health and improve the mental and physical condition of society. From a political point of view, the clinician is in more urgent demand than the public health officer though the function of the latter is more positive and constructive, because order is the mother of all things.

Regardless of these inherent differences, the judiciary, and education are intimately and inseparably related. The judiciary, in addition to being the guardian of the inalienable rights of the people, teaches, through the settlement of individual cases, justice, law, order and freedom. In this sense, the judges are educators.

On the other hand educator must possess ability to think accurately and objectively in observing right and wrong in guiding individuals. For this reason, they must be judges at the same time. There is no difference between the two, in as much as they have their basis in the universal principles of man-kind, natural law and true humanism.

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