

# PHILIPPINE LAW JOURNAL

Vol. XVIII

SEPTEMBER, 1938

No. 3

## UNWARRANTED APPLICATION OF THE DUE PROCESS CLAUSE

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### CHAPTER I

#### ORIGIN AND DEVELOPMENT OF THE DUE PROCESS CLAUSE

##### *Introduction—Economic Basis of History and of Political Institutions*

Historians have a way of writing history as if the events they narrate were disconnected happenings. They relate of revolutions, of civil wars, of alliances, as if they just happened, without in any manner attempting to correlate those events with the underlying causes which occasioned them. In the same manner, most histories of political institutions are sadly deficient in their treatment of causes underlying the changes in such political institutions. The reason for such deficiency is not far to seek. It arises from a wrong perspective in which society is viewed. To many thinkers (historians included), society is viewed not as a growing organism, not as a dynamic thing always in flux, but merely as a static abstraction to which absolute rules and principles are made applicable. From such a view of society naturally arises the absence of a unifying principle, which could adequately explain the progress of history, and the changes taking place in political institutions.

To others who have grasped the essential character of society as a dynamic organism, attempts are being made to seek, and when found expound that unifying principle in the historical evolution of society and its political institutions. Of late the tendency has been to find an economic basis for historical development and growth. The modern historians do not now stop at merely recounting events in their chronological order. They seek to explain such events by the economic forces at play before their occurrence.

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It is now recognized that the evolution of society, composed as it is of individuals moved by a variety of motives, must perforce be largely determined by the action and interaction of such motives. Political institutions—merely a means devised by men to better realize their collective needs—must of necessity develop in that direction in which the aggregate motives of the individuals composing society dictate it to develop. Equally recognized is the fundamental fact that foremost among the motives that animate man, is the economic motive—the motive to satisfy his economic wants. Hence, the importance of a clear understanding of the prevailing economic system by which man is enabled to satisfy his wants, of the adequacy or inadequacy with which such system functions under the prevailing political framework, in order to understand subsequent changes in political institutions to make workable the prevailing economic system. To illustrate our point, we cite the case of the United States. The accepted economic system in that country is private capitalism with its emphasis upon the right of private property, and freedom of contract. Capitalism in that country has reached a stage in which the vast majority of its people is dependent for their living upon their wages. Due however to maladjustments in the capitalistic economy in that country (which to some economists are deemed necessary incidents of capitalism), unemployment is rampant, and the only source of livelihood of quite a large number of Americans is denied them. It is only natural for such people deprived of the only means for satisfying their needs to inquire into the validity of the economic system under which they live. They thus begin to question the validity of the claim to absolute right of property, and of the claim to practically unlimited freedom to contract. Having thus inquired into the ills of the prevailing economic system, they now resort to political action to cure those ills. Hence, the birth of the New Deal of President Roosevelt, the New Deal as we shall see later, is a radical departure from the traditional American way of living. It is a negation of the claim of the absolute right of private property; it is equally a negation of the claim to unlimited freedom to contract. It marks the end of that period which considers production as an individual affair, with which the government is not supposed to meddle, and the beginning of that age which considers production as a social function, and therefore legitimately subject to government control and interference.

The New Deal in some of its aspects has been declared unconstitutional, but the American people, decided on having a new deal will not be defeated by such mere declarations of unconstitutionality by their Supreme Court. They will find ways by which to attain their end—by constitutional amendment if need be.

By this single instance, it is hoped that our point is made clear. In the following pages, an attempt will be made to trace the development of the due process clause from its first insertion in the Magna Carta to its final incorporation in the Philippine Commonwealth Constitution. The reader should be forewarned that although the due process clause is essentially a legal concept, yet it is so intertwined with every day economic life, that to ignore its economic implications, and its economic paternity and growth, would render one guilty of misappreciating its true significance. A purely legal history of the due process clause is not therefor to be expected in the following pages.

#### *Absolutism*

History records that originally man was a nomad, without a fixed abode. He wandered from place to place, and satisfied his wants only when the need arose. He then had no notions about private property—private, in the sense of being exclusive against his fellow nomads. With the passage of time, he realized the inconvenience of the wandering, nomadic life, and thought of establishing a fixed place for living. Thus began the early concept of private property. Man began to appropriate by occupation, against his fellowmen a piece of land upon which to establish his abode. His abode thus fixed, he felt the necessity of a regular satisfaction of at least his most elementary wants. His experience, however, taught him that he could not satisfy his wants at the very time he wished to satisfy them, because he did not then have a command over those things requisite to such satisfaction. So, he thought of further appropriating those things, (land, implements, tools, etc.) which he deemed essential to a regular satisfaction of at least his most elementary wants. Thus far, we have only seen how primitive man appropriated to himself to the exclusion of others, things requisite to his living. There was, however, no guaranty that those excluded would respect his right to such appropriated property. Those excluded may be stronger than he who appro-

priated the property, and it might occur to them to wrest from him such property by force. To forestall this contingency, primitive men agreed to submit to a common superior (who might have been the strongest, or the wisest etc. among them), who could see to it that property thus appropriated be respected. As social intercourse among primitive men developed, this common superior had to exercise more functions than he had originally exercised. He had to regulate such social intercourse, and mete justice to his wards according to his own notions of right and wrong. In thus submitting to him, primitive men did not anticipate his possible abuse of his authority. They did not therefore provide for limitation to his power, nor safeguards for their rights. Thus arose the absolute rule of a single individual. Conscious of the unlimited power which he could exercise over his wards, this common superior naturally desired to transmit his absolute rule to his successor by blood. He therefore so contrived that at his death his son should succeed him. Once this precedent was established, it was easy enough to enforce the same on future occasions. Hence, the origin of hereditary absolute rule.

#### *Rise of Classes*

In the meantime, some of the wards through superior intelligence or skill, acquired more property than the rest, until they felt a sense of security and of independence, while others through ignorance, lack of skill or maybe through sheer laziness, had barely enough property on which to live, and still others had no property at all. Classes based on economic considerations began to appear. Thus the common superior (an absolute ruler), the nobles, the freemen and the serfs appeared in the scene.

This was exactly the condition we find in England in the early part of the thirteenth century. On the one hand was the king, an absolute ruler, lording it all over his subjects. Upon the other hand, were the nobles, the freemen and the serfs. The king was all powerful, and on occasions sought to exercise his power arbitrarily. There was then nobody to call him down. The nobles, however, because of their vast accumulated wealth, would not tolerate the high-handed acts of the king, especially so when such acts directly affected their wealth. Feeling a sense of security borne out of ownership of vast wealth, the nobles decided that an end must be put to the too absolute rule of the

king. Finding a willing ally from the freemen who had also been the victims of the king's high-handed acts, the nobles literally forced King John to grant the Magna Carta in 1215.

### *The Magna Carta*

The Magna Carta has been called the English peoples' charter of liberties. This characterization is not apt. By far, the greater number of its provisions refer to the various ways in which John had personally abused his feudal rights over his tenants-in-chief, i. e. the barons. The king promised to refrain from committing these abuses in the future. In their turn, the barons promised to observe towards their own vassals the same respect for their privileges as the king has promised to observe towards his tenants-in-chief. But no guarantee was provided in the charter that these promises would be carried into effect, save that a committee of barons was to be set up to see to it that the king lived up to his promises. In reality, therefor, the Magna Carta mostly affected only the nobles, the prime movers in the fight against the King.

There are, however, certain important clauses in which the rights of freemen were mentioned. Thus "No freemen shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or anywise destroyed, nor will we go upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land". It should be noted, however, that England in the thirteenth century, the great mass of the population were not freemen. It is estimated that the unfree i.e., the serfs, then constituted no less than three fourths of the entire population. The serfs were not included in this clause. They were chattels, and enjoyed no standing in the King's courts. Further, the real danger to the liberty and happiness of the serf was not the King, but his immediate lord. No clause in the Charter limits in any way the rights of lords over their serfs or villeins. It is, therefor, clear that the Magna Carta when it was granted was a charter of liberty for only one fourth of the population of England.

Further, the Magna Carta purported to grant "liberties"; but it may be asked what these "liberties" were. They were not political liberty as we understand it today. The word liberty was then intended to describe some concrete privilege belonging to some person or sets of persons. To the lords, it

meant the right to force his tenants to submit to the jurisdiction of his court. It meant exemption from certain payments and services which others were obliged to render. Thus, "liberty" of one man often resulted in the limitation if not total denial of liberty to others.

The clause above-quoted, which guaranteed the freeman his life, liberty and property, and provided that he could not be deprived of the same, except by "lawful judgment of his peers, or by the law of the land" was the forerunner of the due process clause which was later incorporated (in a modified form) in the United States Constitution, and in the several states' constitutions. It is this same due process clause which still later was incorporated in our own Philippine Commonwealth Constitution.

It should, however, be noted in passing, that it was against the arbitrariness of the King, that the due process clause was inserted in the Magna Carta, to serve as a limitation against his too absolute power. It was then never thought of using the same clause to check arbitrariness on the part of some other body which might attempt to encroach upon the rights and liberties of those people for whose benefit the clause was intended. It is interesting to note that up to the present, due process in English constitutional law is merely a safeguard against executive harshness, and leaves parliament unchecked, so that any law (no matter how harsh or arbitrary it maybe) is constitutional, and is not violative of the due process clause. The American and Philippine due process, however, is a radical departure from the English due process. It is directed not only against executive encroachment upon the liberties of the people, but also against those possible encroachments which the representatives of the people themselves may commit.

#### *Feudalism Displaced Absolutism*

The Magna Carta serves as a landmark in the history of the long and continuous struggle (which we are still witnessing at present) of the submerged classes conscious of rights to which they are entitled, and a power to enforce such rights which has been denied them, against the ruling class, who would not grant concessions unless forced so to do. The Magna Carta was virtually a victory of the nobles against the King, a concession granted not from any sense of altruism of the granting power, but a concession wrested against the will of the granting power,

by sheer force of numbers, and power borne out of ownership of vast wealth possessed by the nobles.

Feudalism, in which the nobles secured in their possessions had the upper hand, thus ensued. But the nobles, like any other ruling class, would not only keep what was already theirs, but would also appropriate as much as they could of what was not yet theirs. Upon the other hand, those below like the freemen and the serfs, would also want to appropriate something to enable themselves to graduate from their then lowly status to a higher station in life. The ultimate conflict between those above and those below was therefore inevitable.

#### *Discovery of Colonies—Struggle for the Market*

In the meantime, events were transpiring which hastened the incoming struggle.

In 1492, Columbus in search for the Indies, instead found a new world, now known as America. Spain and Portugal, then at the height of their power, proposed to divide the world between them. England, then comparatively weaker than either Spain or Portugal, would not be outstripped in the search for colonies. Thus ensued the first struggle for colonies among the then rival powers. It is interesting to compare this first struggle for colonies with the present struggle among the present rival powers, but it would be a digression which would not be indulged in. Suffice it to note that the present struggle due to imperialism, had its counterpart in the struggle for colonies during the evening of feudalism.

#### *Rise of the Merchant Middle Class*

The discovery of colonies brought about trade with them, which latter encouraged home production of articles of foreign trade. A new economic class was on the making. The nobles were generally landed gentlemen, who took pride in being possessors of big landed estates. Trade was then consigned to persons of lower caste. It was then not considered fit for gentlemen. This was the chance of the freemen, the great middle class, and they were not slow in taking advantage of the situation. Individualistic capitalism was the result. For lack of the necessary machinery (which we find in abundance at present) production had to be carried on individually, (not collectively as at present) at homes where the whole family worked (not in

a factory where total strangers cooperate in production). Almost anybody with a home and some tools could engage in production and sell his own products and reap profits therefrom. Income from trade was therefor more evenly and widely distributed. The great body of the merchant middle class was coming to its own. From ownership of property, and from the assurance of profits from trade, was borne a feeling of security—that percussor of the feeling of independence of, and contempt for arbitrary authority. The middle class, then predominant in numbers and secured in their possessions, could no longer tolerate the political situation in which they found themselves. They began to rebel against the undue restrictions imposed by the King and against the excessive taxation to which they had been subjected. This unrest culminated in the so-called “glorious revolution” of 1688, as a result of which King James II fled from England. Immediately after such flight a Convention called by William of Orange drew up a list of the unconstitutional acts of James II and pronounced them illegal. After some hesitation, the crown was offered to William and Mary jointly, on condition however that they accepted the Declaration of Rights, as the document prescribing James II’s arbitrary acts was called. On William and Mary’s joint acceptance of the crown upon these conditions, the Convention declared itself to be a true parliament and proceeded to pass a number of important constitutional acts the chief of which was the Bill of Rights, the embodiment in statutory form of the Declaration of Rights.

#### *The Bill of Rights*

The Bill of Rights did not set up any form of government. It simply limited the exercise of sovereignty by the King, but it did not locate exactly where final sovereignty should reside. It, however, made parliament the predominant partner in the Constitution, for practically everything declared illegal by the Bill had the clause “save by the consent of parliament” tacked on to it. The inference was that the consent of parliament could make everything legal. Under such conditions, monarchy could no longer be supreme.

The Bill of Rights was a signal victory for the middle class. Henceforth, they could not be unduly imposed upon save by the

consent of parliament which was fast becoming a popular body. But they had no mind as yet of protecting themselves from arbitrary acts of parliament.

### *The Industrial Revolution*

Trade, foreign and local, continued to flourish. Necessity arose for a more efficient means of producing articles of trade. Men began to inquire and experiment as to the best means of production and manufacture. Crude machinery appeared on the scene being a better substitute to purely human labor. By dint of perseverance and hard work, improvements in machinery have been made. The industrial revolution, destined to bring in its wake a shifting of the balance of social forces, was ushered in. Historians, economic and political, are wont to treat the industrial revolution as merely revolution in industry, i. e. revolution in the means of production, discoveries and inventions of new machinery to cope with increased demands for articles of consumption. But underlying all these, was an awakening in man, who no longer would rest content with what nature chose to give him, but would subdue nature, call it to his aid in realizing his multifarious wants. A complete metamorphosis in man's mental attitude has taken place. Heretofore, he was a more or less passive being, timid, self-effacing, and unchallenging in his attitude towards nature, his environment, and his social relationships. With the advent of the industrial revolution, with the continuous inventions of machinery, with a heretofore unheard of capacity for production, man began to realize that there was nothing inevitable in his lot, that within him was the power to mould his own destiny. Encouraged by his previous accomplishments, he became an active being, assertive, aggressive, imaginative and challenging in his attitude towards men and things. He no longer accepted the then order of things as natural, as inevitable, as preordained. He was convinced, that what was, was, because men made it so, and that the same power which made it so, has the power to alter it at will. This is the intellectual phase of the industrial revolution.

To come now to its industrial phase. The introduction of machinery in production led to the transfer of the seat of production from the home to the factory. More and more, there developed a growing influx of population from agricultural to urban or industrial centers. The prospect of greater income from

wages, in comparison with agriculture income, led many formerly independent farmers to desert their lands, go to the city and work for wages and if he were fortunate, establish a factory of his own. The ultimate result therefore of the industrial revolution was the creation of an ever-increasing class of persons wholly dependent for their living upon their labor. The great body of middle class freemen, submerged during the days of absolutism and foundalism, was now branching out into two classes. The more fortunate, the more aggressive, smart and predatory middle class people began to accumulate wealth and appropriate to themselves the means of production. The rest were consigned to the less pleasant task of working for their living by doing the dirty work.

*Importation of the English Due Process into  
American Jurisprudence*

We have now come to a stage in our historical narrative where we should leave Great Britain and pursue our inquiry into the United States. It should always be borne in mind that our aim in this economic political history is to follow the development of the due process clause from its origin in the British Magna Carta to its final incorporation in our own Philippine Commonwealth Constitution. When we say development of the due process clause, we do not limit our treatment to the externals—the garments in which it is presented—in the form of its expression in court decisions and constitutional provisions. We go further, and inquire into the social and economic forces at play which give life and reality to the abstract enunciation of principles in court rulings.

The year 1776 is truly epochal, for in that year was invented the steam engine by James Watt; in that year also was published Adam Smith's *Wealth of Nations*, and finally in that year the American revolution against British rule began. It was not pure coincidence that these events should happen in the same year. They were but three different manifestations, economic, intellectual, and political of a natural instinct of man to strive for better things, and not be held back by forces of authority, reaction and superstition. The invention of the steam engine revolutionized industry. It intimated to man his economic potentialities, and created in him a craving for inquiring further into the mysteries of nature, so that he might harness her aid

to the satisfaction of his wants. The "Wealth of Nations" was induced by the then prevailing mercantilistic system of economy by which it was believed that all interferences upon liberty were legitimate so long as they tend to bring in more gold, it being then believed that gold was the greatest wealth of a country. Adam Smith's "Wealth of Nations" was a protest against such a system of economy. It was the forerunner of individualism, the exact antithesis of mercantilism. Finally, the American revolution of 1776 was a revolt of settlers of a new world—mostly fugitives from the old world—against the attempt at tyrannical rule by the ruling class in Great Britain. The watchword of the day was liberty—freedom from slavery to nature, freedom from slavery to an outmoded economic system, and freedom from political autocracy. The results were a technological or industrial revolution, an economic revolution, and a political revolution.

The revolution of 1776 gave birth to the United States of America. Immediately after the revolution was consummated, the original thirteen states set down to the difficult task of framing a constitution that would set out their ideals of government, and provide for the political framework that could adequately realize these ideals. The framers of the Constitution were men reared and conditioned in an atmosphere predominantly individualistic in economic and political philosophy. It is not surprising then to have as a result an ultra-individualistic constitution.

The preamble to the Constitution expressly recognized that the protection and preservation of life, liberty and the pursuit of happiness are the objectives of a government. The "Declaration of Independence" was careful to recognize in the governed themselves, the right to change and alter at will a government which they thought did not realize adequately the objectives recited. It was a recognition in express terms of what in plain language is called the right of revolution.

It is interesting to note that the Bill of Rights among which is the due process clause, was not a part of the original constitution of the United States. It was only incorporated as amendments to the Constitution, Art. V of which contains the due process clause. It should not be thought, however, that because there was no guarantee of due process for the protection of life, liberty and property in the original constitution, that life, lib-

erty, and property may arbitrarily be taken. A law even superior to the Constitution was always invoked in these cases. Thus, whenever any attempt was made to tamper with one's liberty or property, resort is had to Natural Law, which was considered to recognize the right to life, liberty and property as natural rights, and therefore inalienable.

*Difference Between the English and American Due Process*

It is also interesting to note that the due process clause as embodied in the Constitution of the United States and as interpreted by the United States' Supreme Court in several decisions, presents a radical departure from the English due process clause. As already noted above, the English due process was merely a limitation upon the executive authority i. e. the King, and was never intended to limit parliament. Upon the other hand, the due process clause in the United States' Constitution was held and rightly so, to be a limitation not only upon the executive but also upon the judicial and the legislative branches of government. The reason for such difference is not far to seek. In England, the due process clause was arrived at, not by voluntary agreement among the governed, but was literally wrested by force from an unwilling sovereign. It was natural therefore to direct it as a limitation upon that authority which was unwilling to grant it, and it was equally natural for the people of England to find in Parliament, an ally against the King. It could not therefor be expected, that the people of England should limit the power of its ally (the Parliament) by the due process clause. In the United States, however, the situation was different. The people were entirely free to frame their constitution, and to provide safeguards and limitations therein. There was no King against whose excesses the people need protect themselves. Hence, there was no necessity of having the legislature as ally in the fight against a King. The executive, judicial and legislative officers, directly or indirectly, were representatives of the people to whom were delegated certain functions of government. These officers, human as they are, may misuse the power intrusted to them. It was precisely against this possible misuse of delegated power that limitations among which is the due process clause was provided for in the United States' Constitution.

*The Industrial Revolution in the United States*

As was already adverted to above, the United States' Constitution is predominantly individualistic. It provides guarantees for rights and liberties of man as an individual. At that time, the industrial revolution was just beginning. Men engaged in individual businesses of their own. Corporations as we know them now were non-existent. Competition was fair because parties to a transaction were more or less with the same bargaining power. Hence, the role of the government was nothing more than to enforce the contracts freely made by parties thereto. The due process clause remained as a legitimate safeguard against any arbitrary interference with individual liberty by government itself.

With the progress of the industrial revolution, the situation was changed. Competition, starting as fair, and legitimate, developed into cut-throat competition, and finally into combination. As a result, smaller businesses were driven out of the field, either by direct cut-throat competition, or by selling out to more powerful competitors. The end of the American civil war marked the end of the purely individualistic era of capitalism, and the beginning of its monopolistic era. Heretofore, production was more or less a purely local affair, because of the difficulties and the high cost of transporting finished products from one place to another. The railroads altered the situation, and opened up markets heretofore closed. The new markets necessarily created a demand for more production, which in turn induced more men to engage in production. Thus arose a craze for production to supply the new market. In the mad scramble for the new market, cut-throat competition was resorted to, and the weaker competitor invariably was driven to the wall. Others more practical and less stubborn, sold out and went out of business. This process of elimination and absorption continued, notwithstanding the anti-trust laws passed to curb the practice. By way of digression, it is interesting to note how impotent man-made laws are when in conflict with a natural law of growth. Demands of the market necessitated more efficient production, and production on a larger scale. It decreed the end of individual production, and no amount of state regulation could either bring to life what was economically pronounced dead, or prevent from growing that which was favored by the economic conditions then existent.

*Transition from the Use-value to the Exchange-value  
Concept of Property*

The transition from individual production to more or less collective or corporative production, the transition from competition to combination, brought with it a corresponding development in the concept of liberty and property, two of the rights guaranteed by the due process clause. This development can be gleaned from the decisions of the United States' Courts.

In 1872 the United States Supreme Court was called upon in the Slaughter House cases to define the words Liberty and Property as embodied in the due process clause. The legislature of Louisiana had granted to a corporation a monopoly to maintain slaughtering places for stock in New Orleans and had regulated the charges to be made to other butchers who used these facilities. Justice Miller for the majority held that the term property retained its common-law meaning of physical things held exclusively for one's own use. Property according to the fourteenth Amendment therefor meant *use-value* not *exchange value*.

The restraint imposed by the legislature of Louisiana did not deprive the butchers of New Orleans of their property, for they still continued in possession and ownership of their physical property. They were merely deprived of the exchange-value of their property, but exchange value is not meant in the prohibition of the due process clauses.

The minority, however, took a more progressive view of property. Thus Justice Bradley held that the "right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and a calling when chosen is a man's property and right." And Justice Swayne held that "*Property is everything which has exchangeable value*, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty."

After the Slaughter House cases, the minority definitions of liberty and property began to be adopted by state and federal courts, until finally, the United States' Supreme Court itself recognized the transition from use-value to exchange value in the first Minnesota Rate case (134 U. S. 418).

The decision in this case was a partial reversal of the decision in *Munn v. Illinois* 94 U. S. 113, 124. In *Munn v. Illinois*, the Supreme Court held that a legislative enactment fixing the rate of charges for the use of services although resulting in the reduction of the exchange-value, of the business was not a deprivation of property in the sense used in the fourteenth Amendment. It was only a regulation of the *use and enjoyment* of property under the police power of the State.

The decision in the Minnesota rate case practically adopted Justice Field's definition of property as the exchange-value of property. Thus Justice Blatchford speaking for the majority held "This power to regulate (police power) is not a power to destroy, and limitation is not equivalent to confiscation."

The majority now held that not merely physical things can be objects of property but that the *expected earning power* of those things is property, and property is taken not merely under the power of eminent domain which deprives the owner of title and possession, but also under the police power, which takes its exchange-value. Thus was the transition of the concept of property from use-value to exchange-value completed.

#### *Meaning of Exchange-value of Property*

If the exchange value of property would be protected, the owner and expected purchasers of such property should have *free access to markets* where such property could be bought and sold. This right of access to markets was recognized in *Allgeyer v. Louisiana* 165 U. S. 578, which held: "The liberty mentioned in that Amendment (Fourteenth) means not only the right of the citizen to be free from physical restraint of his person, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood or avocation and for that purpose, to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. \* \* \* His enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing, an ordinary calling or trade, and of *acquiring holding, and selling property is an essential part of liberty and property, as guaranteed by the fourteenth amendment.*"

But liberty of access to markets although promotive of and necessary to exchange-value is destructive of it when allowed too far. Convinced of this fact, courts in a long line of cases concerning goodwill and unfair competition, restrained this excessive liberty. The decisions in these cases were intended to protect the exchange-value of property, and goodwill being an expected, beneficial behavior of other people towards one's property, itself became a special case of property, to be protected under the fourteenth Amendment.

#### *Liberty and Property Identified*

Once property attained the exchange-value concept, i.e., anything that can be bought and sold, liberty and property became identified. The logic of the identity runs thus: Property is anything that can be bought and sold; liberty can be bought and sold; hence, liberty is property. Liberty may be sold in two ways. Thus one may promise to pay another a certain sum in the future. In effect the promisor sold a portion of his liberty by engaging himself to do a positive act in the future. Or one may promise to render service to another in the future. The promisor in effect sold his liberty to the promisee by engaging to perform a particular positive act.

Again, one may sell his trade-name or good will to another. Without the sale, one could continue using his goodwill and trade-name, but after the sale was made the seller has sold a portion of his liberty by agreeing to refrain from doing an act in the future.

The first restricts the seller's liberty of action by requiring a performance, usually described as a *compulsion*; the other restricts the seller's liberty of action by requiring an avoidance, usually denominated as a *restraint*. Both compulsion and restraint are restrictions upon the seller's liberty. They are his duties and are the corresponding *property rights* of the buyer.

#### *Recognition of the Economic Power of Liberty and Property*

The concept of the economic power of liberty and property was first recognized by the Supreme Court of the United States in the Munn case decided in 1876. Prior to that decision, the term "power" was always associated with the physical power of the sovereign to enforce obedience to its laws, out of which power came the grants of monopolies and privileges which were

not property but rather infringement upon rights of property. The common-law concept of property merely extend to the right to acquire, use and dispose of *physical things*. Hence, property then was not associated with power; it was rather associated with liberty, and protected because of such association. For the first time in the Munn case, the liberty of private property was held to mean also the economic power of private property. Out of such recognition of economic power of property arose the justification of the regulation to which property in the Munn case was subjected.

Under the common law, regulation of business applied only to those businesses run by virtue of special grants or franchises was not necessary to create a monopoly; that economic circumstances may be such as to enable property used for a private business to assume monopolistic power. To curtail the power of the economic monopoly, the principle of "business clothed with a public interest" was coined. An evil was found to exist, which was none other than the economic power of a monopoly. Regulation must be resorted to, but the common law furnished to precedent for regulating businesses which do not derive their existence from a special charter. The ingenuity of the majority of the Supreme Court was taxed by such a lack of precedent, and so the convenient phrase "business clothed with a public interest" had to be resorted to, to justify the regulation.

#### *Growth of Trusts, Monopolies and Combinations*

So much for the legal development of the concept of liberty and property as embodied in the due process clause. We shall not follow the growth of corporations, trusts and combinations in the United States. As we have earlier learned, the combination was one step advanced from individual competition in the process of economic growth. It was an inevitable development, and the attempts of the elder Roosevelt at trust-busting proved at most nothing more than a temporary check to its full and normal development. Roosevelt, alarmed by the economic power that combinations and trusts could and did wield, could not (in the face of popular demand for trust-busting) see the better side in combinations.

He saw the abuses perpetuated by large trusts, and felt the economic power which was being wielded by them over the lives of millions of human beings. He did not realize that prop-

erly controlled and regulated, the combinations represented a step in advance in the technique of production, and that they would bring about more efficiency and economy in production. There was nothing inherently wrong in bigness—in combinations. It was only when such combinations were placed under irresponsible and anti-social individuals that they became a menace to society. The evil therefor was the irresponsibility of the men behind the trusts, and not the trusts themselves, and the correct remedy should have been not the abolition or prohibition of trusts, but rather the curbing of the irresponsibility of the men behind them.

#### *Imperialism and Social Justice*

The development of the trusts, with the resulting increase in production and economic power wielded by them, brought about imperialism on the one hand, and clamor for social justice on the other. No longer could the local market in the United States absorb all the manufactured products turned out by the trusts. Foreign markets had to be found which would absorb excess production in the United States. These markets were found in the East, notably in China. The United States found it necessary to protect her markets in the East, and for this purpose a basis for military operations to protect this market, was conveniently found in the Philippine Islands. The United States' authorities denied any intention of taking the Philippines for imperialistic purposes, but it would be interesting to inquire why such conquest should come precisely at a time when her economic situation dictated that she should embark on such a policy of imperialism.

#### *The Proletariat Come to its Own. Conflict of Due Process and Police Power*

Another development resulting from the abuses perpetuated by the trusts was the persistent demand for social justice on the part of those over whom the trusts tyrannized. The millions of workers whose only source of livelihood was their wages, became class conscious. They saw actually transpiring the gradual although legal dispossession of millions of men of their property—men who sooner or later would join the ranks of the wage-earners. The good old days of the small independent businessman has gone never to return. Henceforth, society

was to be composed only of those *who have* and those *who have not*—the capitalists, and the wage-corners. It is not surprising therefore for the workingmen thus to be class conscious. Trade-unions were formed to meet combination by combination, economic coercion through combination of capital, by economic coercion through combination of labor. The workingmen did not confine themselves to industrial action alone. They resorted to political action also. They demanded social legislation to aid them in their bargaining power with their employers, and to ameliorate their already miserable situation. The legislative measures they demanded were granted them. Thus were passed the maximum hours of labor, and minimum wage laws. Unfortunately, however, although these workingmen had control over their legislatures, and even over Congress, yet they had no control over the Supreme Court of the United States. The constitutionality of these laws was tested in the United States' Supreme Court. The employers claimed a deprivation of property and liberty without due process of law; the workingmen defended on the ground of a legitimate exercise of police power. The United States' Supreme Court held such laws as an undue interference with liberty to contract, and hence, violative of the due process clause in the Constitution. The workingmen obtained social legislation through political action, but lost them through judicial declaration of unconstitutionality. The workingmen wanted state interference to obtain real liberty for them. The capitalists objected against state interference so that they may be at liberty to do as they pleased. Made to decide between two claims for liberty, the United States' Supreme Court decided that it would protect the liberty of the capitalists even if such liberty could be and was actually used to deny liberty to the workingmen.

#### *American Due Process Imported into the Philippines*

The conquest of the Philippines by the United States introduced into the Philippines the American due process. This guarantee is embodied not only in the Philippine Bill of 1902 but also in the Jones Law. Like the American due process, ours is intended as a limitation upon the arbitrary exercise of power by any of the three branches of government. It is also individualistic in its tone by inheritance from American jurisprudence and American traditions. It is not surprising that our own Supreme Court in the case of *People vs. Pomar*, declared a law re-

quiring employers to grant vacation with pay to pregnant women employees, unconstitutional, because it interfered with the liberty to contract.

*The World War and the Depression of 1929*

In the meantime, events continued to transpire, bringing in its wake a new balance of social forces, and a corresponding attempt at the rëexamination of the concept of due process. Others more daring and more penetrating in thought would not stop at a mere rëexamination of a single legal concept. They would go deeper and inquire into the adequacy of the prevailing political and economic set-up in providing the millions of the inhabitants of the world with the means of self-realization, of the development of their personalities, which in the last and ultimate analysis is the highest ideal of any government.

Big business continued to grow, and side by side with this growth, more and more formerly independent property owners joined the ranks of wage-earners. Production continued to exceed the local consuming capacity. Some excess production had to be destroyed to keep up local prices, while millions of men could not even satisfy their most elementary wants. The fight for foreign markets became more intense and more bitter. England, Germany, France, Japan, Italy and the United States vied with each other in partitioning the less civilized spots of the earth, and establishing exclusive spheres of influence. A clash of armed forces was inevitable, and the World War was the result. It is unnecessary to elaborate on the causes of the World War. Suffice it to say that only the unhistorical historians would deny that it was fought on economic grounds. The World War brought temporary prosperity to a few people, and untold misery to many. Prices soared up to heretofore unknown levels. Naturally, capital was embarked on ventures to take advantage of high paper profits necessarily incident to periods of high price levels. Capital, unrestrained in its right to be invested was thus sunk in what later on proved to be unwanted ventures. Labor had its share in higher wages, though not in higher purchasing power. But the day of reckoning and accounting for imprudent and reckless investments was yet to come. In the latter part of 1928 the eventful day came. The crash in the stock market occurred. Business confidence was lost. Banks called in their loans lest everything be lost. Depositors called on the banks for

their deposits. Businesses failed one after another. Unemployment became rampant. Occasionally, an optimist would predict that prosperity was just around the corner and that if only the public would buy more, everything would be all right. The logic of these optimists was that the cause of the depression was the failure of consumption to keep pace with production, and therefore if only the public could be induced to buy more, the depression could be driven away for good. These optimists oversimplified the situation. They took no trouble of inquiring as to why of the failure of the public to buy more. They were trying to induce the public to buy more without inquiring as to whether the public could do so even if they wanted to. The truth of the matter was that consumption lagged behind production not through any fault of the consuming public in that they refused to buy, but through the fault of the prevailing distributed system. Income was not widely diffused, and purchasing power was naturally limited, so that even if the millions of the consuming public would like to satisfy even their most elementary wants, they could not, because they did not have the necessary means with which to do so. That is the most fundamental problem that confronts the whole world today—a more or less equitable distribution of purchasing power, to ensure that consumption keeps pace with production. In that way, it is hoped that the recurrent crisis in capitalism would not come, because of the resulting stability of prices that is believed would arise from such arrangement.

*Roosevelt and His New Deal*

Acting on this belief, Roosevelt and his "brain trusters" gave to the United States the "New Deal". The economists of Roosevelt analyzed the depression and found its fundamental cause to be the instability of price levels. The basic goal therefore of the New Deal is the maintenance of a stable price level. All policies of the New Deal, like control of production, control of prices, managed currency, control of wages etc.—all converge at one focus, and that is to maintain a stable price level. As was already adverted to earlier, the New Deal is a radical departure from American ways and traditions of individualism. It consists of state interference and supervision over many matters traditionally looked upon as purely of private and individual concern. Individualistic capitalism was found unworkable. It failed to solve the problem of crisis which invariably followed

prosperity. It failed to feed millions of unemployed men, while products were deliberately destroyed or allowed to rot. A substitute must be found, and this substitute is the New Deal. It is a beginning of a great experiment in collective capitalism. It is an answer to a popular clamor for social justice. It is not a part of this thesis to pass judgment upon the New Deal. It is mentioned only to indicate the trend towards which the United States is headed. It is mentioned also to bear testimony to the fact that once a people becomes conscious, they can get what they want through political action. The New Deal if successful, will continue, notwithstanding the ululations of the rugged individualists to go back to individualistic capitalism. If it fails, a more radical experiment may be tried by the American people. Such seems to be the law of growth, and certainly such is the trend of history.

*Social Justice and the Philippine Commonwealth Constitution*

The great depression which gave the New Deal to the United States also gave the Independence Law to the Philippines. The depression had assumed such wide proportions, and it had hit various classes of interests that the American Congress passed the Philippine Independence Law over the veto of the then President Hoover. The farm bloc, joined by labor, and other interests hit by competition with Philippine products, like sugar, cordage etc., united for the first time in favor of Philippine independence. The single element—the imperialists—who are against Philippine independence, could not in the face of such formidable combination withhold independence from us any longer.

The Independence Law authorizes us to formulate our own Constitution, and pursuant to such authorization, we adopted our present Philippine Commonwealth Constitution. It is interesting to study the economic atmosphere which prevailed in 1776, when the American Constitution was drawn, and compare the same with that obtaining when the Philippine Commonwealth Constitution was adopted. In 1776, as we have already occasion to mention, individualistic capitalism was just beginning, and it is natural that the American Constitution should be highly individualistic in tone. We were spectators in the development of individualistic capitalism in the United States and we found that it began to show signs of decay during

the monopoly era, and finally showed itself entirely inadequate during the great depression of 1929. We witnessed the birth of Roosevelt's New Deal, a supreme effort to revitalize capitalism as an economic system. We heard of the insistent demands for social justice by the millions of men who were rendered social wrecks by the depression. We in the Philippines did not remain unaffected by the social, economic and political trends in the United States. Our own country passed through the same depression, world-wide in its scope. We had our own unemployment, our own failures in business. The only difference is that while in the United States, those most hit by the depression were loudly vocal in their demands for a change—for social justice—our own people are not so vocal. It did not, however, prevent our delegates when they prepared our Constitution from emphasizing therein the promotion of social justice as one of the ends of government. The same phraseology used to express the American due process clause, was likewise used to express the Philippine due process clause. The only difference is that while the United States' constitution was pervaded by individualism, our own constitution is pervaded by social justice. We shall elaborate on social justice when we come to the chapter on "Due process in the Philippine Commonwealth Constitution".

#### ETHICAL AND RATIONAL BASIS OF THE DUE PROCESS CLAUSE

##### *Introduction—Ethical and Historical Due Process. Substantive and Procedural Due Process*

In the foregoing chapter, we have attempted to trace the history of the due process clause from its origin in the English Magna Carta, to its final incorporation in our own Philippine Commonwealth Constitution. We have followed the changing concepts of liberty, property, and due process, and we have tried to explain the why of such changes. We have sought to explain them upon the changes in the balance of economic and social forces resulting from changing economic conditions. In short, we attempted an economic explanation of the development of the due process clause as a political and legal institution. In the brief historical narrative that we attempted, one fact stands out predominant, and that is, that in the transition from one age to another, there were always at least two contending forces

fighting for supremacy. On one hand was the ruling class, the possessors of wealth and power, bent on maintaining the status quo; upon the other hand were the submerged classes, from whom power was withheld, and who, therefore were bent upon changing the prevailing institutions in order to attain for themselves that power which was long denied them. In that struggle for supremacy, the ruling class—always in the minority—invariably gave way to the new order. The victorious majority then became the ruling class, and invariably another class arose which in turn became the submerged class. This observation is amply illustrated by the change we have noted from absolutism, to feudalism, to capitalism, and to what may possibly displace capitalism now that we see it seriously challenged by the submerged class, the proletarian. The history of the due process clause is nothing more than the history of the ideology of the ruling class. Viewed in that light, historical due process is simply a convenient political weapon in the hands of an economic class bent on perpetuating itself in power, and protecting whatever it has already possessed and appropriated. It is essentially an ally of established order, an apologist of existing institutions.

Due process, however, may be viewed from another perspective, the ethical angle. Taken in this light, ethical due process is an abstract principle, a static, unchanging concept, as contradistinguished from historical due process, which is dynamic, everchanging, always abreast with, and dependent upon changing economic circumstances. It is with ethical due process that we shall concern ourselves in this chapter. Historical due process may or may not coincide with ethical due process, and it is when there is an irreconcilable variance between them that there is an unwarranted application of due process.

Due process may also be considered from its procedural or from its substantive aspect. In its procedural aspect, anything that provides for a procedure of doing things is due process, i.e., a law although confiscating property or abridging liberty would still be due process so long as a procedure for such confiscation or abridgment is provided for. With such procedural due process, we are not now concerned. Substantive due process looks into the substance, not merely into the form of interference by government with the life, liberty, or property of

individuals. It condemns any arbitrary interference notwithstanding the procedure provided for such interference.

With such preliminary remarks on historical and ethical due process on one hand, and substantive and procedural due process on the other, we are now prepared to inquire into the more delicate question of the ethical validity and rational basis of some of our political and legal concepts necessarily involved in, and related to due process.

### *End of All Living*

We should not, however, lose sight of the fact that due process, and its content, life, liberty and property, fundamental as they may be, yet should not be confused with the *ultimate* end of all living. It is not pretended, that what we would formulate as the ultimate end of all living is a new discovery, a "eureka", so to speak. From ages long past up to the present, this transcendental problem of the "ultimate" had busied the greatest minds in history. Men like Socrates, Plato, Aristotle, Epicurus, Christ, Confucius and a host of other ethical writers too numerous to enumerate, each in his turn, sought to expound a philosophy of life. With these as a formidable background, we realize the presumptuousness of our attempt to formulate the ultimate end of life. We shall, nevertheless, attempt so to do, at the risk of our being considered presumptuous.

Nature has endowed man with native latent faculties which it is his mission to develop and realize to the maximum possible. But nature was not partial in her endowment. She did not limit her generosity to a single individual or group of individuals. She is universal and indiscriminating. Thus endowed, it is the supreme right of man to develop his individuality, to seek out and pursue a pattern of life consistent with his tastes and endowments. This right is, however, qualified by a corresponding obligation which he owes to his fellow-men likewise endowed by nature, to permit them to develop and mould their own patterns of life. This obligation assumes a two-fold character—a positive and a negative duty. On one hand, it requires him in pursuing his own development, to so act as would enable others to better pursue their own. Upon the other hand, it forbids him in pursuing his own development, from so acting as would hinder the growth of other's individualities. *It is this identification of one's development,*

*with that of society at large, without unnecessarily sacrificing or surrendering one's distinctive individuality, that constitutes the ultimate end of life.* This is an ideal which should at least be approximated if it could not be fully attained, and no institution—economic, social, or political,—which makes no pretense to such an ideal, and which, even if it does, cannot in the nature of things approximate it, deserve perpetuation.

*The Doctrine of Utilitarianism as an Ideal of Government*

The utilitarian doctrine of Jeremy Bentham, as modified by John Stuart Mill expresses in the shortest possible language the nearest approximation to our ideal. It runs thus: "the greatest good to the greatest number." The mere statement of the doctrine at once provokes questions as to its meaning. What is meant by "good" and "greatest number"? Who is to determine what is the greatest good to the greatest number? We shall attempt in the limited way we can, to answer both questions. By good is meant, not merely pleasure, not merely happiness; it is the equivalent of what in our ideal we may call self-realization. Greatest good would therefore mean the maximum of self-realization. Greatest number does not mean the present greatest number; it takes into account posterity; it is realized that the members of the present generation have not only their lives to live, but that generations yet unborn are as much entitled to live as the past generations had lived. Thus individuals in an existing society, must, in their attempt at self-realization necessarily be circumscribed not only by the welfare of the present generation, but also by that of the generations yet unborn.

Now, who is to determine what is the greatest good of the greatest number? It is obvious that with regards the good of the individual himself, i.e., his maximum self-realization, he is the best judge of how he would realize himself, what pattern of life he is to follow etc. But as regards the good of the greatest number, i.e., of society at large, individuals acting collectively (government) is the best judge. Hence, we have a situation wherein individuals are given the utmost free play for their faculties, conditioned, however, that should such faculties be directed towards anti-social activities as would result in the denial to others of their right to maximum self-realization, society acting collectively through its government, steps in, and

through legislation or otherwise, sees to it that everyone is afforded his right to self-realization. This precisely is the function of ethical due process—the ethical harmonization of possible conflicting interests, the unifying principle in an otherwise anarchic state of selfish interests.

*Representative Democracy and Dictatorship*

What form of government could adequately realize our ideal? To this question, two forms of government at once furnish possible answers—first, representative democracy, and second, dictatorship. It should be observed, however, that dictatorship need not be unpopular; it need not be imposed; it may be voluntary, and may be accomplished through popular choice. Its only difference from representative democracy, is the absence in it, of a division or separation of functions, and necessarily, the absence of a system of check and balances. The mere contrast between these two forms of government at once reveals their respective strength and weaknesses. Representative democracy, with its separation of functions, emphasizes the principle of checks and balances. It would sacrifice a little efficiency in the carrying on the business of government, for the sake of the guarantee that the representatives of the people themselves do not betray the trust reposed upon them. Upon the other hand, dictatorship lays emphasis upon efficiency, and would bear a little arbitrariness on the part of the dictator, in the interest of greater efficiency in the execution of government policies. There are, however, several remedies which are available to the governed should the dictator misuse his plenary power, among which may be mentioned the right of revolution, the right of recall, and refusal to reelect after the expiration of the term of the dictator.

In a representative democracy, due process is administered by one of the departments of government, usually the judiciary, although in England as we have noted, whatever parliament enacts as law, is due process, because in accordance with law. In the United States as in the Philippine Islands, the judiciary is entrusted with the function of determining ultimately what is and what is not due process of law, and this may be directed as we have noted even against laws passed by the legislative branch of government.

Under a dictatorship form of government, it cannot rashly be concluded that there can be no guarantee of due process. So long as a government is constitutional, even if all powers be lodged in a dictator, limitations may be placed upon him, and remedies may be provided against his arbitrary exercise of such powers. The only difference from a representative government is that while in the latter, it is the judiciary which decides what is or what is not due process, in the form, it is the people directly who makes the decision, which may be expressed either by recalling the dictator himself, recalling his act, or by exercising their supreme right of revolution, against the dictator.

*Due Process, an Ethical Necessity in any Form of Government*

It is thus seen that due process as a guarantee of human rights need not be limited to a representative democracy form of government, nor to a society in which economic classes obtain. As a harmonizer of conflicting interests, it is an ethical necessity in any society, whatever form of government it takes, and regardless whether such society is classless or not. Even in that ideal society envisioned by Communists wherein classes do not obtain, there must of necessity arise from the very nature of things (i.e. inherent differences in man's nature) conflicts, which due process has to harmonize in the interest of the collective maximum self-realization of the individuals composing society.

*Enumeration of Rights of Life, Liberty and Property  
Advisedly Used*

It is no mere accident that the due process clause is phrased thus: "No man shall be deprived of his *life, liberty and property*, without due process of law." The enumeration is used advisedly. It is a recognition of the relative importance which these several rights bear to each other. Primordial is the right to life, for it is physical existence that gives birth to the other two rights. But bare physical existence is not enough. Possessed of native faculties, man naturally desires to develop them to express his individuality, and for this the right of liberty is provided. Finally experience has taught man that a certain amount of private property is essential upon which to express

one's individuality to the exclusion of others; this the right to private property takes care of.

*The Extension of Right to Life and to Decent Living  
Concept of the Social Minimum*

Under an individualistic age, the guaranty of right to life extends merely to bare physical existence as if secured in his physical existence, man can live his life in a manner human beings should live. With the growth of industry and expansion of commerce brought about by the industrial revolution, with their attendant emphasis upon profits, capital and property, man as a human being was gradually relegated to the background, and man as a producer, as a machine, as a cog in the vast machinery of capitalism, was put to the front. No longer was human life considered as an end unto itself. Rather, it was considered as a tool to satisfy the inordinate desire for power, of a few individuals who could not be happy unless they could wield power over other men's lives.

This was the sad state of things, when thoughtful individuals, fired by a love for humanity, and moved by the deplorable station to which human beings were assigned, began to think straight, and strove to strike at the very root of social ills.

There were indeed some, who, convinced that the root cause of such an unfortunate state of affairs was the system of private property, would do away with it altogether.

Others less radical in their temperament, would not alter the existing system of economic society, but would simply redefine the concept of human rights, so as to conform to changed economic circumstances. It is these latter, who, sensing the antiquated concept of man's right to life, sought its redefinition, and would so enlarge it, as to mean a right to a decent living. These men would look upon the state not only as a defender of vested rights, but also as an active agent in securing to the individuals composing it a certain minimum of livelihood, so that when thus secured, such individuals could feel a sense of security, of stability, of independence, that would better enable them to fight their economic battles on an equal footing with others more happily circumstanced.

The claim for the "social minimum" or a minimum of decent living is grounded on the fundamental instinct of self-

preservation and on the evident social fact that under the present system of economy, not all men can enjoy even the bare necessities of life.

The logic of the claim runs thus: Man is naturally assertive of his self-interest, and would not voluntarily enter agreements prejudicial to him. However, he cannot always afford to be assertive of his real self interest. He has some immediate wants to satisfy. Under pressure of immediate physical necessities, he will barter away everything he has—his labor power, even his self-respect just to stave off starvation. Thus could be explained, how an employer gets the better part of a bargain in any of his dealings with his hirelings. On the one hand is the employer, possessed of property and secured in his livelihood. On the other hand is the laborer, who has no property to fall back upon, except his own body (if that can be called property), which needs sustenance to enable it to work. The laborer cannot drive a hard bargain, because to him, the problem of food is always his primary concern, and unless his immediate and most pressing problem of food is solved, he can ill afford to think and provide for more remote necessities, indispensable to a decent living.

Then again, specially with the advent of the machine age, with its attendant labor-saving devices, there are just too few jobs in comparison with the too many men fighting for them. Employers are not slow to take advantage of this economic fact, and they are rather too ruthless in pressing their advantage to the limit. They do not look upon the laborer as a man with a life to live, but just as a man with a commodity (his labor-power) to sell, and apply to him the inexorable law of supply and demand, giving him only his market price.

In the face of such economic inequalities, of such difference in bargaining power, between economic classes, it is not difficult to understand the position of those who would redefine the concept of the right to life, and would extend it to the right to a decent living. It is submitted that it is this right to a decent living that is meant by our Constitution when in its declaration of principles, it enunciated that the promotion of social justice to insure the well-being and economic security of all the people should be the concern of the state.

*Liberty—Its Meaning and Content. Natural and Civil  
Liberty*

In the original state of nature, in which civil society was unknown, man possessed *natural* liberty, unhampered and unrestrained. Then, there were no rules of right and justice, nor a defined public conscience which could compel if not induce him to do the right things towards his fellowmen. Then, it was the rule of might, not of right that prevailed. In the nature of things, such a condition was insecure, unstable, and uncertain.

But this condition cannot last indefinitely. Man craved for security, for stability, for certainty. He therefor relinquished a portion of his natural liberty to attain those ends. Thus grew up civil society, to which he surrendered his *natural* liberty in exchange for *civil* liberty.

But it may be asked: Why does man desire liberty? Does he desire it for its own sake, or does he desire it as a means to a higher end. To some indeed, liberty is desired for its own sake. With them I take issue, and it is submitted that liberty should be looked upon merely as an indispensable means to attain the ideal which we have already defined i.e., one's maximum self-realization. Liberty is only desirable in so far as it enables one to freely and fully pursue a pattern of life of his creation, a mode of living in which he could give vent to his natural talents, in which he could express his distinctive individuality.

In a system of society in which the principle of private property is well imbedded, one cannot talk of liberty without necessarily involving economic security, which is a condition *sine qua non* for the full exercise of real liberty.

In this age in which we live, real liberty for a vast majority of individuals does not in fact obtain. To the possessors of wealth, there is no doubt that real liberty is accessible, but to those who depend for their livelihood upon their labor, even to the intellectual workers themselves (who certainly are in a much better position than the teeming millions of unskilled manual workers) such liberty do not in fact exist.

Liberty in its widest acceptation includes not merely liberty of action, but also liberty of thought and of expression. Who, except those who choose to be blind to realities, would deny that liberty of action does not in fact obtain for the millions of workers dependent upon their jobs for their living? Who, with sincerity, can assert that liberty of expression does prevail even

in the most enlightened states in the world? Who will deny, that, even in universities, supposedly seats of learning, in which the search for truth is the ideal, liberty of expression is curtailed. But, it may be asked; whose fault is it that such conditions exist? There can be no tyrants where there are no slaves. This platitude is easier said than understood. In an age where economic security is limited to a few, where the problem of the stomach is ever present in the life of many, such a condition of mental slavery is not surprising to exist. So long, and as long as economic slavery does exist, intellectual slavery cannot be avoided.

This is not necessarily an indictment upon the system of private property considered as a system. It is more a protest against the inhumanities of which irresponsible and selfish possessors of wealth are guilty. Government, always solicitous of the highest welfare of the governed, should be uncompromising in its fight against these inhumanities, and the police power of the state can, and should be used as a weapon to bring about a more humane society, fit to be the habitat of liberty-loving individuals. The due process clause should not prove a stumbling block to the efforts of government to create a state of affairs which would make life worth its living.

*Right to Private Property: Property for Use and  
Property for Power*

The modern man has been born in an age when private property is an established legal institution, recognized and regulated by a complicated system of rules and regulations, that he is wont to think of it as the natural and immutable order of things.

He has failed to see property in its historical perspective. He has not inquired into its origin. He has been so overwhelmed by the power which property has exercised over his life, that he has stoically resigned to his fate, as if the system of private property were immutable and unchangeable. It was not until Karl Marx, the German expounder of Socialism, announced to the world that the system of private property was not the origin, nor was it the ultimate condition of things, but was merely a stage in the evolution of industrial society, that man began to question the ethical validity of private property as a legal institution.

There are those indeed, who, carried by the revelations of Marx, without understanding his philosophy, would do away with all forms of private property. These represent happily a small minority.

There are others who would strike a happy balance between the two extremes, of private property in all things, and of no private property at all. They concede private property in all things merely used by man for his own *private consumption*, but deny private property over things which may be used by him to exercise power over others. Hence, arose the distinction between property for use and property for power.

Property for use, they justify, because for the free and full exercise of man's faculties, a certain minimum of private property is considered to be necessary. However, property over and above what can actually be used by him, becomes a tool in his hands—a potential instrument of coercion, and has no ethical justification. Property for use is promotive of individual liberty, while property for power, to the extent that it is used as a coercive instrument, is a denial of individual liberty of those unfortunately tyrannized over by such property.

Ethico-economic writers would classify property into consumption and production goods, the former being those that immediately satisfy human wants, while the latter being those that are used for, or absorbed into the production of other goods. Private property in consumption goods they justify, because in the very nature of things, such could not be used as an instrument of coercion. But private property in production goods, they deny, because being thus used for the production of goods necessary for the satisfaction of human wants, it may be so misused to the prejudice not only of those hired to work on such property, but also of the final consumer who buys the goods produced. The reason behind this distinction is that while consumption is considered a purely private affair, production is deemed to be a public function.

As can be seen from the above discussion, there is not much difference between the two classifications. Both hinge on the test of "coercion". Where there is no possibility for certain property to be used as a coercive weapon over the lives of men other than its owner, private ownership of such property is justified. Upon the other hand where such coercion is possible, state ownership of such property should be the rule.

It would seem that should we follow strictly the ethical writers, the due process clause should only guaranty private ownership over property for use, but not so over property for power. A careful study, however, of our Constitution does not seem to justify the conclusion that its guarantee to private property is limited only to the so-called property for use. It seems that the more reasonable interpretation, is that its guarantee extends to all things susceptible of exclusive appropriation, whether they be potential instruments of coercion or not. The social justice clause in our Constitution, however, will justify restrictions upon the use of private property, when in the public judgment as expressed by the National Assembly, such restrictions are necessary in the public interest. Likewise under the clauses authorizing expropriation of private lands and operation of industries in the interest of national welfare, a government solicitous of the welfare of its constituents, may take over the ownership and operation of heretofore private property, when in its judgment such property is being used against the public welfare.

*Conflict of the Rights to Life, Liberty and Property*

It is apparent that a conflict between these several rights of individuals composing society is inevitable. On the one hand is the owner of property, claiming sanctity of his private possessions, and liberty to use the same as suits his taste. Upon the other hand, is the propertyless individual, claiming a right to live, and asking society's interference with the manner the property owner uses his property, to enable him to live a decent life. Faced with this dilemma, the question arises: How should government harmonize this seemingly irreconcilable conflict? In a popular democracy, two agencies of the government, the legislative and the judicial branches, assume to decide this conflict. On the one hand, the legislature by passing laws which restrict or regulate the use of private property, or interfere with individual liberty, decides in the first instance that its legislations are not violative of the due process clause, for otherwise it would not have passed them. On the other hand, when such laws are tested before the judiciary, this branch finally determines whether or not they are in fact violative of the due process clause. Invariably, the laws passed by the legislature are for the interest of their constituency. The majority

of the people are suffering from a common evil. They elect a representative to their legislature pledged to remedy the evil. The representative so elected, could not but keep his pledge, on pain of non-réélection. In short, the laws thus passed are simply answers to a popular clamor for them. Invariably those responsible for the alleged evil would be prejudiced by such legislations. So they test the constitutionality of such laws before the judiciary. But the constitution of the judiciary does not depend (except indirectly) upon the will of the majority of the people. Often, powerful interests exert pressure to see to it that judges entertaining ideas in their favor should sit in the highest court of the land, where ultimately, questions of constitutionality are determined. It is not surprising therefore to read of supreme court decisions declaring unconstitutional, laws whose only defect is that they seek to remedy an extant evil for which powerful interests are guilty, and which they seek to perpetuate. The many laws dealing with social and economic evils that the United States Supreme Court had declared unconstitutional, made people doubt whether the Supreme Court is still the guardian of the people's rights which it is supposed to be, and which it assumes to be. Such doubts had even given rise to movements to deprive the United States' Supreme Court of the right to declare laws unconstitutional, other movements, while allowing the supreme court to declare laws unconstitutional, yet would grant power to the legislative branch to overrule the court's declaration of unconstitutionality, by simply repassing the laws thus declared unconstitutional.

(Note: *This thesis is to be continued in the next issue.*)