

PHILIPPINE LAW JOURNAL

Vol. XVIII

OCTOBER, 1938

No. 4

UNWARRANTED APPLICATION OF THE DUE PROCESS CLAUSE

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CHAPTER III

ECONOMIC IMPLICATIONS OF THE DUE PROCESS CLAUSE

In our first chapter, we have followed historical due process in its development and growth, and found that it has been essentially a reflection of the political and economic ideology of the dominant class. In our second chapter, we have attempted to rationalize a few of our legal concepts—liberty, property, due process, etc.—and we attempted to find an ethical justification for their continued existence. We found that historical and ethical due process do not always coincide, and that when such a variance arises, there is then a prostitution of the due process clause.

Due Process and the Police Power

In this chapter, we shall attempt to elaborate on the economic implications of the due process clause, i.e. we shall show how the due process clause touches the economic life of a people.

We have already shown that due process in practice is a conservative force, an ally of the existing order, an apologist of institutions as they are. Its arch enemy, the police power, is a liberal force, a destroyer of situations and conditions formerly sanctified, a champion of the submerged class in its struggle for liberation, especially economic liberation.

The issue is therefore squarely planted: Shall due process remain adamant and refuse reforms in our economic institutions, or shall it gallantly make way for the police power to embark on social and economic experiments to better insure economic well-being and security to all?

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In an earlier chapter, we formulated the maximum self-realization of individuals composing society as an end of life. While maximum self-realization is a composite term, made up of those innumerable little things that go to make a good life, yet from its economic aspect it may be boiled down to one thing—a decent standard of living.

No one will deny that all these talks of maximum self-realization, of following one's own pattern of life, of developing one's distinctive individuality, would all come to naught, if their fundamental basis,—economic security—a minimum of decent living—is not assumed to everyone.

The Standard of Living Formula

This brings us to the most pressing problem that confronts the civilized world today, the problem of economics, more specifically, the problems of production, distribution, consumption and standard of living.

It is advisable to go back to the elementals for an adequate understanding of these problems. There are three factors that go to determine the standard of living of individuals living in society. First is *Nature*, which includes, land, sea, atmosphere, climate, the laws of nature, etc. This factor is essentially a fixed determinant, for it is fundamental that it is beyond the power of man to create something out of nothing. Second is *Technology*, which includes all the discoveries of the laws of nature, and their practical application in the form of inventions. As civilization advances, knowledge in all its varieties (science included) also advances. It is therefore reasonable to expect that technology would develop as civilization progresses, were it not for the attempts of some misguided individuals who are afraid of the advance of technology, to check it. These individuals see that production far exceeds society's consuming capacity, and the ruinous effect of such disproportion between the producing and consuming capacities. They blame this excess production on the rapid advance of the technological arts, and the only remedy therefore that is left to them is to check its advance. They do not stop to think and inquire whether there is real truth in the oft-repeated statement that the world is suffering from over-production. Statistics has belied such statement. The truth of the matter is that, if we would only distribute the aggregate world production equally among its popu-

lation, we would be surprised to know that the pro-rata share of each individual would not be sufficient to give him a decent living. The third factor in the determination of the standard of living formula is *Population*. It is clear that given a constant amount of production, the greater the population, the less will be the pro rata share of each individual, and vice versa.

From the above brief analysis of the standard of living formula, it is at once apparent, that a government desirous of securing an adequate standard of living to its people should center its thoughts upon the second and third factors. Nature is, what it has been from the beginning. Man cannot add nor subtract from it. However, the technological arts can be developed indefinitely. With the increased knowledge in chemistry, physics, mechanics and the other allied sciences, we can increase our capacity for production, and therefore increase our standard of living. Further, population may be so regulated that its increase shall not be faster than the increase in our producing capacity.

Problem of Production

Our first problem, therefore, is how to increase our productive capacity. There is need for the elimination of wastes and inefficiencies necessarily incident to duplicated services and unbridled competition. There is need, further, to better coordinate the productive processes, to eliminate over-production in one line, and under-production in other lines. Some sort of certificate of public necessity like that required of public utilities, should be required before capital is allowed to be invested in any industry. This device is necessary to prevent the sinking of investments in industries already heavily invested in. Destruction of crops, and the buying off of useful patents and inventions should not be permitted. Discoveries and inventions should so far as possible be applied to industries and agriculture. Limitation of agricultural production to increase the price of agricultural products, like that practiced under the New Deal, should not be resorted to. It should be borne in mind as a cardinal principle in economics, that the wealth of a nation depends not on the money that it accumulates, but on the aggregate goods that it produces. Money is desirable only in so far as it is used as a medium of exchange, or as a store of value etc., but the things that ultimately satisfy human wants are the goods produced. Hence, it is sheer folly, and absurd to limit any kind of produc-

tion—industrial, agricultural, or otherwise—in order simply to raise the level of prices of any particular product. That would be confusing the end with the means. The end of all economic activity is the satisfaction of wants, and wants are only satisfied by the goods produced—money being merely a means to obtain or exchange the goods.

Government should have active supervision, if not control of the productive activities of the country. By means of investigation boards, it should find out just exactly what, and in what proportions, goods are demanded. By having control over the issue of the certificate of public necessity to intending producers, the government can then refuse its issue if the result of its investigations shows that there would be a danger of over-production in the industry intended to be entered. At the same time, it can advise intending investors to place their capital in industries whose products are on demand, but in which there are still very few investors.

Problem of Distribution

Granting that we can do all the above, that we can develop the technological arts to such a degree that we should have no more problem of production, the question arises: Is there a guarantee under the present economic system, in connection with our prevailing political institutions with its due process clause, that every single individual composing society would have an adequate share of the goods produced? Or, would there still exist that sad spectacle which prevails at present, of starvation and want in the midst of plenty, of destruction of goods while many people go hungry? The answer is simple enough. Unless the problem of distribution (the gravest problem that capitalism has not yet solved) is adequately tackled, such a condition of want in the midst of plenty will continue to exist. The next problem, therefore, is how to formulate a fair and adequate distribution scheme that would diffuse purchasing power, to enable every individual to participate in the enjoyment of goods collectively produced by society. Under the prevailing system of economy, income from production is divided as follows: interest, rent, wages and profit. However, as interest, rent and profit accrue in the final analysis to the owners of capital or property, it is advisable for the sake of simplicity and clarity to divide income from production into that which goes

to persons by virtue of their ownership of property or capital, and that which goes to persons by virtue of their labor. Now, how is this income divided? Legally, there is perfect freedom and voluntariness in the division. Contracts for services are entered into voluntarily between the employer and the employee. The employer does not use physical force to coerce the employee into signing a wage contract. Neither does he use cunning, fraud, or misrepresentation to induce the employee to enter into such a contract. To the over-legalistic mind, the contract not being vitiated by force, fraud, mistake, or misrepresentation, is perfectly valid and should be enforced. But the inquisitive mind may ask: Is the contract really the result of the free, and voluntary will of both contracting parties? Is it not tainted by a force even superior to mere physical force? Is the fear of going hungry not a determining consideration in the making of wage contracts? To an unprejudiced mind, and one not blind to the realities of living, the answer is clear.

Absolute freedom of contract presupposes equality of bargaining power, and unless such equality exists, it is idle to talk of freedom of contract. That equality of bargaining power does not in fact obtain, is too obvious to be elaborated upon. What is the result of such inequality? The employer can hire men at a minimum wage sufficient only to enable them to live and reproduce their kind. Thus, the vast majority of the people live on a bare subsistence level, while a favored few appropriate to themselves the surplus that remains after paying to labor a subsistence wage. The result is the concentration of purchasing power in a few hands, and the practical denial of purchasing power to the vast majority of mankind. While owners of capital continue to invest their surplus wealth on the further production of consumer's goods, the final consumers—the greater portion of which is formed by the masses (dependent upon their wages for their living)—are left with barely enough to maintain a decent living. There are indeed many others who are left with nothing to live on. The final result of this inequitable distribution of income is the lagging behind of the consuming to the producing capacity. Goods already produced can not be sold, except at very low prices, which would mean losses to the producers. To prevent the lowering of prices, goods are deliberately destroyed, the want and starvation of the people notwithstanding. When producers suffer a loss, further curtail-

ment of costs is made; as interests on capital are obligations for a fixed period of time, they cannot be avoided, and wages are therefore made to suffer further cuts. Not only that, but oftentimes this is followed by a wholesale discharge of men from their work. Purchasing power is therefore further curtailed, and losses further sustained. And this process continues indefinitely ad infinitum.

Expedients Adopted to Mitigate the Lot of the Workingmen

What have the present capitalistic countries done to remedy this situation? Several expedients have been resorted to, as answers to popular clamor therefor. In the nature of things these expedients are haphazard, not well thought of, and were not conceived as a part of an ordered scheme of economy. They are merely patches in the holes of a decaying system. Thus, we have minimum wage, old-age insurance, sickness insurance, unemployment insurance, and other social service legislations. The motive behind these legislations is unassailable. They were passed to mitigate the lot of the workingmen. In times of prosperity, these expedients work smoothly. Minimum wage laws are observed, there is practically no unemployment, and hence, no need for the unemployment insurance fund. It is when depression comes that the inherent defects of these expedients are revealed. When the capitalists themselves are barely making a profit, they can ill afford to maintain a minimum wage for their workers. The unemployment insurance fund, accumulated during prosperous periods are drained during depression, and unemployed men remain without visible means of living. Comes again a period of social unrest, and once more people begin to cry for a change in the economic order.

Other industrialists resort to the practice of employee participation in the profits made by an enterprise. Not only do the employees get fixed wages, but in addition, they also receive dividends, as shareholders in the company for which they work. This practice would be a real help to employees if dividends are distributed to them by the mere fact of their working for their company, but, if such dividends are given only if they are shareholders, such practice is tantamount to making employees invest in the company, which is not possible for those who are given merely subsistence wages. Further, this practice is purely voluntary on the part of the industrialists, and as

yet no legislation exists (at least in the United States) which requires such employee participation in the profits of an enterprise.

Economic Security and Equality of Bargaining Power

From the above analysis of the system of distribution prevailing in a capitalistic economy, it is apparent that much is still to be desired in the way of change, to render more equitable the distribution of the social wealth collectively produced by individuals composing society. As an original principle from which arises all the inequity in distribution of produced wealth, it must be recognized that underlying all such inequity is not only the inequality in bargaining power between economic classes, but also the *insecurity* in the livelihood of the vast majority of mankind.

It is, therefore, the task of any government making any pretence at all to have the welfare of the governed at heart, to devise a scheme of distribution to assure economic security to all its constituents. No longer should government be looked upon as a mere passive agent, to be called upon merely to decide and enforce free contracts made by free contracting parties. The economic complexities of present-day living demands a different role for government to assume. It calls for a government, aggressive in its policy of giving economic security to everyone. It calls for a redefinition of our concept of due process, to prevent it from being an impediment to social and economic progress. It calls for the aggressive exercise of the police power, to render possible the embarking in social and economic experiments with a view to mitigating the lot of the submerged classes.

What can our own government do in this direction? This question will be answered more exhaustively in a later chapter. It is sufficient to note in this connection, that, if only our government can assure everyone with a minimum of property on which to work, from which one can decently make out a living, then, it is safe to say without fear of serious contradiction, that our problem of distribution is practically solved. For if and when such condition of things should come to pass, one need no longer be coerced into entering wage contracts which he deems inequitable—he, having something back of him to assure him that at least he would not go hungry even if he should not enter into such wage contracts. Then, and only then, can we expect real freedom to exist in the making of contracts.

Economic Planning

Of late, the tendency has been towards planning our economy, as evidenced by the New Deal in the United States, and the creation of the National Economic Council in the Philippines. Economic planning is an experiment of far-reaching significance, and therefore demands our close analysis. It is a virtual recognition of the patent inadequacy of the existing economic system which sadly lacks the sense of direction, of coordination—the very qualities which inspires economic planning. It is a denial of the reliability of the market in the determination of what should be produced. It substitutes aggressive policy in the attainment of well-thought-of ends, for a passive policy of allowing the market to determine the action of individuals as producers and consumers. It is aware of the wastes from duplicated service, necessarily concomitant to a planless economy, and would do away with such wastes. It views production no longer as merely of private concern, but considers it as a social function. It aims to so coordinate the forces of production, that the greatest amount of goods could be produced at the lowest possible cost, and with the least possible effort exerted. For that purpose a central planning authority is created, which will formulate and execute the policies of the planning machinery. Expert economists, accountants, statisticians, technologists, chemists and engineers are employed, first, to determine in advance just exactly what the demand for goods will be, and then when such demand is more or less approximated, to see to it that the economic machinery produces what is demanded, in the proportions required. By such means, it is expected to balance production with consumption, and therefore eliminate waste from over-production in one kind of goods, and want in another. The economic planners also realize that even if they could balance aggregate production with potential aggregate consumption, still there remains a possibility that the goods so produced would not be bought, due to lack of purchasing power on the part of the great majority of the final consumers. It is part of real economic planning to devise a means for a wide diffusion of purchasing power to enable the final consumers to enjoy that which is purposely produced for them.

Economic planning necessarily presupposes the surrender of much of our traditional liberty to do things as we please, in favor of a central planning authority which is the final arbiter

as to what is to be done. It should, however, be noted in this connection that it is only in the productive phase of our economic existence that we are required to submit to a dictator, while in its consumption phase we are left at perfect liberty to spend our incomes as please our individual tastes. Economic planning seeks the maximum of efficiency in production, consistent with the maximum of individuality in consumption. It is collective in its use of means, but individualistic in its ends. It recognizes the inherent ego of mankind, but would subordinate this ego in the productive process, to better realize it in its highest form.

Economic Planning and the Due Process Clause

Now, the question arises: Shall due process prove a stumbling block to our efforts at economic planning, or shall it gallantly give way in the interest of progress? Shall we insist on our traditional rights of freedom to contract, freedom to do as we please with our private property, or shall we march with the times, and surrender some of our most sanctified liberties, in the interest of a better living for all? On the answer to these questions will depend much of the future course of our history. The possessors of wealth—the present ruling class—are bent on doing things in the traditional way. They abhor government interference as being encroachments upon their liberty. The submerged classes, on the other hand, clamor for government interference in their favor to improve their lot which is already miserly through no fault of theirs. This conflict of forces—of private desires the government is called upon to decide. The government cannot afford to be partial in its decision, if it is to draw together these contending forces. It has to use statesmanship, absolute fairness and impartiality in dealing with this delicate problem. Its criterion in all its decisions should be justice, square deal and fair play. Short of this the government is bound to fail, and we may be forced to enact a tragic drama, in which the opposing forces would be bitter participants.

What Kind of Economic Planning Must We Have?

Economic planning being thus proved to be necessary, another pertinent question may be asked: What kind of economic planning must we have—planning for profits, or planning for the masses? It is at once apparent that neither planning for

profits nor planning for the masses will adequately solve the problem. Planning to be adequate must be impartial, and should have as its aim nothing short of the highest welfare of all the people. For this purpose, only men of known integrity, and of proven sense of justice and probity should be appointed in the high councils of the planning authority. So-called labor leaders whose only qualification is their ability to incite the masses to fury in order to be noticed, and when noticed, to betray the very people for whose interests they are supposedly working, should have no place in the planning board. Neither should a place be given to those unfortunate beings, who pretend to be economists and experts, but whose economics can be bought by capital in the interests merely of the capitalist class. In short, neither labor demagogues nor apologizing economists should have a place in the economic planning council. This high council should be reserved to those academicians who have no axe to grind, no masters to serve, and who have broad sympathies, unswayed by the sentimentalism of the submerged class, and unbought by the glittering gold of the ruling class. Only by having such men to sit in this council can we expect a happy solution to our present social and economic problems.