A CONSTITUTION FOR THE PHILIPPINE COMMONWEALTH

By V. G. SINCO

Historical Background

A brief review of the development of our government from 1900 to the present day will enable us to get our bearings and to obtain a clear perspective of its general outlines together with its changes in the past. This orientation is absolutely necessary before we can intelligently draft a governmental plan for the Philippine Commonwealth. For it should never be forgotten that a constitution to be workable must be adjusted to the conditions of the country. It should in fact preserve tested features of governmental organization and eschew as much as possible not simply what is obviously bad but also what is superfluous. Thus while a constitution must perforce follow conservative lines, it should not be completely barren of constructive ideas.

Constitutional government, as now established in the Philippines, began from the date President McKinley issued his famous Instructions to the Second Philippine Commission on April 7, 1900. That instrument brought into this country the bill of rights, the principle of government of laws, and the republican form of government with its indispensable adjunct, the theory of separation of powers, which is associated with the presidential system of government. It is apparent, therefore, that from the very start, the basis of governmental organization in these Islands has been the presidential system. The general outlines of its development may be stated as follows:

From 1900 to 1901, governmental powers were distributed among the three branches, which were a military executive, a *unicameral* legislature consisting of the legislative commission, and a judiciary of about the same form as at present.

From 1901 to 1907, the same tripartite division of powers obtained. The executive power was vested in a governor general, a civil officer, who was at the same time the chairman of the legislative body. He had no veto power over legislation. The legislative body was *unicameral* with the governor general as chairman, and the heads of the executive departments as members together with some purely legislative members (commissioners without portfolios). Much constructive legislation was accomplished by that unicameral chamber. The judicial branch was exactly what it is at present.

From 1907 till 1916, the legislative authority for the Christian provinces became bicameral, the Philippine Assembly and the Philippine Commission; but for the non-Christian provinces legislative authority continued to be unicameral, the Philippine Commission. The governor-general continued to be without any veto power.

From 1916 till the present, the legislature has become almost completely elective; and the executive has been vested with veto power on all legislation. The provisions of the Jones Law, which has been the organic law of this country since then, by implication permit legislators to be appointed heads of executive departments. Accordingly, now and then members of the Legislature have been appointed secretaries of the interior, finance, and agriculture and commerce. Former Secretary of War Newton D. Baker considered this feature of the Jones Law a distinct improvement on the Federal government of the United States. In principle, however, this aspect of the organic law introduced nothing absolutely now in the Philippine system for the Philippine Commission was made up partly of executive heads.

Essential Features

It must be borne in mind that a constitution is intended not only for this generation but for generations to come; that it should be known not only by lawyers but by the people. It is primarily the people's law, not the lawyers' law. For these reasons, a constitution should be brief in form, clear in expression, and comprehensive in scope. These characteristics are found in the Constitution of the United States. As to brevity Chief Justice Marshall, the greatest interpreter of that Federal charter, said: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those subjects be deduced from the nature of the objects themselves." [1]

The evils of an elaborate constitution do not arise simply from the fact that it becomes incomprehensible to the public but also from other considerations. Its details become so easily and so quickly outmoded that in a relatively brief space of time they

[1] McCullough v. Maryland, 4 Wheat. 316, 4 L. ed., 579.

lapse into a state of "innocuous desuetude". When the bulk of a constitution becomes a dead letter, constitutional government is a myth. The possibility of amending obsolete details is not a cure, but simply a poor palliative. This is so because the frequent use of the amending process detracts from a constitution that deep sense of respect which it should engender in the people. A keen student of constitutional law, Professor Ernst Freund, calls attention to another danger lurking in an elaborate plan particularly existing in a system of jurisprudence similar to that which obtains in the United States and in the Philippines where the judiciary is made the final interpreter of organic laws. He said: "The more elaborate the constitutional organization, the more likely it is to contain implications that are unrealized and unforeseen, and such resulting limitations may under a legalistic spirit of judicial construction seriously impede legislative and constitutional progress." [2]

In order that its scope may be comprehensive, general terms are used. Mr. Justice Story says of this characteristics as existing in the American Constitution: "The Constitution, unavoidably, deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purpose of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; the restrictions and specifications, which at present might seem salutary, might in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require." [3]

A constitution is not to be considered as a mold into which to squeeze the social order. It should be regarded as a form of government to enable the people to work out a social order.

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[2] Encyclopedia of Social Sciences, Art. "Constitutional Law."

[3] Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. ed. 97.

The business of a constitution is to set up a government, flexible enough to adjust itself to changing demands, but rigid enough to assure a relative stability to individual rights and to fundamental institutions. The government should be so sensitive as to be capable to execute effectively the people's wishes. A complicated governmental machinery is obviously unwieldy for this end.

The constitution should not undertake to settle social problems for all time, much less fix upon us forever the present economic or social ideas, or a particular economic, social, or educational theory. In the words of Mr. Justice Holmes: "A Constitution is not intended to embody a particular economic theory." Any attempt in this direction is to mistrust democracy, and is an erroneous conception of a constitution. A good constitution should never be a straight-jacket.

In our desire to emulate the best features of the constitutions of other states, we should be guided by one important criterion: That no feature of a constitution may be rightly considered an excellent model unless it is workable, has actually worked, and has produced results of practical utility. A logical provision, a nicely-balanced construction, do not in themselves prove the real worth of a constitution. The world is full of paper constitutions.

Simplification of Government

The problem of establishing and maintaining an efficient and economical government has one principal solution,—simplification. President Wilson expressed this matter very forcefully in this language: "Elaborate your government; place every officer upon his own dear little statue; make it necessary for him to be voted for; and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man upon his own statutory pedestal and you have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch; public aversion will have no effect on it; and public opinion finding itself ineffectual, will get discouraged, as it does in this country, by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no position where they accomplish nothing. You have a grand housecleaning, you have a grand overturning, and the next morning you find the government going on just as it did before you did the overturning. What is the moral? * * * The remedy

is contained in one word: *simplification.* Simplify your processes, and you will begin to control; complicate them, and you will get farther and farther away from their control. Simplification! Simplification! Simplification is the task that awaits us; to reduce the number of persons to be voted for to the absolute workable minimum—knowing whom you have selected; knowing whom you have trusted; and having so few persons to watch that you can watch them."

The theme of simplification in government is being forcibly restated by President Franklin D. Roosevelt who has been insisting in the consolidation of government agencies in order to effect efficiency and to secure economy in government. Characterizing it as an answer to the challenge to democracy, he said: "We heard a great deal during the Great War about the challenge to democracy and I think it was a good thing for our complacency to learn that democracy was being challenged. But democracy is being challenged today just as forcibly if not as clamorously. The challenge is from all who complain about the inefficiency, the stupidity and the expense of government. It may be read in the statistics of crime and in the ugliness of many of our communities. It is expressed in all the newspaper accounts of official graft and blundering. It is written in our tax rules and even in the patriotic-seeming text books that our children study in the schools. It looms large on election day when voters see before them long lists of names of men and women of whom they have never heard to be voted upon as candidates for salaried offices of whose duties and function the voter has but the haziest impression." [4]

The multiplication of the agencies of government is, therefore, anything but desirable. It is productive of irresponsibility and of waste. The creation of boards and commissions may be good temporary expedients, but as instruments to be provided in a constitution they are bound to increase the difficulty of coordinating the functions of government and unifying governmental action.

Republican Form of Government

The Philippine Independence Law requires that the constitution of the Commonwealth should be republican in form. While no fixed and comprehensive definition of a republican government has been so far unanimously adopted, there are cer-

[4] Looking forward, pp. 86-87.

tain features which characterize it. Among these are the following:

1. It should be a representative government, that is, that the government should be by representatives chosen by the people rather than the people themselves acting directly. (Madison in the Federalist, No. X.)

2. The government should be administered by persons holding their offices during pleasure, for a limited period, or during good behavior. (Madison, Federalist, No. XXXIX).

3. It is essential that the government "be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it." (Madison, Federalist, No. XXXIX). This element is opposed to a very limited electorate.

4. The government should observe the American principle of separation of powers, for, as our Supreme Court said in referring to the Philippine Commission organized under the President's Instruction: "President McKinley in creating civil government in this country took into consideration these fundamental principles of separate and independent departments, *which have been demonstrated to be essential to a republican form of government.*" [5]

From the above analysis, it is obvious that any organization may be adopted by the Constitutional Convention without violating the requirement of republican form of government provided that the foregoing features are incorporated in it.

What should be jealously preserved are the principles governing the relationship between the departments of government and the proper allocation of powers. The details of the organization of the executive, the legislative, and the judiciary are matters of minor importance compared to this question of departmental status and relationship. Whether our executive should be plural or single, whether our legislature should be unicameral or bicameral, whether our judiciary should be unitary or decentralized, these matters do not affect the substantive principles of the presidential system. They do affect, however, the efficient and economical administration of government. It is to this question that the Constitutional Convention should address itself.

Bill of Rights and other Mandatory Provisions

Besides the requirement of republican form of government, the Philippine Independence Law also prescribes that (1) the

[5] Severino v. Governor General, 16 Phil. 336.

Commonwealth constitution must contain a bill of rights; and (2) that certain provisions of the Law should be embodied in the constitution itself or in an ordinance having the same force and effect as the constitution.

As to the first requirement, it is imperative that the provisions of the Jones Law on the Bill of Rights should be closely followed. Some slight changes should be introduced for the sole object of adopting the phraseology of similar provisions found in the Constitution of the United States. With respect to the prohibition against imprisonment for debt, cases of fraud are excluded. This exception is highly protective of personal rights and is provided in many state constitutions in the United States.

A great American statesman and jurist referring to a certain provision found in the Massachusetts Constitution wisely remarked that the words expressive thereof should be preserved "in their very rust." The same statement is applicable to the words expressive of the Bill of Rights as couched in the Constitution of the United States or in our Organic Laws not simply because of their sentimental value but also and especially because of their practical importance. Their meaning has acquired stability through judicial interpretation.

As to the second requirement, the constitution of the Commonwealth should incorporate *by reference* all provisions of the Act of Congress. This method has two distinct advantages: (1) The Constitution is thereby made complete by itself and may, therefore, continue in the form as may now be drafted by the Convention even after the withdrawal of American sovereignty over the Philippines; (2) it avoids omissions or mistakes which may easily take place if we were to classify and repeat the mandatory sections of the Act of Congress in the ordinance. We should bear in mind that there are many provisions in the Independence Law which are mandatory in effect although they are not so expressly designated. To prevent possible errors in the transcription, incorporation by reference is considered a safe method.

The Executive Power

The constitution should vest the executive power in the President of the Commonwealth. The term *president* is used instead of *governor-general,* for two reasons: (1) the constitution is intended to continue even after American sovereignty shall have been withdrawn from the Philippines; and (2) the term *governor-general* will be misleading in a common-

wealth, for it is apt to be confused with such an office as the governor-general of the Commonwealth of Australia, an officer representing the executive power of the sovereign state, rather than an elective head of the Commonwealth.

Almost every thinking person is convinced that a strong executive is essential to our government. Experience has shown that this is wise and proper. The best way so far known to accomplish this end is to place in the hands of the executive authority, so far as safety allows, all powers which are inherently executive. On this subject it is well to remember the words of Alexander Hamilton when he said: "Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

"There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government; and a government ill-executed, whatever, it may be in theory, must be, in practice, a bad government.

"Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

"The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

"The ingredients which constitute safety in the republican sense are, first, a due dependence on the people; secondly, a due responsibility." (The Federalist, No. LXX).

The Power of Appointment

When the Jones bill was being considered in Congress, there was a definite proposal to vest the appointing power of administrative officers in the Governor-General exclusively. The principal reason that the proposal was disapproved was because Congress wanted to enlarge as much as possible Filipino control over local affairs. Secretary of War Newton D. Baker, in his letter of instruction to Governor-General Harrison, expressed his concurrence to the suggestion that, were it not for other counterbalancing provisions in other parts of the Jones Law, the power of the senate to confirm appointments "would materially handicap the governor-general in his desire to maintain a proper personnel." The reason behind this arrangement no longer exists under the Philippine Independence Law, as the Chief Executive will be a Filipino elected by the voters of the Philippines. Filipino control over local affairs will be practically complete during the Commonwealth period. The time has thus come that this power be vested exclusively in the President of the Commonwealth. Responsibility for good or bad appointments becomes fixed. "Senatorial courtesy" may no more be put forth as an excuse for bad appointments. Moreover, as this power is by nature executive, it should logically find its place in the office of the Chief Executive. The division of its exercise will tend to weaken the position of the President of the Commonwealth.

With respect to the system of appointment followed in the different States of the American Union, a well-informed writer (Professor Young of the University of Pennsylvania) graphically expressed the opinion of practically all students of government as follows: "All the States require the approval of the Senate for the Governor's appointments. This has proven a serious obstacle to his control over the State administration. There is no reason why he should not be trusted to select the State officials, even the most important. The question at bottom is after all a simple one,—do we want the Governor to manage the State administration? Or differently expressed, do we want that administration to be controlled by outside forces which escape public observation and responsibility? Every check and limit which is placed upon the Governor's appointive and executive authority is a measure of directing power and responsibility from him to these outside forces. Every step taken to increase his prerogatives brings out into the daylight the real influences at work in State government and renders that

government more accountable to the voter. Our commonwealth administration to-day is one of indirect responsibility and concealment. It is no coincidence that many advanced and vigorous executives protest against the policy of limiting the Governor's powers at every point. The Governors of Kansas and Colorado have forcibly called attention to this need."

In the case of the appointments of heads of executive departments, however, the constitution of the Commonwealth should require the confirmation of the Legislature for very obvious reasons. These are political officers intrusted with the carrying out of the policies of the party in power. They must naturally have the confidence of the majority in the Legislature. Party government, as now developed in this country, is preserved by this system. This also explains the reason why, with the exception of the vice-president acting as a department head, the term of office of these officers ends with the termination of the Legislature under which they have appointed.

The Council of State

The Commonwealth constitution should retain the Council of State. This institution, as now organized in this country, is peculiarly Philippine both in composition and functions. It is a feature which constitutes a modification and an improvement of the presidential system established in the United States. It is a legal agency of coordination between the executive and the legislature. Through it that needed harmony and coöperation which should exist between these two departments are secured. Of the advantages of this relationship, Governor-General Harrison said in his message of October 16, 1917; "Whatever may be our ideas theoretically as to the best method of conducting the affairs of our government, that method should be followed which will tend to bring all responsible elements of the public administration in close coöperation, prevent unnecessary friction in adjusting and operating the component parts of the administrative machinery, and thus secure rapid and united action and substantial results. This cooperation is particularly essential in moments of difficulties and crises. A lack of coordination of the elements of government or the failure of the great measures of government demanded by the public interest will not result in the final favorable opinion which the world will form of the political capacity of the Filipino people, but such final favorable opinion will of necessity be based upon the united and responsible action of the government, working and

operating like an organized and efficient whole, and keeping in view the necessities and aspirations of the people to whose security and welfare we are jointly consecrating our best efforts."

As the official link between the two policy-determining departments, it must necessarily have but advisory powers. Otherwise, it will absorb the powers of the two and destroy the independence and equality of each. Such a result will defeat the purpose for which this body is intended.

Important matters of legislation and administration will be discussed more deliberately in this small body of carefully chosen persons than in big assemblies. Whatever hasty or ill-considered acts may have been perpetrated by the Legislature, whatever arbitrary policy may have been contemplated by the Executive, in the Council of State they are apt to be corrected or tempered, without producing unnecessary irritation on either body as both are here present or are amply represented by their trusted leaders. Unified leadership in the formulation of policies may thereby be established. In many respects this body may in practice be made to act like a second chamber of the type approximating the ideal of Lord Bryce expressed in the report of his committee suggesting the reorganization of the House of Lords. (See below). The advocates of a bicameral legislature should bear this feature in mind before unduly criticizing a unicameral legislative body.

Administrative Centralization

The greatest defect of American State governments in respect to administration is the absence of centralization of the administrative agencies. The Jones Law has corrected that evil by placing all executive functions and all executive officers under the supervision and control of the Chief Executive. That section of the Jones Law placing all executive functions of the Government directly under the Governor-General or under the executive departments subject to his control was drafted by Secretary of War Garrison in compliance with the request of President Wilson. Commenting on this section, the Secretary said:

"The section redrafted * * * contains a provision which I consider essential. Unless all the executive functions of the Government come directly under the Governor-General or under one of the executive departments that are under him, we will encounter one of the difficulties that now exists in the Philippines. The legislature appoints commissions or some one of its own members, who attempts to act as an inspector or su-

pervisor of the executive functions, with the consequence that he either interferes where he should not or unduly aggrandizes his own political power, or otherwise is in a position to misuse this function. If it is at all confined, as this section confines it, to the Governor-General, this would not happen."

This system, which makes the executive the real head of the administration, should be preserved in the provisions of the Constitution of the Commonwealth. Moreover, it is improved by the fact that the appointment of all administrative officers and employees is exclusively placed in the hands of the Chief Executive. The Chief Executive is thus given a free hand in the control and direction of his administrative personnel. As he is made responsible for the proper execution of the laws, it is but right that he should have power proportionate to his responsibility.

Executive Veto

Two alterations on the veto power of the Chief Executive are considered necessary. One refers to the overriding of his veto by two-thirds of *all* the members of the Legislature, instead of two-thirds of the members present. This requirement slightly increases the strength of the veto power. This increased force is intended to produce a stronger check on hasty legislation.

The second alteration refers to the extension of the veto power to any separable section of a bill. Under the Jones Law the Chief Executive may veto any item of an appropriation bill but not a part or section of a bill on subjects other than appropriation. This power is granted to governors of some States in the United States by their constitutions, such as the Ohio constitution of 1851 (Sec. 16, Art. II). It is believed that this power will increase the usefulness of the executive veto and may produce constructive results. It may be noted that a section of the Gratuity Law passed by the Philippine Legislature in 1932 allows the Governor General to veto any section of that law. That provision cannot be supported by any legal authority found in the Jones Law, but its inclusion in that statute is indicative of the feeling on the part of the Legislature that the power to veto sections of a law is sometimes necessary and wise.

Tenure of Office of the President

The constitution should fix a term of six years for the office of the President of the Commonwealth, and should provide that he shall not again be eligible to that office. It is

believed that a term shorter than 6 years is not long enough to enable the person elected President to become thoroughly acquainted with the varied duties which his high office demands, and to make good use of the knowledge he acquires during the first days of his term. A term longer than 6 years has a tendency to make the office undemocratic.

The provision prohibiting reëlection, seems to have popular support, as may be judged from published statements of leading Filipinos. The reasons of this prohibition are many. It prevents the entrenchment of a person in power. It minimizes the partisan leanings of the man elected President. A provision for reëlection, even only for another term as is the tradition in the United States, ordinarily tempts or induces the President to *play politics* during his first term in order to assure his reelection. The time and energy of the President under such circumstances are wasted in partisan activities. When a person is elected President, the nation expects that he places the interests of the public above those of his party. To realize this expectation, the constitution should contain provisions which will enable him to so act.

Several foreign constitutions contain prohibitions against reelections, but even some American State constitutions, such as the Pennsylvania constitution of 1873, have a similar prohibition. President Taft was an ardent advocate of this measure and of the term of six years. He stated that the President who is free from thinking of a campaign for reelection does not have to compromise his acts with political chieftains unless the good of the country so demands. A term of six years in his opinion is sufficiently long to enable a new president to learn the duties of his office and thereafter to follow a constructive plan.

(To be continued in the next issue)