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# THE SEPARATION OF POWERS IN THE PHILIPPINE CONSTITUTION

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The Americans have brought into this country two very important maxims of government previously unknown to the Filipinos in the actual conduct of governmental affairs. One is the principle of government laws, and the other is the doctrine of separation of powers. The first is fundamental. It is a substantive principle of government. The second is procedural, a means intended to prevent "tyranny in government thru undue concentration of powers." This at least was the intention of the framers of the Constitution of the United States when in the constitutional convention at Philadelphia in 1787 they decided that the three departments of government should be kept separate and should be coequal with one another in their respective spheres.

It has been shown, however, that in the practical workings of government, a strict and literal adherence to the principle is not possible. It would prevent action, since this requires a coordination of the three different functions of government. The Supreme Court of the United States, therefore, declared that this doctrine is not to be treated as a technical rule of law. In various instances that high tribunal refused to draw strict and abstract lines of separation, basing its refusal on such considerations as "the necessities of the case," "practical exposition," "to stop the wheels of government," and the like factors. That great jurist, the late Mr. Justice Holmes, gave a warning that the doctrine of separation of powers "should be received with a certain latitude, or our government could not go on." Professor Ferdinand Larnaude of the University of Paris, a fellow countryman of Montesquieu, the man to whom authorship of the theory of separation of powers is attributed, has this to say on the significance of this theory: "The separation of powers is merely a formula, and formulas are not working principles of government. Montesquieu had chiefly aimed to indicate by his formula the aspirations of his times and country. He

could not and did not wish to propose a definite and permanent solution of all the questions brought up by the government of men and their long-felt longings for fairness and justice." [1] This thought also appears in the statement of Mr. Justice Cardozo in a leading case decided by the New York court of appeals in 1928 when he said that "the exigencies of government had made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers." [2]

The Supreme Court of the Philippines once said that President McKinley, in creating civil government in this country thru his Instructions to the Second Philippine Commission, "took into consideration these fundamental principles of separate and independent departments, which have been demonstrated to be essential to a republican form of government." [3] It would seem then that a republican system of government as understood in American jurisprudence has as its essential concommitant the theory of separation of powers, not in its abstract sense but in the sense it has been actually applied in the United States. As a matter of fact, the United States Congress expressly embodied in Philippine Organic Laws modifications of the orthodox conception of the doctrine of separation of powers. From the Instructions of the President to the Second Philippine Commission clear down to the Jones Law, these variations were expressed. While organic separation of powers was always adhered to both in the Philippine Bill and in the Jones Law an overlapping of personnel between the legislature and executive departments was allowed. For instance, under the Philippine Bill, the Governor-General and the heads of executive departments were at the same time members of the legislative department, the Philippine Commission. And under the Jones Law this overlapping of personnel was also permitted. In fact it was considered a notable advance over the system established under the American Constitution, the fact that members of the cabinet could be members of the legislature, and vice versa. So able and experienced a statesman as the former Secretary of War Newton D. Baker said on the subject in his famous letter of instruction to former Governor-General Harrison: "The influence of the Governor-General with the legislature under this

[1] Frankfurter and Landis, 37 Harvard L. R. 1010.
[2] Richardson v. Scudder, 247 N. Y. 401.
[3] Severino v. Governor-General, 16 Phil. 366.

act should be far greater than it has been in the past, due to his participation in legislation: first, by the comprehensive veto power; second by preparing a budget; third, by the appointment of members of the legislature; fourth, by the possible provision that heads of executive departments shall have seats and voices in the legislature. It is hoped that the Philippine Legislature will provide for this. It is thought that the inclusion of men of the class that would be appointed heads of executive departments would materially strengthen the legislature and made better team work between the legislature and the executive. If, however, the legislature should fail so to provide and you should deem it necessary or advisable that heads of executive departments should be in the legislature, it is entirely within your power under the act so to have it be selecting good men from the legislature to be heads of executive departments and by appointing, among the two senators and nine representatives to be appointed by you, the heads of executive departments to be members of the legislature." Continuing, Secretary Baker made the following observation and suggestion: "Having this power, it would seem that the governor general would have no difficulty in having the legislature recognize by a law the principle of having the heads of executive departments sit in the legislature. *The department feels that this is a great improvement on our form of government* and, if you are of that opinion, you will have the opportunity of being the first to inaugurate it under the American government." [4]

The Jones law provides in its Section 18 that "no senator or representative shall, during the time for which he may have been elected, be eligible to any office the election to which is vested in the legislature, nor shall be appointed to any office of trust or profit which shall have been created or the emoluments of which shall have been increased during such term." This provision divides itself naturally into two distinct parts. The first part refers to positions which are to be filled through election by the Legislature. To such offices, the Legislature is prohibited from electing any of its members during their term as such. Thus, no senator or representative may be elected to the office of resident commissioners, inasmuch as this is an office to be filled by election by the Legislature. The second part bars a member of the Legislature from being appointed to two classes

[4] Letter of Secretary of War Baker to Governor-General Harrison, August 18, 1916.

of offices, namely, (1) offices created during his term, and (2) offices the emoluments of which have been increased during such term. This part of the provision finds its counterpart in the constitution of the United States and State constitutions. It is likewise reproduced, with some alteration, in the new Constitution of the Philippines. The words "office of trust or profit" as used in this provision have been interpreted broadly. Thus a member of the Philippine Independence Commission was said to occupy an office of trust within the meaning of this section and members of the Legislature creating that commission were deemed ineligible to such office.[5]

Outside of the three offices above named, a senator or representative under the Jones law could lawfully fill any public office. In this they differed from members of the United States Congress who are disqualified by the Constitution to hold any office under the United States during their terms of office. Members of the Philippine Legislature were then more like members of the British Parliament who may be cabinet officers.

From the year 1917 until the inauguration of the Commonwealth of the Philippines, members of the Philippine Senate and of the House of Representatives were appointed to important posts in the executive department. The Council of State was organized as an advisory body to the chief executive and as a devise to secure the needed harmony between the executive and the legislative branches of the government. In its membership were the heads of the two departments. Its consultations proved beneficial to the government of the country. Through that agency there was developed a form of government which had its roots in the American Presidential system, but its main stem gradually assumed a distinctively Philippine form.

The new Constitution of the Philippines cut short that natural development. It departs radically from the law and the practice observed in this country from the very first days of American administration. Whether or not the framers of our Constitution realized the full import of what they did, the fact is that under the provisions of our fundamental law there is established in our governmental system the doctrine of separation of powers in an even stricter form that that obtaining in the Federal government of the United States. The modified doctrine, as embodied in our former organic laws, particularly that provided in the Jones Law, was considered, as we have seen,

[5] 34 Opinion of Atty. Gen. of U. S. (1924), 287.

"a great improvement" over the form of government of the United States. We may thus logically infer that the orthodox doctrine now found in our Constitution indicates a backward step and constitutes an anachronism in the political structure of the Philippines. If it was deliberately embodied in our Constitution by its framers in the belief that they had to adopt it as a part of the presidential plan of government or as a fulfillment of the requirement found in the Philippines Independence Law for the establishment of a republican government, it reflects a misconception of the presidential system and of republican government. Long before the Constitution of the Philippines was framed, our government under the former organic laws had been republican in form, and had been basically presidential with such alterations as were thought to be essential correctives of the defective features of the system as practiced in the United States and to be consistent to our political status.

If, on the other hand, the doctrine of separation of powers in its orthodox form was embodied in our constitution for no particular reason except the fact that it is found in the Constitution of the United States, then the framers of our Constitution stand convicted of the charge that they were guilty of blindly imitating a system that had not been actually followed in the Philippines, in theory and in practice.

The consequences of this change are serious and far-reaching. While our prominent leaders in the government might have anticipated them, they did not express any concern over that reversion to the orthodox and rigid doctrine. Neither President Quezon nor Senator Osmeña bothered themselves about the details of the work of the Constitutional Convention. At least there was no public expression of their views on this subject. And of all men they were the ones who could have offered valuable and practical advice derived from their actual experience in the workings of our system of government. The omission on their part to render that needed counsel might be attributed to different causes, such as their desire not to interfere with the activities of the Convention.

One of these consequences following the innovation introduced by our Constitution is the impossibility of creating a council of state such as the one we had under the Jones Law. No doubt that institution was a very useful and convenient agency in ironing out differences between the executive and the legislature in an open and lawful manner. It was a body to which the chief

executive could go for advice in a legal and constitutional form. As it is, the chief executive may indeed secure advice from members of the legislature but his action will have to be illegal and unconstitutional. It cannot even be considered merely extra-legal. He will have to follow the procedure followed by the President of the United States who secures consultation with the leaders of Congress over the breakfast table. Competent observers feel that this method is not satisfactory. It is conducive to irresponsibility, besides being a circumvention of the plain mandates of the Constitution.

The orthodox doctrine of separation of powers as adopted in our Constitution finds expression in its Article VI, section 8, par. 1 which says: "No member of the National Assembly may hold any other office or employment in the government without forfeiting his seat." In the United States Constitution the provision equivalent to this is found in Article I, section 6, clause 2 which runs as follows: "No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States * * *; and no person holding any office under the United States shall be a member of either house during his continuance in office."

Comparing these two provisions, it is obvious that the prohibition in the Philippine Constitution is much broader in scope. It expressly refers not only to office but also to employment as distinguished from office. Moreover, it makes no distinction between offices or employments with emoluments on the one hand, and those having none, on the other. If the framers of the Constitution had merely intended to prohibit Assemblymen from holding offices *of profit,* they surely failed to express that intention so it can be seen on the face of that document. Certainly no one has any right to give a meaning to any provision of the Constitution which is not supported by plain words employed therein. As one famous jurist said in refusing to declare a law unconstitutional because there was nothing expressed in the constitution which the law violated: "If we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely." [6] Thus to supply a meaning to a constitutional provision not borne by the words of the latter

[6] Sharpless v. Mayor of Philadelphia, 50 Am. Dec. 759.

is a very dangerous way of interpreting our fundamental law. It would amount to an unauthorized amendment.

The House of Representatives of the United States, through its committee on the judiciary, held certain positions as not civil offices within the meaning of the prohibition of the United States Constitution. The positions then considered were those of member of the Board of Regents of the Smithsonian Institution and of visitor to the military academy. Members of the House of Representatives designated to occupy those posts were not said to be holding a civil office within the meaning of the American Constitution.[7] But that ruling had reference to *offices* only. It is thus inadequate precedent to justify legally the holding of similar offices in the Philippine government by any member of the National Assembly. Restricted as it was to the interpretation of the term civil *office,* it has no value whatever in the construction of the prohibition expressed in our Constitution, for this includes not simply offices but also employments. While technically a post might not be an office, it certainly is an employment. Thus the subtle distinctions between office and employment found in different decisions rendered by courts in the United States are of no use whatever in the interpretation of this prohibition of our constitution. We have here a veritable constitutional Scylla and Charibdis.

It might not be amiss to recall the famous Board of Control cases[8] which took place some eight years ago as a climax of the bitter controversy between Governor-General Wood and the Filipino leaders in the government. Parenthetically, that struggle was significant for it did not simply bring to a decision an important dispute affecting the policy of the economic enterprises of the Philippine government, but it also drew public attention to the necessity of adhering faithfully not simply to the spirit but also to the letter of the Constitution, our Organic Law. We may rightly attribute to it the awakening of the intelligent and civic-minded Filipinos to the existence of constitutional limitations. The Filipino leaders became more conscious of the majesty of an organic law than at any other time in the history of this country. But going back to those cases, they involved the validity of the statute passed by the Philippines Legislature creating a board of control consisting of the Governor-General, the President of the Senate, and the Speaker of the House of

[7] House Reports, vol. 2, No. 2205, 55th Congress.

[8] Springer v. Govt. of P. I., 277 U. S. 189.

Representatives. The argument against the law was that the Senate President and the Speaker of the House were disqualified to hold the post of member of that Board because as legislators they could not occupy executive positions. The defenders of the law argued that the posts occupied by the Senate President and the Speaker were not technically public offices and that their function in the board of control, that of voting the stock owned by the Philippine government in the National Coal Company and the Philippine National Bank, was not a governmental function but a proprietary one. The United States Supreme Court, in deciding these cases declared the law invalid, and, among other things, said: "There is nothing in the Organic Act or in the nature of the legislative power conferred by it to suggest that the legislature in acting in respect of the proprietary rights of the government may disregard the limitation that it must exercise legislative and not executive functions. It must deal with the property of the government by making rules, and not by executing them. The appointment of managers (in this instance corporate directors) of property or a business is essentially an executive act which the legislature is without capacity to perform directly or through any of its members." That conclusion of the United States Supreme Court applies with even greater force to the provisions of the present Constitution of the Philippines where the prohibition against Assembly members occupying any other *office* or *employment* is written in black and white.

Subsequently, the rule laid down in the Board of Control cases was adopted by the New York Court of Appeals, a tribunal which enjoys as high a prestige as the United States Supreme Court. In 1929 the legislature of New York passed a law providing that money appropriated for personal services should not be available until a schedule of positions and salaries should have been approved by the Governor, the chairman of the finance committee of the senate, and the chairmen of the ways and means committee of the Assembly. The Governor of the State, now the President of the United States Franklin D. Roosevelt, disapproved this particular provision of the statute on the ground that it was contrary to the Constitution. The case [9] was brought before the court to restrain the comptroller of New York from making payments without the approval of the legislative chairmen. The argument presented against the validity of the statute was that the legislature had no power to assign to chairmen

[9] People v. Tremaine, 252 N. Y. 27.

of two of its committees the function of approving segregations of lump sums appropriated by the legislature for the executive departments. The New York Constitution contains a provision, running as follows: "No member of the Legislature shall receive any civil appointment within this State." Judge Pound, one of the most outstanding members of the New York Court of Appeals, speaking for the Court said that the words *civil appointment* include "any placing in civil office or public trust, pertaining to the exercise of the powers and authority of the civil government of the State, not reasonably incidental to the performance of duties of a member of the Legislature, as distinguished from a military office or a mere employment or hiring on contract, expressed or implied." Proceeding he said: "The importance of the office is immaterial if the appointment is administrative or judicial in character." Referring to other decisions involving the same principle and applying them to the law involved in the case, he stated: "Under this decision, the chairmen of the two committees discharged duties, not for their own benefit, not for the benefit of private individuals but for the public. They are, therefore, public officers and public officers vested with great power to act as a check on the expenditure of lump sums appropriations." As to the argument that the positions were simply held ex-officio by the legislative chairmen, the court made this explanation: "Obviously the prohibition of the Constitution applies actually when a member of the legislature receives a civil appointment *ex-officio,* as chairman of a committee and when he is appointed by name. * * * No such evasion of the letter and spirit of the Constitution could be tolerated. * * * The positions are created and filled by the legislature; the incumbents possess governmental powers; * * * such powers and duties are performed independently; the positions have some degree of permanency and continuity. The power is not exhausted by a single act."

We have adopted the doctrine of separation of powers in our Constitution in its rigid form. For good or for ill, let it be strictly followed. A constitution's value to a people depends upon the faithful observance of its provisions.

Undoubtedly this will hamper the freedom of the Chief Executive as well as of the National Assembly to some extent. Assemblymen will have to devote their full time and attention to their legislative duties. Outside of legislative investigating committees, they will be disqualified to occupy positions in com-

missions or in similar bodies performing administrative or judicial functions. Such bodies as the Board of Regents of the University of the Philippines, the text-book board, the boards of directors for different government enterprises, and similar bodies will be closed to members of the Assembly. But this ought not to destroy the equanimity of the Chief Executive or of the members of the Assembly. Private citizens not connected with the government will now have an opportunity to serve the government as members of these different boards and commissions. Who knows but that this result might prove productive of greater popular interest in the functioning of the government of our Commonwealth?