

CONSTITUTIONALISM AND THE POSITIVE CONCEPT OF LIBERTY

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Bills of rights, it might be said, express the ideas dominant in the community regarding the desirable relations between the government and individual citizens. Of necessity, therefore, such bills of rights must undergo considerable alterations as community ideas change with historical developments. As new interests take root in society, they will clamor for recognition as soon as they become sufficiently weighty to arouse a sizable group of people to rally to their support. It is not far-fetched to assume that the resulting need for adjustment may create sharp tensions.¹

Fortunately for the American and Philippine peoples, by and large, there have not been too many crises to warrant revisions of their respective constitutions. Ever since the Great Depression, however, the general tenor of the role of government in the increasingly complex national economy has undergone a major change. Ever since, constitutionalism, as we know it today, has been under fire from those who think that its chief role is anachronistic,² namely, a mechanism for the division, limitation and restraint of power to prevent its abuse. This negativistic system, so the criticism runs, if not outworn, is at least now subordinate in a world where modern technology, military and economic conditions and the prevailing desire to translate the claims of private interests into legal rights are the predominant claims of society.

To evaluate this criticism properly, it is essential to go back to the political and economic conditions of the seventeenth and eighteenth century Western world. That was a period in which politics was just struggling to be free from the rigors of old absolutisms. Likewise, in the economic field, mercantilism was in full swing. The framers of the American Constitution, therefore, remembering the politico-economic history of England, were predisposed, both by their experience and the philosophy they embraced, to regard political power as inherently dangerous. Hence, the essential purpose of a written constitution was to devise a system of

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¹ C/. CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY esp. Ch. IX (Rev. ed., 1951.)

² E.g., CARL BECKER, FREEDOM AND RESPONSIBILITY esp. Ch. IV (1955); HAROLD J. LASKI, LIBERTY IN THE MODERN STATE Ch. I (1930); LEARNED HAND, SPIRIT OF LIBERTY (Ed. Irving Dillard, 1953).

government in which political power would cease to be excessive and undefined by law; to be strictly limited in scope, as well as dispersed, checked and balanced in its application.³ The limitations of the bill of rights, the system of checks and balances, the division of powers between state and federal authorities were meant to achieve this end.

At the time bills of rights were written into the constitutions of the original states of the Union, and until their incorporation by amendment into the federal Constitution, social and economic life was still relatively simple. The circular flow of goods in a condition of near-static equilibrium characterized the rosy world of political economy. What complexity there was in the horizon arose from the impending emergence of a world community with a surplus population that could not be fed. Into such a calm and benign order of things, the cult of *laissez-faire* took hold of the intellectuals and became the predominant slogan. Mercantilism, which in both theory and practice necessitated the active intervention of government, had to give way then to the *laissez-faire* order in which the Invisible Hand would automatically guide man's political and economic activities. Thus would happiness and progress ensue without any deliberate effort or conscious planning on the part of men.

From the eighteenth century to the twentieth is a big leap. The static equilibrium of the *ancien regimes* has given way to a tremendously complex culture (at least as far as the West is concerned) in which combinations and trusts and giant factories run by captains of industry have become the warp and woof of society. The obvious question then is, is an eighteenth-century Constitution of a cotton-planter aristocracy and small-time manufacturing elite suited to the complex conditions and complicated problems of our age? The relevance of this problem to the contemporary American scene has been made clear by the late Professor Becker:

"The right of the people to assemble and consult for the public good is exercised with little let or hindrance; we still have our town halls, social forums and campaign speeches. But where the people chiefly assemble in front of their radios to consult with disembodied voices that announce and comment on the news collected by corporations organized for profit, what happens to freedom of speech? The right of assembly is a part of the right of free speech and of the press; and in our time the practical problem has to do, not so much with those who may freely assemble and speak their minds, but rather with those who may acquire a virtual monopoly of collecting and disseminating information. Freedom of speech is of little use to those who have not free access to the principal means of communication; and nothing in the bill of rights is of much help

³ See THE FEDERALIST, Numbers 10, 51 etc.

in determining whether freedom of speech and of the press is maintained or denied by the Associated Press and the broadcasting corporations."⁴

Fortunately, the provisions of the American and Philippine Constitutions have been interpreted progressively by the different departments of government, particularly the courts, to suit contemporary conditions. In the beginning, for example, courts held that the liberty of citizens included liberty of contracts, which was held to be sacrosanct. In the United States, no one was more emphatic in this view than the old conservative, Justice Sutherland. Slowly in the twenties, and more decisively in the thirties, this idea was mutilated, and finally thrown out altogether. Under the aegis of the keen minds Justices Brandeis and Holmes, a new era of governmental interference to protect human rights from exploitations was ushered in. In the Philippines, Justices Malcolm and Laurel were the chief exponents of the idea that human rights are preferred to property rights.⁵ This idea has now become, at least in theory, the accepted norm of industrial and social relations in our society.

But it was President Roosevelt who, in his characteristic solicitude for the economic security of men and women, first made the most emphatic and effective declaration of belief in positive freedom. In his annual message to Congress in January, 1941, Roosevelt made a public statement of the celebrated Four Freedoms: freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear. The last two of these freedoms were explicitly reaffirmed the following August in the Atlantic Charter, and received a wide sanction on January 1, 1942, in the Joint Declaration of the United Nations.⁶

The speech on the Four Freedoms was a major pronouncement. Its echo reverberated throughout the free world. "We look forward," Roosevelt wrote, "to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peaceful life for its inhabitants—everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fash-

⁴ FREEDOM AND RESPONSIBILITY, *op. cit.* *supra* note 2 at 89.

⁵ See, e. g., *Rubi v. Provincial Board*, 39 Phil. 660 (1919); *Atamok Gold Mines v. Court*, 40 O.G., 8th Sup. 173 (1939); *Calalang v. Williams*, 40 O.G. 9th Sup. 239 (1940); *Leyte Land Transportation v. Leyte Farmers' & Laborer's Union*, G.R. No. L-1377 (1948).

⁶ HARRY N. HOLCOMBE, HUMAN RIGHTS IN THE WORLD COMMUNITY 4-5 (1948).

ion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world."

It is evident that the last two freedoms were of a different nature from the first two. The Four-Freedom speech was a clear manifestation of the growing belief among many peoples that liberty was no longer to be thought of as mere absence of restraint; it is also, in Laski's terms "the maintenance of such an atmosphere that men can be their best selves."

But the trend was already manifest in another part of the world in the late nineteenth century. A new liberalism arose in England, generally associated with the names of T. H. Green and a group of humanists calling themselves the *Fabians*, the latter of which provided the brains in the final birth of an organized Independent Labor Party in England.⁷

Green wrote his *Principles of Political Obligation* in 1880, just after the depression of the 1870's, a depression traditionally regarded as a period of unrelieved economic decline and difficulty. At that time, the general position of labor became seriously worse until by 1878 average unemployment, rising through the year, announced the final phase of the depression. Pauperism had moved decisively upward; consumption of food had slumped.

Green's general theory was that a liberal government ought to legislate in any case where the law can remove an obstacle to the

⁷ Cf. G. D. H. COLE, *HISTORY OF THE BRITISH WORKING CLASS MOVEMENT* 288 (1924): "If the Independent Labour Party expressed the soul of the new ferment, the Fabian society aspired to be its brain. From the very beginning, the Fabians had a clear social philosophy, though it was far removed from that of Karl Marx. It was a small intellectual group intent on working out the mechanics of the new society its members felt to be growing up around them. They became Socialists less by spiritual conversion than by a process of intellectual conviction. It seemed to them obvious that the gross inequalities of wealth and opportunity ought to be put right by better social organization, and they set themselves deliberately to think out the means of change."

Parenthetically, Labor Leader Hugh Gaitskell has but recently defined for the public the philosophy of British socialism. It is based, he said, upon Fabian gradualism. "While the trade unions provided the solid and well-organized movement, the most important intellectual contribution came from the members of the (Fabian) society. They were a group of middle-class men and women who though especially interested in ideas, did not hold themselves aloof from political action. Their influence upon Labor policy in Britain in the last fifty years has been substantial... The Fabians' influence culminated in 1918 in the adoption of a party program, 'Labor and the New Social Order,' which was the first and in some respects the best detailed statement of the ideas of gradualist democratic socialism to appear in Britain. It contained among other proposals a deliberate policy of full employment through state action; big expansion of the social services; the control of prices and profits in private industry; a more progressive system of taxation... Most of these proposals were to remain the policy of the party for the next thirty years. Many of them were finally put into effect by the Labor Government of 1949-50, in accordance with the gradualistic approach which by then was almost universally accepted within the party." "Socialism's Way," *N. Y. Times Magazine*, Apr. 8, 1956, p. 14.

highest moral development of its citizens. In place of *laissez-faire* and freedom of contract, it opened the way, in the name of positive freedom, for any degree of social legislation that could be justified as practically effective in improving the standard of living. It is true that Green retained the prevailing liberal view that presumption is against regulation and control, because he thought it good morals that men should be responsible for their own welfare so far may be. But "it is idle, both on moral and political grounds, to demand responsibility for that which is not within a man's control, and doubly idle to expect men to become responsible agents when they live in conditions that destroy the qualities of character on which responsibility depends."

What Green added to the liberal theory was the conception of collective well-being as a precondition of individual freedom and responsibility. Consequently, sound social policy, to him, justifies the protection of common interests, such as public health or education, or a decent standard of living, no less than the protection of individual rights, such as individual property. The liberal legislation which he defended assumed that the end of government is not to guarantee the greatest individual liberty but rather to insure the conditions for at least the minimum of well-being: a standard of living, of education and of security below which good policy requires that no considerable part of the population shall be allowed to fall.

Shortly after Green's advocacy of the new liberalism, Fabian socialism took form and advocated ideas that have become since the main strands of Socialist thinking in England. Sidney Webb, during the first decade of the twentieth century, persisted in pointing out that the very conception of democracy would have to be widened so as to include economic as well as political relations.⁸ The framers of the United States Constitution, he charged, like the various parties in the French Revolution, saw no resemblance or analogy between the personal power which they drove from the castle, the altar, and the throne, and that which they left unchecked in the farm, the factory and the mine. But to the "dim, inarticulate" multitude of manual working wage-earners, the uncontrolled power wielded by the owners of the means of production, able to withhold from the manual worker all chance of subsistence unless he accepted their terms, "meant a far more genuine loss of liberty, and a far keener sense of personal subjection, than the official jurisdiction of the magistrate, or the far-off, impalpable rule of the king."⁹

⁸ There seems to have been no association between T. H. Green and the Fabians, in spite of the fact that they lived almost at the same time. The difference in their philosophies is a matter of degree.

⁹ SIDNEY AND BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 840 (1914).

The philosophy of the Socialist idealists can be reduced to simple terms: To start with, we are largely what our world invites us to be, and the basic features of our soul are impressed upon it by the form of its surroundings as a mould. This is natural, for our life is no other than our relations with the world around us. The general aspect which it presents to us will form the general aspect of our own. It was therefore the ideal of those who have espoused the cause of Socialism during its early years of struggle, to set men free from the shackles of their surroundings; set them free from economic necessity that they might set themselves with new manhood about the creation of the good life. Men like Bernard Shaw, Cole, Webb, MacDonald, Laski, and others believed that, in the ultimate appraisal, it did not really matter what men and women would make of their freedom if it were secured to them; whatever they might make of it, they have nevertheless a right to that freedom. The one thing that supremely mattered, in their minds, is the free exercise of the human will.¹⁰

II

It is noteworthy that the modern constitutions of democratic countries stress social progress.¹¹ In these constitutions, however, the distinctions between aspirations and prohibitions are becoming more and more blurred. For instance, the French Constitution of 1946 contains a preamble enumerating the entire bill of rights. After solemnly affirming the traditional rights of man as stated in the revolutionary Declaration of the Rights of Man, it recites the more recent rights: equality of women, health and old age protection, child care and education, as well as the right to work. This last one is one of the most important freedoms at the present time, and needs to receive a good deal of serious consideration if constitutional government is to keep up with the temper of the times.

Very wisely, the framers of the Indian Constitution guaranteed that the State shall, "within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of undeserved want."¹² Following this policy, the Constitution of India announces as a principle of state policy that provision for just and humane conditions of work and for maternity relief shall be made;¹³ that the State shall endeavor to secure, by suitable legislation or economic organ-

¹⁰ However, there is here interjected a note of disillusion: the English miner, on the day after nationalization, finds that he must go back into the pits.

¹¹ Alongside "peace" as an ideal and a conscious goal of national policy.

¹² Article 41.

¹³ Article 42.

ization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and in particular, to promote cottage industries on an individual or co-operative basis in rural areas;¹⁴ that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.¹⁵

The preamble of the French Constitution of 1946 states that "everyone has the duty to work and the right to obtain employment." A similar provision was contained in the Weimar Constitution, and is now embodied in the Italian Constitution.¹⁶ The German Basic Law goes further to provide that all Germans have the right freely to choose their trade or profession, their place of work and their place of training.¹⁷ Recent history, however, renders doubtful the application of this provision in times of great depressions or runaway inflation. Again, it is important to note the increasing emphasis on aspirations in the provisions mentioned, as opposed to traditional prohibitions and limitations.

Needless to say, these provisions are all founded on broad, humanitarian concepts. The German Basic Law explicitly recognizes that the dignity of man is inviolable and that it is the duty of all state authority to respect and protect it.¹⁸ Therefore, the German people acknowledge in their Constitution, "inviolable and inalienable human rights are the basis of every community, of peace and of justice in the world." As far as the French are concerned, it has already been mentioned that the Declaration of the Rights of Man itself has been incorporated into the preamble of their 1946 Constitution. On the other hand, the Indian Constitution is more directly concerned with social justice. Thus, in India, "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."¹⁹ There is likewise a recognition that they who are less favored in life should receive more favor in law: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."²⁰

¹⁴ Article 43.

¹⁵ Article 47.

¹⁶ Title III, Economic Relations.

¹⁷ Article 12.

¹⁸ Article 1.

¹⁹ Article 38.

²⁰ Article 46.

The stress placed upon social progress in these constitutions is indicative of a new spirit, and one which, doubtless, would express itself very forcefully in an American Constitution adopted today. Already, in 1934, this spirit was caught by the framers of the Philippine Constitution, and certain special provisions were written, embodying the growing concern of society over the social and economic rights of human beings. On the other hand, there is no doubt that both the Philippine and American Constitutions are not yet ready to go as far as the Soviet Constitution in the guaranty of these rights.

In the Soviet Constitution of 1936, there is a declaration that the right of citizens to personal ownership of their incomes from work and of their savings, of their dwelling houses and subsidiary household economy, of their household furniture and utensils and articles of personal use and convenience, as well as of the rights of inheritance of personal property of citizens, is protected by law.²¹ Chapter X of the Constitution likewise contains a statement of the "Fundamental Rights and Duties of Citizens." The list of rights includes the right to work, to rest and leisure, the right to maintenance in old age and in case of sickness or loss of capacity to work, the right to education, sex equality, absence of discrimination on account of race or nationality, freedom of conscience, freedom of speech, freedom of press, freedom of assembly, freedom of street processions and demonstrations, freedom to unite in public organizations, the inviolability of the person and the homes of citizens, and privacy of correspondence. It is common knowledge, of course, that these constitutional myths are to be interpreted against the background of Soviet political realities. Nevertheless, as a goal and as an ideal, there is something to be said for these humane provisions. As a matter of fact, so much of the spirit of these provisions has found recognition in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948.

The Philippine Constitution itself, while basically similar to the United States Constitution as far as political rights and structure of government are concerned (except for the fact that the United States form of government is federal and that of the Philippines unitary), diverges from the model American Constitution when it comes to social and economic rights. For the Philippine Constitution, in the words of Justice Laurel, was "adopted in the midst of surging unrest and dissatisfaction resulting from economic and social distress which was threatening the stability of governments the world over."²² The Great Depression, at that time, had cast a mantle of darkness, as it

²¹ Article 10.

²² See *Atamok Gold Fields v. Court*, 40 O.G. 8th Sup. 173 at 189 (1939).

were, all over the world—none more so than in Germany and the United States. As early as 1934 then, when the Philippine Constitution was drafted, a positive concept of liberty was recognized in the fundamental law.

One of the fundamental principles enunciated in the Philippine Constitution is the promotion of social justice "to insure the well-being and economic security of the people."²³ More specifically, there is the constitutional mandate that the State shall regulate the relations between landowner and tenant, between labor and capital in industry and agriculture.²⁴ Likewise, the Congress of the Philippines is empowered to determine by law the size of private agricultural lands which individuals, corporations or associations may acquire and hold, and may authorize, upon payment of just compensation, the expropriation of lands to be subdivided into small lots and conveyed at cost to individuals.²⁵

III

Today, there are many discerning people in both the United States and the Philippines who have unleashed devastating criticisms of our present-day constitutionalism, saying, among other things, that too high a premium is presently placed on it, and too little value left for other possible approaches to the never-ending attempt to accommodate the rival claims of authority and liberty. In their contention that the constitutional system may very well be obsolete now, these critics may very well have been fortified by Jefferson himself, who, in a letter to a colleague,²⁶ once decried the idea that constitutions are sacred:

"Some men look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment... I know also that laws and institutions must go hand in hand with the progress of the

²³ Article II, § 5. Social justice has been defined by the Philippine Supreme Court, through Justice Laurel, in *Calalang v. Williams*, 40 O.G., 9th Sup. 239 (1940), as follows:

"Social justice is 'neither communism, nor despotism, nor atomism, nor anarchy,' but the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated. Social justice means the promotion of the welfare of all the people, the adoption by the Government of measures calculated to insure economic stability of all the component elements of society, through the maintenance of a proper economic and social equilibrium in the interrelations of the members of the community, constitutionally, through the adoption of measures legally justifiable, or extra-constitutionally, through the exercise of powers underlying the existence of all governments based on the time-honored principle of *salus populi est suprema lex*."

²⁴ Art. IX, § 8.

²⁵ Art. VIII, § 4.

²⁶ JEFFERSON, *WORKS*, XII at 11 (1904).

human mind... As new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regime of their barbarous ancestors...."

The most radical view propounded, as we have said, is that the climate under which constitutionalism in the Philippines and the United States was nourished is gone forever. According to this approach, such constitutionalism as we have presupposes an unplanned society, where the economic and social, as well as the political system is highly individualistic. It assumes that men live today in the simple economy of Adam Smith's time, where the circular flow of goods creates enough for sustenance, and where, in an atmosphere of apparent freedom, initiative and enterprise, the state alone seems powerful and it alone is to be feared and checked.

There is, indeed, no gainsaying the fact that the temper of the times calls for a changed concept of personal liberty. In the first place, to think that the limitations to freedom wholly arise from the antagonism of government is to take a narrow viewpoint. To a large degree, the massive habits of physical nature, its iron laws, determine the scene for the sufferings of man. In a country like the Philippines, where 90 per cent of the people are in need, and where one hundredth of one per cent of the people own about 42 per cent of the farm area, it means land reform. It also means increasing the per capita income and production of the people; it means more job opportunities for our increasing battalions of unemployed; it means, in short, releasing men from the haunting fears of the morrow and its wherewithals.

In sum, there is, undoubtedly, a primary demand for freedom of thought, speech and assembly, but there is also a fundamental one of meeting the rigorous requirements of living. This, in a sense, is where our Philippine-American constitutional system is anachronistic. There is increasing need for the recognition that it is only when man feels safe and secure that he may cultivate the spiritual aspects of his existence, for it is only then that the captive can be truly free to embark on what can very well be the ultimate in human experience.

PHILIPPINE LAW JOURNAL

*Published by the College of Law, University of the Philippines
Diliman, Quezon City*

VOLUME 31

NOVEMBER 1958

NUMBER 5

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