

A LAYMAN LOOKS AT THE CONSTITUTION*

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Although it had been suggested that I would deliver today the keynote address that I had prepared for the cancelled seminar on the new Constitution last January, nearly a year ago, I realized upon re-reading that speech that it would not be suitable to the present occasion. That speech, in effect, has been overtaken by events.

As I was going over the program of this seminar, I was struck by the arrangement of the speakers. The list begins with a layman and ends with a judge. As keynote speaker, I open the series and Justice Fernando of the Supreme Court closes it. Whoever made this arrangement is in obvious sympathy with the principle of judicial supremacy. As Chief Justice Hughes once said, we live under a Constitution but the Constitution is what the judges say it is. This seminar series confirms the validity of this view. Whatever the rest of us may say, the judicial spokesman will have the final word.

Nevertheless, I am hopeful that judicial supremacy is not an obstacle to my sharing a few thoughts with you on the Constitution. More and more, in public forums, constitutional questions are being avidly discussed and some commentators are laymen, not lawyers trained in the law. Somewhat rashly I follow their example, believing that every citizen has the right to speak on the Constitution according to his lights. To paraphrase a common saying, the Constitution is too important to be left to the lawyers.

Having confessed to being a layman in the area of law, particularly constitutional law, I know you will not expect me to dwell on contextual subtleties or doctrinal complexities. These I leave to the distinguished lecturers in this conference.

The basic problem

Let me address myself instead to what I consider to be the central problem of constitutionalism in our contemporary society. The problem is whether or not the Constitution remains an efficient instrument for the moderation of conflict within society. There are two aspects

* Keynote Address in the Lecture Series on the 1973 Constitution, delivered at the U.P. Law Center, Bocobo Hall, University of the Philippines on 3 December 1973.

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of this problem. One is the regulation of freedom in order to prevent anarchy. The other is the limitation of power in order to prevent tyranny.

Our Constitution springs directly from the Western tradition. At the heart of such tradition are the tenets of liberal democracy. These tenets are well known:

All men are created free and equal.
They are endowed by their Creator with certain inalienable rights.
Among these rights are life, liberty and the pursuit of happiness.
To secure these rights, governments are instituted among men.
Governments derive their just powers from the consent of the governed.

The social contract

Government is thus a creation of the people. It springs from their common consent based on common needs and interests. Government is established to carry out the people's will. In so doing, the people give up some of their freedom in order to better enjoy the freedoms they reserve to themselves. By their own free choice, individual liberty is limited in the common interest so that a larger freedom is possible for all. This is the theory of the social contract.

As a creation of the people, government is the instrument of their civil liberties. From this theory of the social contract, the fundamental principles of constitutional law have been derived. The Constitution as the manifested will of the sovereign people is the fundamental law of the land. It is over and above the government because it not only organizes that government but also directs and controls its action. The government, as the creation of the sovereign people, must conform to their will as embodied in the Constitution.

The Constitution may thus be said to be the validating criterion in a democratic polity. Because it is the general will of the people made manifest and because the people are the ultimate source of power, every act of the government must conform to the Constitution or it is invalid.

I am told that these doctrines are still sound law and that their validity continues to be recognized. As soon as we consider them in a larger context, however, we are assailed by doubts. There is no correspondence between principle and reality. We fail to discover the actualization of that general will which the Constitutional tenets presuppose. We find instead only partial manifestations of common consent. The reality of the general will eludes us. Whether through

plebiscite, referendum or election, we catch only a hazy glimpse of the people's will, often distorted as through a broken glass.

We come to the uncomfortable realization that the foundations of Constitutional doctrines rest on social myths. They are authoritative because they are binding, but they are myths just the same. Lawyers call them legal fictions. It is now part of conventional wisdom to say that the people's will is not scientifically discoverable and that the social contract as its external manifestation is only an illusion, an artificial construct of liberal philosophy.

Liberal tradition under challenge

The situation stems from the polarization of political forces into Left and Right. In all nations today, regardless of the level of development, democratic regimes of the liberal tradition are under challenge by both these forces. In the highly developed societies, such as those of the West, including the United States of America, the confrontation is mitigated by a condition of industrial affluence. But in the less developed nations, the confrontation is direct and the struggle is therefore fierce. The universality of such confrontation and struggle underscores the absence of consensus as a social reality.

The ideological challenges do not exhaust the sources of strain and stress for traditional constitutionalism. Equally fundamental challenges arise from the pyramiding complexities of modern society. One is the emergence of the world economic system. The economies of the Third World, that of the Philippines included, are integrated into the world economic order. This is a source of profound and unending anxiety. Events abroad may have far-reaching consequences for the national well-being. Each national economy is subject to unpredictable disturbances resulting from geographically remote events, including economic dislocations and political upheavals.

Within each national society itself, challenges arise without end. Specialization has brought about interdependence, which is merely another name for mutual dependence, often resulting in a condition of mutual insecurity.

Big problems breed Big Government

Problems peculiar to the twentieth century exact their toll. We are told that increasingly we shall be confronted with the Malthusian spectre of overpopulation. By a singular irony, the gift of life has itself become the threat to an improved quality of life. There is a

world-wide clamor for higher standards of living and this, in turn, has created a headlong rush toward industrialization as the key to the affluent society. There is everywhere a formidable residue of age-old inequalities, and a corresponding clamor for massive reforms. We realize that social justice is possible only through social transformation.

The confluence of these pressures has generated a degree of government intervention in our lives unparalleled in human history. Big problems breed Big Government and everywhere in the world today, we find government assuming more and more tasks and correspondingly expanding its powers.

This situation poses profound problems for traditional constitutionalism. In the face of mounting government regulation, what is the proper sphere of individual liberty? How can popular sovereignty be ensured as a continuing reality? Through what mechanism can the great issues of policy remain in the hands of the people?

The validity of the democratic order depends upon effective control of delegated power. This is the very essence of the Rule of Law. But the emerging conditions of life tend to undermine the efficacy of traditional controls. More and more, emergencies recur in modern society; indeed, one might say that the modern condition is a condition of perpetual crisis. It is axiomatic that an emergency creates emergency power, and recurrent emergencies tend to make that power permanent. The result is the enlargement of executive discretion, and legal controls tend to recede as such discretion expands. This must diminish, in turn, the scope of the Rule of Law. Finally, the courts themselves are called upon to validate the assertion and exercise of executive power in the emergency. The circle is complete.

Freedom has no nationality

I do not hold with those who say that the Western forms of liberal democracy are appropriate for Europeans and Americans but are not suited to Africans, Latin Americans, and Asians, including Filipinos. Freedom has no nationality, and neither has tyranny. Both have occurred and recurred in all ages, all climes, all cultures, all civilizations. No race, nationality or society has had a monopoly of either.

In his book, *Today's Revolution — Democracy*, President Marcos quotes with approval the Hegelian doctrine that "history is the story of liberty." I think he would agree that Philippine history is essentially the story of the Filipino's courageous and tireless striving for liberty.

We have raised large questions that are of profound interest to all who are concerned with human liberty and the future of constitutionalism. If our remarks are somewhat less sanguine than expected, let me assure you that our purpose is not to depress your democratic hopes, but to invigorate them with a sense of sober realism. Liberty cannot be served by the repetition of old and outworn platitudes. It can only be served by a candid examination of the changing conditions in which we live. In the end, it is only upon the foundations of social reality that we can build firmly a national society worthy of our libertarian heritage — a free, democratic, just and compassionate society which we have a duty to hand down to our children.