

LIBERTY AS A FUNCTION OF POWER *
(A Positive Approach to Freedom under the Constitution)

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I. Introduction:—

One of the most perplexing questions not only in Philippine jurisprudence but also in that of other countries is the proper relation between liberty and authority, between individual freedom on the one hand and governmental power on the other.

Under the prevailing interpretation of the Philippine Constitution, liberty seems to be regarded largely as an affair of the individual.¹ The view is easily justified. Sec. 1 of the Bill of Rights in its opening paragraph states in part that no person shall be deprived of his...liberty...without due process of law, with the apparently clear implication that the duty of the government mainly lies in abstaining from interference with that right. Its participation then in the preservation of liberty is negative, that is, it must restrain itself so as not to impair individual freedom.

This conclusion emanates from the traditional view which regards liberty primarily as absence of governmental restraint. Under this view, the main function of libertarians seem to be resistance to government authority so that it will not degenerate into tyranny. This narrow view has produced sharp criticism from those who urge social action to alleviate social ills and promote the economic well-being of the nation.² Declared a critic in a recent article:

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.³

The criticism is justified if the concept of liberty under the Constitution is so fossilized as to be incapable of change and re-definition. I believe otherwise. I think new wine could be poured into the old conceptual bottle of liberty without doing much violence to the senses in which the public has been accustomed to take it. I agree with Prof. Ambion when he stated that liberty and control are not truly opposed to each other provided that the control aims at

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¹ See, e.g., *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660 (1919); *Calalang v. Williams*, 70 Phil. 236 (1940); *Villavicencio v. Lukban*, 39 Phil. 778 (1919).

² PHIL. CONST. Art. II, sec. 5 states: "The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State."

³ Espiritu, *Constitutionalism and the Positive Concept of Liberty*, 31 PHIL. L.J. 663 (1956).

the free and unimpaired development of man for one must consent to be restrained to be free.⁴

It is the task of this paper to investigate the classic antithesis between liberty and authority, to present its inadequacies to meet present-day needs of constitutionalism, and to advance a concept of liberty that may very well harmonize the need for individual freedom with the need for increased governmental activity. Such junction must be effected if the tremendous appeal of liberty is to be channelled in support of governmental action to advance social justice in this country.

II. The Traditional Concept of Liberty and Its Historical Basis:—

The prevailing concept of liberty in this country as elsewhere is that liberty is absence of or freedom from, governmental restraint. The heart of this view is the assumption of Rousseau that liberty is an inherent possession of the individual in the natural state.⁵ Man is born free and by himself lacks nothing to make him free. An absolutistic adoption of this view would have several serious faults. Its implications would ignore the major elements of social experience. First, it fails to take into consideration the social setting essential to human freedom. If man is free by his own exertions, what need is there for social action to help him keep free? And yet even Rousseau admitted that the convention which created the community is a sacred right that is the basis of all other rights. Whatever freedom there is must have to be freedom under law. As aptly put by Corwin, we are all slaves of the law that we may be free.⁶

Second, such view would make every rule of law destructive of liberty, for the essence of law is interference with individual conduct and therefore limits what the citizen would be otherwise free to do. This implication permits the observation of Pres. Hoover that every law passed narrows the field for individual choice and action.⁷ Third, such view identifies the government as the greatest enemy of individual liberty. This is easily understandable. It is the greatest coercive power in the community and whenever it acts therefore, there is bound to be interference and liberty always comes out loser.

The classic antithesis between freedom and government power has seldom been given a clearer expression than as expounded by two of the best thinkers this country has so far produced. I refer to former Justice Laurel and Pres. Quezon. Declared the latter in a speech:

The slogan that must be thrown overboard is the theory that in a democracy, individual liberty must not be restricted. Liberty is of course one of the most precious rights. But civilization has made progress only

⁴ Ambion, *Freedom & Planning — a Brief Examination*, 30 PHIL. L.J. 128 (1955).

⁵ ROUSSEAU, *SOCIAL CONTRACT*, Chaps. I, II, III (1902).

⁶ Corwin, *Liberty And Juridical Restraint*, FREEDOM: ITS MEANING 281 (Ruth Anda Anshen Ed. 1940).

⁷ Hoover, *The Challenge to Liberty*, quoted by R. M. MacIver in *The Meaning of Liberty And Its Perversions*, FREEDOM: ITS MEANING, *op. cit. supra* note 6 at 281.

at the expense of individual liberty. The freest man is the savage, the man who lives in the fastnesses of the mountains, recognizing no rule except his own will, no power except his physical strength.⁸

Justice Laurel expressed much the same sentiment differently in the case of *Calalang v. Williams*:⁹

Persons and property may be subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state. To this fundamental aim of our Government the rights of the individual are subordinated. Liberty is a blessing without which life is a misery, but liberty should not be made to prevail over authority because then society will fall into anarchy. Neither should authority be made to prevail over liberty because then the individual will fall into slavery.

The effect of this view and its implications is inevitable distrust of the government and even opposition to the laws. For the love of liberty seems inborn; in every quarrel between freedom and authority, whether such be merely apparent or real, the sympathies of the citizen are with freedom. Resistance therefore to every proposal that would interfere with civil liberty is natural and to be expected; every opposition to an unwelcome bill in the legislature voices out sooner or later a protest in the name of individual liberty. Only when there is a clear and pressing evil which needs social correction are men inclined on the side of authority. Even Filipinos share this propensity to freedom, despite their paternalistic tradition in politics. This natural inclination to liberty, this emotional bias, so to speak, is so strong that intelligent practical men of affairs who clearly see the necessity for governmental action as well as the benefits that flow to the citizens, suffer some intellectual confusion or emotional conflict in their advocacy of laws which seem to do liberty a disservice. Being imbued with the traditional concept, all they do is to accept the conflict and attempt a reconciliation, accompanied usually by a profusion of apologies.

Historically, there is good reason for the concept of liberty in this narrow sense, that is, liberty *against* governmental restraint.¹⁰ As John Dewey keenly observed:

Finding the existing institutions oppressive, the new movement (for freedom) reacted against authority as such and began to conceive of authority as inherently external to individuality, and inherently hostile to freedom and the social changes that the overt expression and use of freedom would bring to pass. In consequence, while the new movement should have the credit for breaking down a system that had grown rigid and unresponsive, and for releasing capacities of individuals that had been dormant, its virtual denial of the organic importance of any embodiment of authority and social control has fostered...confusion.¹¹

The oppression of monarchs and the abuses of despots which make the history of Europe before the nineteenth century such gloomy

⁸ Manuel Luis Quezon, in a speech delivered at U.P., Manila, July 16, 1940, listed as "Appendix A," DR. RICARDO PASCUAL, PARTYLESS DEMOCRACY, 308 (1951).

⁹ *Calalang v. Williams*, *supra* note 1.

¹⁰ Corwin, *op. cit.*, *supra* note 6, at 90-93.

¹¹ JOHN DEWEY, INTELLIGENCE IN THE MODERN WORLD 346 (J. Ratner Ed. 1939).

reading, taught the various peoples and their political thinkers the sad realities of absolutism. As safeguards against repetition of their unpleasant experience, they have enshrined in their various constitutions certain principles restrictive of governmental power, which are supposed to guarantee to the individual his freedom from abuses of state power. As Dewey has stated, the idea that the government is the main source of unwelcome restraint on the conduct of the citizen persists to this day. Without regard to social and economic realities, the fundamental understanding of the nature of liberty, on the part of the political scientist no less than the ordinary citizen, is that it is something which the government is always trying to take from the individual. The *laissez faire* doctrine is merely patched up and modified. When therefore we hear the maxim repeated that eternal vigilance is the price of liberty, what is usually meant and understood is vigilance against governmental oppression.

I think it is about time that advocates of governmental power for the attainment of social justice, stop sounding apologetic for every law that interferes with individual conduct. This requires a change to be effected in the concept of liberty which would accurately relate and reflect the existing political and economic realities of the modern world. The circumstances have changed from the days of Thoreau and the ideas on which we base action to deal with the altered facts of our environment, must also change at the risk of their becoming anachronistic and ineffective. But before we proceed, let us examine the social facts for which the prevailing concept of liberty fails to provide and which it cannot explain.

III. The Inadequacies of the Classical Concept of Liberty:—

We shall consider here the defects of the view which considers liberty as absence of restraint by the government.

This view fails to account for the fact that though man loves liberty, he is also a social being. He has always lived in communities from the earliest times; and despite the claims of Locke and Rousseau that he is freest outside society,¹² he prefers to live with his fellow men. This is the one social fact which no amount of theorizing can evade. What does it mean? It must be one of two things. Either natural liberty is not the absolute good it is assumed or made out to be or man does not know what is good for him and therefore foolishly surrenders the good that is complete freedom and yields to the evil of social restraint. The answer is obvious. Even the classical writers on liberty admit that social life brings greater personal rewards to the individual than does the lonely life of the hermit.¹³ The conclusion then arises that government is necessary to develop the best potentialities of man and is far from being the wholly unmitigated evil which the prevailing concept of liberty makes it out to be. To the extent at least that governmental intervention in the affairs of men is welcome, one can say that so much

¹² ROUSSEAU, *op. cit. supra* note 5 and John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, reprinted in E.A. BURTT, *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL*, 403-503 (1939).

¹³ Locke, *op. cit. supra* note 12, at 408.

of freedom, traditionally conceived, as is thus negated is bad for men. Hobbes' description of the condition of the savage, who if the traditional theory of liberty were carried to its extreme, should be the happiest of men, is the unanswerable argument for community life. Says Hobbes:

Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time, wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which was worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short.¹⁴

It is government that enables that minimum of order and security which makes cooperation and intercourse among men possible. Men have natural rights but such rights are without force unless some social authority furnishes the coercion that assures protection of such rights and if violated, their redress. Man is born free perhaps but his neighbor might have stronger fists and so he is made subject to the latter's will by force of arms and thus remains until he gains in might or until somebody else defeats the present master and succeeds to his authority. As Russell observes:

There can be no widespread liberty except under the reign of law, for when men are lawless only the strongest are free, and they only until they are overcome by someone still stronger.¹⁵

We can therefore say, contrary to the implication of the traditional concept of liberty, considered in the absolute, that government is for the good of men. We can further say that liberty cannot be the absolute good it is supposed to be. The natural result is that a distinction arises between forms of liberty that are welcome and those that are bad. Those who undertake in the framing of policy to reconcile theory with practical needs seek to avoid the distinction by saying that these latter forms are not part of liberty but rather constitute "license".¹⁶ An unpleasant dichotomy is then thought to have been avoided. But the contradiction in the system is not evaded thus. You cannot declare liberty to be the highest good, define it as the absence of restraint and then admit that government which imposes restraints is good, without appearing more than a trifle absurd.

Another fact which the concept fails to explain is that the citizen can become more and more miserable even in the absence of restraint from the government. This was the condition during the Industrial Revolution in its later stages. The government followed a policy of *laissez faire* but it seemed more liberty from social authority

¹⁴ Thomas Hobbes, *Leviathan*, reprinted in E.A. BURTT, *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL*, 161 (1939).

¹⁵ Bertrand Russell, *Liberty and Government*, in *FREEDOM: ITS MEANING*, *op. cit. supra* note 6, at 256.

¹⁶ Justice Malcolm, in *Rubi v. Provincial Board of Mindoro*, *supra* note 1.

was not enough to guarantee the opportunity of men for happiness. There are other forces, mainly economic forces. As Whitehead says:

The limitations to freedom are conceived as wholly arising from the antagonisms of our fellow-men. This is a thorough mistake. The massive habits of physical nature, its iron laws, determine the scene for the sufferings of men. Birth and death, heat, cold, hunger, separation, disease, and general impracticability of purpose, all bring their quota to imprison the souls of men and women.¹⁷

Economic security then is essential, even for liberty as traditionally conceived. Particular freedoms like freedom of speech and the press are not realized merely by the fact that the government does nothing to interfere or limit them. There must not only be ability to speak understandably and to read with understanding but there must be also time and energy to do so. This means a secure economic base for the citizen. This would not be difficult to attain in a pastoral or wholly agrarian economy where needs are simple and the relations between members of the community are easily adjusted. But in modern countries the growth of population has been accompanied by growth in commerce and industry and the economic system has grown more and more complex. Without sufficient regulation, the free enterprise system has led to great inequalities in wealth and consequent privation and suffering for the great mass of wage-earnings. It is subject to irregular movements, to depressions, inflation and unemployment. Aside from these impersonal forces, men who wield economic power had not been vigilant for the welfare of their workers. The Industrial Revolution working on the basis of the *laissez faire* approach to economics led to such evils as overworking of laborers, poor wages, bad working conditions, child and women labor and other forms of exploitation.¹⁸ It was the intervention of government upon the call of the citizens that remedied these evils and it is social authority operating through a network of laws which prevents their recurrence.

The traditional view assumes that left to himself and his own exertions man can find happiness. That is why liberty as freedom from restraint is exalted. This assumption is at war with the facts in the modern world, where the welfare of the individual largely depends upon correction of economic evils and abuses by the intervention of the government in business and where the individual himself frequently calls for the exercise of social authority to relieve him of felt evils. It would seem that in the present order of things, man cannot enjoy by his own efforts alone the blessings of liberty which libertarian philosophers envisioned for him. For the truth of the matter is that there are many forces acutely restrictive of individual choice and action than the government.¹⁹ Those who control the productive process in capitalistic countries determine principally the flow of income in society and thus control the lives of great numbers of citizens. They decide how many persons shall be hired, who in particular is to be hired, what conditions they will work under,

¹⁷ ALFRED WHITEHEAD, *ADVENTURES OF IDEAS*, 134 (1952).

¹⁸ See *ENCYCLOPEDIA BRITANNICA* on the topic *Industrial Revolution* (1948).

¹⁹ Corwin, *op. cit. supra* note 6, at 102.

and how much they will be paid. Their discretion as to these matters has been curtailed by social legislation but their power remains substantially undiminished. In the grip of economic institutions beyond his small powers either to correct or chastise, the citizen has to rely on the aid of government to make the appropriate adjustments. Alone, he is helpless against powerful combinations of capital. To give him a chance for a decent living, he must be protected from exploitation. He has to be protected in his rights to join associations of workers for greater bargaining power, to work under decent conditions for a limited number of hours, to have a living wage and to leave one form of employment for another. All these rights of the common man rest upon the fabric of law and behind them is the coercive power of the state.

How is the traditional theory of liberty reconciled with the fact that individual happiness is promoted by governmental action and that individual citizens often call upon the government to restrain the forces that oppress them? By a number of apologetic devices. Those whose injurious acts in business and other activity are restrained by governmental fiat are told (1) that social welfare is paramount over the liberty of the individual, (2) that individual freedom is never absolute but is liberty regulated by law, (3) that liberty is not license or (4) that *laissez faire* is a doctrine that has outlived its usefulness and has yielded to the necessity of social action for the common good. These are palliatives. They are mere modifications of the concept of liberty as absence of restraint by social authority. They introduce exceptions to liberty which by their proximity can collectively become the rule. For in our day, the increase of governmental activity is a fact, a *fait accompli*, something you cannot deny without inviting suspicion as to your sense of reality. The area of government functions have expanded and have encroached upon the specific freedoms in the Constitution. Liberty traditionally considered has shrunk—a peculiar field supposedly free from governmental invasion but subject to many exceptions. Due to popular benefits received from social action, hardly any one will agree with Thoreau that that government is best which governs not at all. Popular sentiment calls for greater activity of the government to achieve economic security and promote social justice.²⁰ It seems the stone which the traditional theory of liberalism rejected has become the cornerstone of modern social life and achievement. The former oppressor has become the instrument of social hope and the traditional enemy of liberty has been tamed into becoming the people's friend. Government, which has long been held suspect by libertarians, has become the popular servant despite their warnings.

But what about liberty? The traditional view maintains a perfect antithesis, a logical opposition, between freedom and authority. Is liberty abandoned when the people embrace the government as a protector? Have the people turned traitor to what has been called the highest good that man can enjoy? Has liberty ceased to command the high prestige it had during the days of despotism in early modern Europe?

²⁰ This duty of government was embodied in the Constitution of the Philippines, Sec. 5, Art II.

There are two sets of answers to these questions. Both uphold the principle of liberty but vary as to their degree of insistence upon the antithetical relation between liberty and authority. The first pertains to those who perceive the preciousness as well as the necessity of individual liberty and at the same time realize the inescapable need for governmental power.²¹ By clinging to the traditional view, they find themselves on the fence that divides the logically irreconcilable areas of liberty and authority. They box themselves into a paradox and hang themselves upon a dilemma. Liberty which is absence of restraint is among the highest objects of human desire but the need for government is admitted and so liberty is an evil to the extent that restraint is needed for the common good. Government increases social welfare but individual freedom makes for human happiness and benefits society as a whole and therefore freedom against government must be upheld. Where is the line to be drawn?²² Nobody knows. The libertarian theory is full of apologetic patchwork. The courts decide in favor of liberty one time and overthrow it in the next. By what objective standard do the courts find restriction permissible in one case and condemnable in another? We are on the high seas of judicial discretion. Governmental power has been finding favor. If as is logical under the traditional theory, the measure of freedom is the area of conduct not subject to regulation, then the field where individual preference or idiosyncrasy, if so it may be, can find free play, is growing smaller and smaller.²³ Liberty thus conceived, due to far-reaching compromises induced by social necessities, has been rapidly constricting. If we are inclined to be absolutistic in our thinking, we can say liberty has disappeared into the quicksand of governmental power. For the traditional view assumes that where the law operates, liberty is absent.

The other set of answers to the question of whether popular patronage of governmental power has evicted liberty from its high place in the social esteem, is given by those whose interests, economic or otherwise, would be hurt by legislation for which the masses clamor. Government power, in intent exercised for the public interest, whether wisely or unwisely, would disturb their privileges. Remedial laws would take away the advantages they enjoy which the public does not share—or at least limit or restrict them. And so these people resist. The sharpest of their weapons against social attempts to curb their power is the plea of liberty for individual choice and action. There is no good realizable but individual good and the way to it is freedom against government. This means abstinence of the latter from interfering with them in the way they use their property, in the way they run their business, in the manner of their relations with the labor they employ, in the means they use to assure themselves of a maximum of profits. The liberty that was won for

²¹ See, Justice Laurel, in *Calalang v. Williams*, *supra* note 1 and Justice Malcolm, in *Rubi v. Provincial Board of Mindoro*, *supra* note 1.

²² Justice Malcolm in *Rubi v. Provincial Board of Mindoro* declared:

"How far, consistently with freedom, may the rights and liberties of the individual members of society be subordinated to the will of the Government? It is a question which has assailed the very existence of government from the beginning of time As to the particular degree to which the Legislature and the Executive can go on interfering with the rights of the citizens, this is and for a long time to come will be, impossible for the courts to determine."

²³ Malcolm, in *Rubi v. Provincial Board of Mindoro*, *supra* note 1.

the masses then becomes an argument for the preservation and protection of privilege. This is inevitable under the traditional theory of liberty. Governmental interference is governmental restraint upon the individual, whether intended to correct social maladjustments or to protect the public from injurious practices or laborers from exploitation. A systematic adherence to the theory would demand non-intervention but non-intervention would not cure but aggravate the evils which the government is pressured upon to mitigate or eradicate. What happens in real practice is that legislation attempts the adjustments which seem most pressing, accompanied by the apologetic devices we have mentioned to placate the feelings of those whose rights and liberties are disturbed.

Let us recapitulate our objections to the theory.

First, it fails to account for the fact that despite their natural attachment to liberty, men find government welcome. The present trend, in fact, is for a stronger government. Due to the complexities of modern life, the citizens demand that the government function where it never had occasion to before. To this call, the government has been responding fairly well, always finding on empirical grounds new powers to excuse or justify its intervention. This extension of authority is bad for liberty as traditionally conceived and yet the citizen welcomes it, which would be surprising if the theory were true that government is an evil that diminishes the supreme good that is liberty.

Second, it fails to account for the fact that the absence of restraint upon men does not *ipso facto* bring about their happiness. The individual left to fend for himself by a do-nothing government might nevertheless be subjected to such plethora of restrictions as render nugatory his natural liberty. Economic want can make his freedom a mockery.²⁴ Illiteracy deprives him of political power and makes him the easy victim of those willing enough to prey upon credulity. Even if he has a job, which is the problem of nearly two million in our country, the blessings of liberty are not assured him. He remains, unless the laws intervene, at the mercy of his landlord or his *capataz* in the factory, subject to their exploitation and caprice. To free himself of the more burdensome restrictions, he has called upon the government to interfere with the powers and practices of those who direct the economic process, gladly pressuring into action the one institution which under the traditional view is the enemy of the citizen because restrictive of his liberty.

Third, it fails to take into account that governmental activity has tended to make life better for the citizen and to increase his welfare, directly and indirectly. The average man in this country would probably be in a more advantageous position if the government had been more active but it could not be because the reforms proposed were strongly opposed by those who stand to be affected, on the argument of individual liberty. But the little that has been done

²⁴ Cf. HAROLD LASKI, *LIBERTY IN THE MODERN STATE* 50 (1948):

"Those who know the normal life of the poor, its perpetual fear of the morrow, its haunting sense of impending disaster, its fitful search for a beauty that perpetually eludes, will realize well enough that, without economic security, liberty is not worth having. Men may well be free and yet remain unable to realize the purposes of freedom."

has improved the lot of the common man. It has increased his literacy rate. It has improved his health; made his life longer. It has given him greater bargaining power and a minimum income, though this is frequently negated by shady economic practices. It has given him protection in his right to organize with other workers so that he can approximate that equality of position where the liberty of contract begins.²⁵ Certainly, it can be said that far from being the foe of individual happiness which the traditional view of liberty makes it out to be, the government by remedying social evils and protecting the citizen from harms, increases his powers and adds to his happiness.

IV. The Concept of Liberty as a Function of Power:—

The above arguments point out the obvious, that the prevailing concept is inadequate to grasp within its framework the social and economic realities of the present day. A revision of the concept is necessary to accommodate the facts of modern social life and at the same time preserve intact the traditional freedoms which our people have enshrined in the Constitution. To particularize, we need a concept of liberty that can integrate and harmonize fact and principle, that can explain (1) why government action must increase and keep pace with industry, (2) why government activity is beneficial to social welfare and individual happiness, (3) why the particular freedoms in the Constitution are still necessary and workable and (4) how they can be preserved in the face of increasing governmental power.

This is a rather large order but it is submitted that it can be filled by conceiving of individual liberty as a function of power. We shall endeavor to present the concept in a rather rough outline and show how it can fulfill the tasks we have set for it.

What is this concept of liberty as a function of power? What does it mean?

The basic idea is that liberty is individual power. Very roughly, one can say that individual liberty is the maximum power or sum of specific abilities possible within a given society, which a person shares with the greatest number of individuals. A person has liberty if he has the power, if he has the capacity, if he has the energies, for accomplishing definite and workable ends.²⁶ Under this concept, even if a citizen is not subject to restraint by the government, he may not be free. An illiterate is not forbidden to read the newspapers but because he lacks the specific ability required, he is denied access to the facts yielded by the printed page. Or as Perry says a man is not positively at liberty to walk unless he has sound limbs or to travel unless he has the fare—even though nothing prevents him and nobody forbids him.²⁷

²⁵ Justice Oliver Wendell Holmes, *dissenting* in *Coppage v. Kansas*, 236 U.S. 1 (1914).

²⁶ Clark, *Forms of Economic Liberty and What Makes Them Important*, *FREEDOM: ITS MEANING*, *op. cit. supra* note 6, at 312.

²⁷ Perry, *Liberty in a Democratic State*, *FREEDOM: ITS MEANING*, *op. cit. supra* note 6, at 266.

Liberty as power to accomplish specific goals requires the presence of two things. First, there must be no external obstacle to realizing the goal. Such obstacle might proceed from private persons who therefore have to be restrained by law or from the government itself which then has to be restrained by the courts applying the constitutional limits to its power. I might have the energy required for a two-kilometer walk, but if I hear that there is a *juramentado* in the vicinity, I am constrained by common sense and by fear for my safety, to stay at home. Or I might have the money required but if my neighbor unreasonably refuses to sell me bananas for which I hunger and cannot get elsewhere, I am frustrated, my power is not effective. Or assuming that I would like to, I would nevertheless might not be able to examine the ideas of Marx if importation and sale of his books are proscribed and reading them is prohibited. The second requisite to make liberty as power effective is some specific positive ability of the citizen which makes possible the realization of his particular aim. It could take on a number of forms depending on the purpose. It could be intellectual power if you seek mastery of ideas, it could be purchasing power if your desire is for goods, it might be literacy if you want to exercise the right to vote, it could be physical power if you seek to become a champion boxer.

It is clear then that liberty as power is liberty to accomplish some definite and workable end. A person is free if his powers are effective to accomplish his purposes. The proper inquiry as to the real sphere of liberty, as to its extent and limits, must be directed to those purposes whose realization make the life of the citizen meaningful and his experience rich and varied. But we must not be ambitious and extend our aims too far. Government is but one of the forces in society which determine the question as to whether the individual is to have happiness. It cannot by itself provide happiness, it cannot lead the citizen to worthwhile achievement in learning and in the arts, it can give only opportunity for accomplishment. But this is big enough a contribution to individual welfare and great enough a task to tax the wisdom of those who administer its powers.

Our question then is: what specific abilities, what personal powers, can be promoted by governmental action so that the citizen will have adequate power to attain the purposes available to him in social life? What can the government do to further that capacity to accomplish which is the essence of individual opportunity? The answer is: that minimum of values which would pertain to each citizen if there were a general sharing of available energies in the form of income. What are these? Health, education, leisure, safety, among other things.²⁸ How can they be provided for? Better distribution of income. By having a balanced social order of which Lasswell speaks:

When we speak of balance, we refer to the distribution of income in any given community. By income we mean both monetary and real—the flow of money and claims of all kinds, and of food, housing, medical care,

²⁸ JOSE P. LAUREL, BREAD AND FREEDOM 14-28 (1954).

clothing, recreation and so on. The distribution is relatively balanced where there is a comparatively small number of rich and poor.²⁹

The power and ability which can be distributed to our citizens is of course limited by our resources. We cannot for example promise next year comforts obtainable only in the context of American industry and with the income of the American working man. But there is a standard of living and well-being realizable with our present resources against which we can measure our short-comings in this respect and towards which we can work as a desirable goal of government. We can determine the amount of real income that would flow to the greatest number of citizens were our economic structure relatively balanced; and comparing that with what the average citizen gets today, we can more or less realize what is to be done and how far we have to go to get to our goal. But this problem is primarily for economists in conjunction with policy-makers and need not detain us further.

V. Implications of the Concept for Social Action:—

Under this view, liberty is not merely a possession of the individual *per se* but a social fact to be accomplished.³⁰ A man is not free if he does not share specific powers and abilities which his fellow citizens in general possess and enjoy; liberty as to him and others similarly situated has yet to be achieved. Social adjustments and economic redistribution have to be made so that liberty as individual power will be sufficiently widespread. This means inescapably intervention by the government in business enterprises and other economic activities, for the optimism of *laissez faire* libertarians has long been given up as futile that the economic system operating by itself without social regulation will approximate a balanced flow of income to the citizens. The government then becomes the instrument by which the ordinary citizen is given his share of needed power, so that he can participate in the benefits of social life. Governmental activity creates favorable conditions for his acquisition of real income upon which is based other personal powers that constitute liberty.

Two implications immediately stand out. First, liberty in point of fact remains an ideal as far as the greater number of our citizens are concerned. Second, the government in its endeavor to give them their share of power that is the essence of liberty gets transformed into an instrument of liberty.

In this country, the first statement in the above paragraph cannot be denied with any success. Conceived as the power to accomplish the general purposes of human life, liberty here is shared only by a few. Economic power is the best test of liberty, since the other powers of the individual are founded upon it; of this power,

²⁹ H. D. LASSWELL, *ANALYSIS OF POLITICAL BEHAVIOR*, 45 (1949).

³⁰ Cf. Shotwell, *Freedom — Its History and Meaning*, *FREEDOM: ITS MEANING*, *op. cit. supra* note 6, at 21:

"The ultimate embodiment of freedom . . . is to be found in institutions which balance the things we need against the needs of others. Freedom is not what it clearly seems to be, the attribute of the individual. It is a social, economic, and political fact and another name for the equilibrium we call justice."

the average person here has but little. The per capita income of Filipinos was reported to have reached 342 pesos in the 1953 Central Bank reports. This figure may be a bit exaggerated already; but assuming it is true, it is nevertheless too small at the present prices of commodities to afford a decent living. Capital and other resources are in the hands of a small group; only thirty per cent of the employed receive over 90 pesos a month. Most of the area under cultivation in the Philippines are owned by no more than 80,000 out of 21 million.³¹ As pointed out by the Bell Report and the MacMillan-Rivera report, our chronic problem is low incomes due to low productivity and bad distribution.

These facts of our economic inequalities tend to be obscured by the traditional concept of liberty. For under it, the citizen is free if he is not subjected to undue restraints by the government. But this freedom in point of fact is not real and vital. It is idle to speak of freedom for a citizen who lives a hand to mouth existence, whose every moment is spent in the unending search for necessities, whose tomorrows are haunted by the spectre of hunger, whose body is undernourished and diseased, whose mind is stunted by ignorance and whose spirit is perverted by superstition, if not crushed by the privations of poverty.

But liberty conceived as individual power when distribution of income is balanced, brings up the problem to the fore. It graphically pinpoints what must be done specially if the citizen is to share in the freedom which the Constitution supposedly insures. As Senator Laurel pointed out, our people have great and pressing needs which our government cannot long afford to ignore.³² Among these needs are physical health, education and leisure. These needs must be fulfilled before he can turn to his higher functions. These needs must be satisfied if the individual is to be accorded the due respect and dignity due him as a free man in a free society.

This brings us to the second implication, namely, that government, far from being the enemy of liberty, is the very instrument by which it can be realized. It alone can hope to solve the problem of widespread distribution of social energies in the form of real income. In this country, the barriers to effective freedom are largely economic, such as spring from inadequate production and great inequalities in wealth. If the common citizen is to have some chance for a decent living, he has to have the income that will bring within his reach those necessities and comforts that will increase his natural powers and help him realize his purposes. To this end, the government must act, not with apology or hesitancy, but with vigor and dispatch. For when it acts for the social welfare that increases the power of the citizen, it acts for liberty also and therefore there need be none of the queasiness and misgivings with which it corrected evils under the doctrine of liberty as governmental forbearance. As Perry boldly asserts:

³¹ JOHN DE YOUNG AND OTHERS, *SOCIOLOGY IN THE PHILIPPINE SETTING* 372, 397-398 (1956).

³² LAUREL, *op. cit. supra* note 28, at 14-20.

What government does in the way of education, public information, health, housing, increased wages, reduced hours of labor or the redistribution of wealth may be as much service to liberty as is its protection of men against interference, from one another or from itself. The distinction between "welfare" and liberty breaks down together, since a man's effective liberty is proportional to his resources.³³

But what of those whose rights will be disturbed by the government in its quest for greater economic equilibrium? What of their opposition to legislation that impairs their rights, on the old argument of liberty? Our answer is that liberty is not merely an individual possession but to be determined in its social context. Their liberty therefore has to be balanced with the liberty of the great number of citizens; and if it should be necessary, as it often is, to restrict their liberty to give the common man such liberty as will make his life meaningful, so be it. The liberty of *some* has to be limited in order that the liberty of *all* will be promoted. In our society, as has been observed, a few have too much economic power in the nature of income while the great number of citizens have too little. It is the role and purpose of the government to correct the distribution of the national income by proper measures like taxation and social security programs. The economic power of the few must be regulated and restricted, so that the great number of citizens might enjoy some measure of freedom. As MacIver ably puts it:

Every law restrains some liberty, but before we can condemn it on that account we must put to ourselves two vital questions. First, whose liberty? For every law gives some men something that they will have to do, while restraining them, and all other men in the contrary direction. Second, what liberty? For there are many kinds of liberty, and they conflict one with another, and the advancement of one man's liberty generally means the setting of a limit to the similar liberty of another man.³⁴

VI. The Positive Concept of Liberty and the Bill of Rights:

And what of the particular freedoms in the Constitution? Are they abandoned or contradicted, or are they integrated into the general concept of liberty as a function of power? The latter case is true, they are integrated. Why is this so? The integration arises from the very nature of these freedoms. They are freedoms against government and therefore restraints upon its power but they are also individual rights and therefore *reservations of power* in favor of the citizen.³⁵

These freedoms then are outlines of what the individual can do without fear of reprisal or punishment. They demarcate general areas of conduct where individual choice cannot be impaired by governmental prohibition or restriction made without good cause. Not that they have no limits. Experience has shown that the exercise of the power these freedoms preserve to the individual can be used as they have been, to impair some specific power or ability of others. Take for example the freedom of speech. It is limited by the law on libel because certain classes of utterance or speech do not improve

³³ Perry, *op. cit. supra* note 27, at 269.

³⁴ MacIver, *op. cit. supra* note 7, at 283.

³⁵ *Id.* at 281.

ideas or increase knowledge of the community and instead injure the reputation of private persons and thus impair or negate their power to command respect and deference in society. Or take the liberty of contract. This is concededly impaired by the Minimum Wage Law but the infringement is permitted to stand because it is necessary under the present circumstances to give a minimum income or purchasing power to the great number of laborers, who could not otherwise live decently and would thus not be able to improve their efficiency. By their own efforts, without the intervention of government, it is doubtful whether they could have obtained wages as high as those for which the law provides. They lack bargaining power because they lack economic resources; the inequality of position between employer and prospective employee is so great as to make liberty of contract a farce. To secure adequate economic power to the laborers which they cannot have by themselves and which they need so that they can effectively bargain as to other terms, the government has stepped in and has provided a remedy.

It would seem from the foregoing paragraph that the specific freedoms enshrined in the Constitution are pretty much at the mercy of the government. This follows also apparently from the concept of liberty as power. For one consequence of this view of liberty is that government activity tends to increase individual power and thereby promotes the liberty of the citizen. If so, what can prevent the government from invading more and more these particular rights in the name of liberty? May not the government by a series of laws emasculate the liberty of contract and even the rights of free speech and press on the plea that the welfare of the citizens require it? It is submitted in answer that the concept we have been investigating permits a line to be drawn and to be drawn with some certainty.

We advert again to the concept of liberty as individual power. A person is free if he shares with great numbers of other citizens the maximum of power or sum of specific abilities possible in the community. For then he can realize most if not all of his practicable purposes. It is the business of the government to promote and increase this power and it is its duty (more particularly, that of the courts) not to lessen or decrease it. This is our test under the positive concept. It is rough and imperfect but nevertheless workable. Briefly, it means that there is some sort of point of diminishing returns in government activity, where it would tend to decrease than increase individual power.

Every law interferes with the power of some individual or individuals but as MacIver has shown, it is not be condemned on that account. It is proper under our test if directly or indirectly, it increases the power of the greater number of citizens. On this utilitarian principle, most of our social and remedial legislation is justified. They interfere with the liberty of some but increase the power of the many and so augment the latter's freedom.³⁵ On this ground, such laws and those with similar effect might truly be said to promote human liberty, because the loss they inflict is more than compensated by gains in freedom on the part of the great number of citizens.

On the other hand, a law would be improper if it interferes with or restricts the liberty of some or all of the citizens without corresponding increase of their power through some benefit or protection received. The law which punishes the use of opium and permits its confiscation is a limitation of power not only as to the owners who are thereby deprived of the power to make a legitimate sale thereof, but on every body else, with some special exceptions. This limitation, however, is thought sensible and is accepted because it protects the health of the citizens and thus conserves their physical power. It would be an altogether different thing if a law were passed prohibiting entirely movie-going or eating mangoes or reading newspapers. These are extreme cases and no doubt would not be tolerated by the community. Such prohibitions would withdraw power to act from the citizen without showing reasonable probability at least of corresponding benefit in form of gain in power or in the form of protection from harm. As to other cases, it is to be hoped that the test would work well enough to guard us against tyranny. Whether or not a specific rule of law justifies its inconvenience by providing demonstrably real gains in freedom for the great number of citizens is always an empirical question and one for the courts to determine. It is their task to see to it that the government does not out-reach its usefulness. Their proper aim is not to weigh the so-called competing claims of authority and liberty, but rather to determine, when the validity of some law is called into question, whether under the circumstances the loss of power which the law inflicts on some individuals is well outweighed by probable and substantial gains in power on the part of the great number of citizens. If the court finds there is such real gain in power, the law is valid though restrictive of the power of some.