THE REVISED CONSTITUTION AS FUNDAMENTAL LAW: AS TO GOVERNMENT, CHANGE AND CONTINUITY*

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We are to discuss this afternoon the structure and functions of government under the Revised Constitution. On the conceptual level, a marked difference between what was formerly provided for and what is to replace it exists. In place of the presidential system, the Constitutional Convention opted for the parliamentary form. While there appears to be a departure from the American model, it is not true to say that the British system is now with us. Nor would there be wisdom had such been the case. For while the past should not bind us with its fetters, else we would have, in Holmes' pungent aphorism, a government of the living by the dead, we are not entirely free from its influence. Our habits, traditions and accustomed ways have too strong a hold to be easily shaken. It may conduce to clarity of thinking, and hopefully to a fruitful discussion considering the limited time at our disposal, at least so I trust, if we view the matter from the standpoint of the doctrine of separation of powers under the present dispensation. After all, that is, as made mention of by Justice Laurel in *Angara v. Electoral Commission*, "the fundamental principle"[1] of the 1935 Constitution. This approach has the merit then of being confined to fundamentals, without necessarily being too abstract. We are thus confronted with the question of whether or not under the Revised Constitution, legislative supremacy is the necessary result, with less than vigorous leadership to be expected of the Executive. Also, the role of the judiciary is to be scrutinized. Perhaps much more significant is an inquiry into how effective this new governmental machinery would be in the promotion of constitutional rights, our subject yesterday. These are the matters to which, with your indulgence, I propose to address myself. With some luck, we may thereafter arrive at some consensus as to whether, tersely put, there is justification for the brief characterization that as to government under the Revised Constitution, there is change as well as continuity.

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[1] 63 Phil. 139, 156 (1936).

1. *The doctrine of separation of powers under the 1935 Constitution*

The doctrine of separation of powers postulates three functions of government, the executive, the legislative and the judicial, to be exercised by three separate departments so-named, through personnel separate and distinct. These three departments are not only co-ordinate; they are co-equal. Moreover, each is as necessary and as important as the other. They are independent one from the other, no undue interference in the exercise of the authority conferred on each being allowed. Much less is control by any one of the three departments of the other two permissible. Each department is on the whole allotted a specific area of competence where its authority is indisputable. There it has the sole power to act. As was made clear by Justice Laurel in *Angara:* "Each department of the government has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere."[2]

a. *Inherent limitations of the doctrine*

It must be admitted that the area that belongs to each department cannot be demarcated with precision and certainty, for to follow Justice Laurel anew, while "in the main, the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative, and the judicial departments," still due to the "over-lapping and interlacing of functions and duties between the several departments, [it is hard to say just where one] leaves off and the other begins."[3] In a later case, Justice Laurel had occasion to repeat the same thought in these words: "The classical separation of governmental powers, whether viewed in the light of the political philosophy of Aristotle, Locke, or Montesquieu, or of the postulations of Mabini, Madison, or Jefferson, is a relative theory of government. There is more truism and actuality in interdependence than in independence and separation of powers, for as observed by Justice Holmes in a case of Philippine origin, we cannot lay down 'with mathematical precision and divide the branches into watertight compartments' not only because 'the great ordinances of the Commission do not establish and divide fields of black and white' but also because 'even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to another.' (Springer v. Government [1928], 277 U.S., 189; 72 Law. ed., 845, 852.)"[4]

Thus it is that there are certain governmental activities that can appropriately be exercised by any two or even all three such depart-

[2] *Ibid.*
[3] *Ibid.*, 157.
[4] Planas v. Gil, 67 Phil. 62, 73-74 (1939).

ments. The ascertainment of facts to enable any of them to discharge its responsibilities is one of them. As for appointments, while partaking more of an executive character, they cannot likewise be denied the legislature and the judiciary, especially so as to personnel with duties technical or confidential in nature. That assumption should apply equally to removal. The legislative body, in the exercise of its prerogative of investigation, may indirectly trench upon the task of law enforcement, which is executive, or make findings that yield the impression of wrongdoing or guilty conduct, which certainly is judicial. Also, there was a time in American law when legislative divorces were granted. Even now, both in the Philippines and in the United States, the legislative power to naturalize specifically-named individuals is indisputable. With the expansion of the field that may be appropriately occupied by the government in view of the stress on social and economic rights that require not so much execution merely as administration, the role of the executive has been expanded, thus necessarily endowing it with the functions of rule-making and adjudication. In the enforcement of such regulatory statutes, it may take necessary steps labelled quasi-legislative when it comes to promulgation of rules, and quasi-judicial when it comes to determining conflicts of private rights arising therefrom, thus avoiding any constitutional infirmity. As set forth by Justice Laurel in *Pangasinan Transportation Company, Inc. v. Public Service Commission*[5] in connection with what he referred to as subordinate legislation: "Accordingly, with the growing complexity of modern life, the multiplication of the subjects of governmental regulation, and the increased difficulty of administering the laws, there is a constantly growing tendency toward the delegation of greater powers by the legislature, and toward the approval of the practice by the courts."[6] The judiciary, in turn, which hardly is in a position to encroach on the domain of the executive, may participate indirectly in legislation in the application of a statute, which often requires that it be construed, to the facts as found in a lawsuit. With legislation usually couched in broad and general language, the modern and complex conditions precluding a greater degree of specificity, courts may find legislating unavoidable. There is likewise this relevant excerpt in a recent opinion: "To paraphrase those noted jurists, Holmes and Cardozo, judge-made law is one of the existing realities of life. A court though is not free to roam at will. The limits of its competence are narrower. It may legislate only between gaps. It fills the open spaces of the law. But courts must and do legislate, only they do so interstitially; they are confined

[5] 70 Phil. 221 (1940).
[6] *Ibid.*, 229.

from molar to molecular motions. Nonetheless within such limits and within the confines of these open spaces, choice moves with a freedom that stamps its action as creative. The law which is the resulting product is not found but made. Clear is it thus that the power to declare the law carries with it the authority, and within the limits, the duty, to make law where none exists."[7]

b. *Doctrine of separation of powers postulates checks and balances*

There is, moreover, a departure from what otherwise could have been a rigid application of the doctrine with the 1935 Constitution itself providing for checks and balances. Justice Laurel's words in *Angara* deserve to be quoted in full especially so as in the Revised Constitution, as it was originally in the 1935 charter, there is a unicameral National Assembly. Thus: "For example, the Chief Executive under our Constitution is so far made a check on the legislative power that his assent is required in the enactment of laws. This, however, is subject to the further check that a bill may become a law notwithstanding the refusal of the President to approve it, by a vote of two-thirds or three-fourths, as the case may be, of the National Assembly. The President has also the right to convene the Assembly in special session whenever he chooses. On the other hand, the National Assembly operates as a check on the Executive in the sense that its consent through its Commission on Appointments is necessary in the appointment of certain officers; and the concurrence of a majority of all its members is essential to the conclusion of treaties. Furthermore, in its power to determine what courts other than the Supreme Court shall be established, to define their jurisdiction and to appropriate funds for their support, the National Assembly controls the judicial department to a certain extent. The Assembly also exercises the judicial power of trying impeachments. And the judiciary in turn, with the Supreme Court as the final arbiter, effectively checks the other departments in the exercise of its power to determine the law, and hence to declare executive and legislative acts void if violative of the Constitution."[8]

c. *The doctrine in terms of its actual operation under the 1935 Constitution.*

It does follow then that the doctrine of separation of powers did not require that the departments be confined to terrain mutually

[7] Tiglao v. Commission on Elections, G.R. Nos. 31566 & 31847, August 31, 1970, 34 SCRA 456, 490 (1970). The above excerpt comes from the concurring opinion of the lecturer.

[8] Angara v. Electoral Commission, 63 Phil. 139, 156-157 (1936). Justice Laurel was here referring to the unicameral body, the National Assembly, which was not replaced by a Congress composed of a Senate and a House of Representatives until the 1940 amendments.

exclusive. Obviously, there was common ground, which any two or all three powers may occupy. The picture, in the language of Professor Green, is that of "circles which partly overlap."[9] More specifically, if the influence of American constitutional law be taken into account, there is no doubt that it was not desirable "for the legislative, executive and judicial departments to be kept totally separate and distinct."[10] For Madison did not exclude any one of them having "partial agency in," or "control over the acts of [the] other."[11] So that only "where the whole power of one department is exercised by the same hands which possess the whole power of another department are the fundamental principles of a free Constitution subverted."[12] Tyranny exists when there is "accumulation of powers in the same hand."[13] The delegates to the 1934 Constitutional Convention found such a view congenial. Too strict an application of the doctrine of separation of powers might result in reducing the effectiveness of government and in preventing it from rendering the services which are expected of a welfare state. An excerpt from *Luzon Stevedoring Corporation v. Social Security Commission*[14] is relevant: "Petitioner thus pays obeisance to a concept of separation of powers, in all its traditional rigidity, oblivious of considerations that preclude an inflexible adherence to such a postulate if government under the stress and strain of problems of ever-increasing complexity is to discharge effectively its responsibilities."[15] What cannot be ignored, as the opinion pointed out, is "that the principle of separation of powers is a relative theory of government not to be enforced with pedantic rigor. As a principle of statesmanship, the practical demands of statecraft would argue against its theoretical application."[16]

2. *The relevance of the doctrine of separation of powers under the Revised Constitution*

The need for an appraisal, even if in a manner tentative and haphazard, of the doctrine of separation of powers under the Revised Constitution is self-evident. Such a concept finds classical expression in a presidential system of government with, as noted, three separate, coordinate, and independent departments, the executive branch being under a President whose tenure is fixed, and whose cabinet is made up of members who do not belong to the legislative body. The Revised

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[9] Green, *Separation of Governmental Powers*, 29 YALE L.J. 369, 375 (1920).
[10] Sharp, *The Classical Doctrine of Separation of Powers*, in 4 SELECTED ESSAYS IN CONSTITUTIONAL LAW 168, 183 (1938).
[11] THE FEDERALIST, No. 47 (1888).
[12] *Ibid.*
[13] *Ibid.*
[14] G.R. No. 26175, July 31, 1970, 34 SCRA 178 (1970).
[15] *Ibid*, 183. The opinion is by the lecturer.
[16] *Ibid*, 184.

Constitution, however, has opted for parliamentarism, tilting the balance in favor of the National Assembly.[17] The constitutional scheme therefore, as will be more fully explained, would thus emphasize the dominant role of the legislature, although, again to be made clear later, there are many other provisions allowing the exercise of vigorous leadership on the part of a Prime Minister, in theory its agent, who is not legally precluded from assuming the reins of authority. What of the doctrine of separation of powers then? An appraisal of such crucial question, to be truly meaningful, must be in terms of how far its observance is necessary for vitalizing constitutional rights, which lie at the heart of our Constitution. It is to secure them that governments are established.[18] So our basic polity assumes. Prior to such an inquiry, however, there is need likewise for a brief survey of its applicability under the British parliamentary system.

a. *Separation of powers under the British Constitution*

What has been said thus far reflects a view of separation of powers in accordance with American legal concepts. Now with the shift under the Revised Constitution to the parliamentary system, a brief inquiry into its standing under British law is in order. Jennings in his *The Law and the Constitution* ascribed to Montesquieu the doctrine having attained "the rank of new and universal constitutional principle."[19] He noted that England had far more liberty than most other countries in 1732 when Montesquieu was in England or in 1748 when *L'Esprit des Lois* was published. The Frenchman was for a regime of liberty, opposed as he was to the despotism current in France under her monarchs, especially Louis XIV. He thought that his statement of the doctrine reflected the English experience.[20] Jennings, after noting that he made no precise analysis of British governmental functions, stated: "Certainly, his classification did not fit exactly the British Constitution

[17] According to Article IX, Section 2 of the Revised Constitution: "The Prime Minister and the Cabinet shall be responsible to the National Assembly for the program of government and shall determine the guidelines of national policy."

[18] As so well expressed in the American Declaration of Independence of 1776: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness — That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."

[19] THE LAW AND THE CONSTITUTION, 20 (3rd ed., 1948).

[20] *Ibid.*

as he knew it."[21] Then he went into detail: "Nor was the separation completely marked in the eighteenth century constitution. The growth of ministerial responsibility had not at that stage proceeded far, and it would not be obvious to a foreigner not very conversant with then very recent English history. The highest court, the House of Lords, was and is a part of Parliament. The Lord Chancellor was at once the President of the House of Lords, a chief adviser of the King, and a judge, and other judges were summoned to the House of Lords. The King no longer controlled the courts, but he was still an essential party to legislation."[22] In legal theory, it is still the King in Parliament that wields such authority; history, however, has reduced the former to an innocuous role, with Parliament, more precisely the House of Commons, occupying the real seat of power. With the ministers being drawn from its ranks, there is at the highest level through the Cabinet a fusion of legislative and executive authority. There is irony in the fact that while the cabinet system was originally devised to enable the King to control Parliament, which had been accumulating more supremacy, it was transformed into an instrument to achieve parliamentary supremacy. While that is so in theory, the growth of the two-party system did bring about the dominance of the cabinet. The British Cabinet, as tersely put by Laski, "is essentially a committee of that party or coalition of parties which can command a majority in the House of Commons."[23] Its real function, as he pointed out, "is to govern the country in the name of the party or parties which provide it with [such] majority."[24] He continued: "It is, therefore, as Bagehot pointed out in that famous chapter which first revealed the nature of the Cabinet to Englishmen, an instrument for linking the executive branch of government to the legislative. It is the body that directs the latter. It provides Parliament with the policy upon which decisions are to be made."[25] That may be a comparatively mild way of putting it, for a former Chief Justice of England, Lord Hewart, spoke of the Cabinet as having been vested with "the whole legislative power and the whole executive power."[26] No wonder, in one of the more recent works in British constitutional and administrative law, de Smith could categorically assert: "No writer of repute would claim that it is a central feature of the modern British Constitution."[27] Moreover, after summarizing the doctrine "as propounded by Montes-

[21] *Ibid*, 22.
[22] *Ibid*, 22-23.
[23] LASKI, PARLIAMENTARY GOVERNMENT IN ENGLAND 183 (1938).
[24] *Ibid.*
[25] *Ibid.*
[26] *Cf.* SINCO, PARLIAMENTARY GOVERNMENT FOR THE PHILIPPINES 33 (1971).
[27] DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 40.

quieu" of a government having three main classes of functions, the legislative, the executive and the judicial, with three main organs of government in a State, the Legislative, the Executive and the Judiciary, he would maintain that there was observance of Montesquieu's thesis under the British Constitution. It cannot be denied though, as he pointed out, that contrary to the classic doctrine, "there is concentration of functions in Parliament through the Cabinet."[28] He likewise did assert: "Indeed, there never was a time in English constitutional history when the functions of government were neatly compartmentalized."[29]

3. *What of separation of powers under the Revised Constitution?*

As set forth, it is a parliamentary form of government that is adopted by the Revised Constitution. Nor is it open to doubt that it is the English model the framers had in mind, subject of course to such modifications to accord with our experience and our needs. The consequence is the departure from the doctrine of separation of powers as traditionally known to us. Where before executive and legislative are co-ordinate and co-equal, it is no longer so. We have instead the supremacy of the National Assembly, the department vested with the lawmaking function. The Revised Constitution, although not making use of precise language, speaks to that effect. It provides that the legislative power "shall be vested in a National Assembly."[30] There is no such categorical statement as to the executive power which, as stated therein, "shall be exercised by the Prime Minister with the assistance of the Cabinet."[31] With such a distinction between legislative power being *vested* and executive power being merely *exercised* and no specific grant as to the latter competence being made therein, it thus seems to follow, if meaning were to be accorded to such change in terminology in accordance with the basic assumption under parliamentarism, that the legislative body is likewise possessed of the executive prerogative. Such a conclusion becomes more manifest when it is noted that the Prime Minister must come from the ranks of the National Assembly to be elected by a majority of its members.[32] There-

[28] *Ibid*, 41.

[29] *Ibid*, 42.

[30] According to Article VIII, Section 1 of the Revised Constitution: "The Legislative power shall be vested in a National Assembly."

[31] According to the first sentence of Article IX, Section 1 of the Revised Constitution: "The Executive power shall be exercised by the Prime Minister with the assistance of the Cabinet."

[32] According to Article IX, Section 3 of the Revised Constitution: "The Prime Minister shall be elected by a majority of all the Members of the National Assembly from among themselves."

after, the Prime Minister appoints the members of his Cabinet, at least a majority of whom must come from the National Assembly,[33] to head the various ministries. The enforcement therefore of the legislation enacted pursuant to a policy adopted by it could be looked upon as likewise its concern, to be performed through a Prime Minister who, under the constitutional scheme, is its agent. He is the one who, in legal contemplation, gives the orders. Such is the similarity with the norm followed in England, except that there it is the cabinet, not the Prime Minister, at the command post. There is thus a fusion, rather than a separation, of legislative and executive functions.

With reference however to the judiciary, there is no deviation whatsoever from its previous status of being co-ordinate and co-equal with the legislative department. Such being the case, what has been written concerning the common ground in which both departments may operate still holds true. Certain statutes, insofar as they apply to individual cases, may partake of adjudication. On the other hand, when the courts construe statutes, the effect may be to indulge in judicial legislation, which thereafter may be subject to further alteration or even repeal by the National Assembly in the form of later enactments. Such a conclusion applies as well for checks and balances. Thus it is the National Assembly that creates inferior courts and defines, prescribes and apportions the jurisdiction of all courts with the exception of such matters of which the Supreme Court cannot be deprived, specifically made mention of in the Constitution itself.[34] It is also the National Assembly that prescribes the qualifications of judges of inferior courts with the limitation that to hold such a position, one

[33] According to Article IX, Section 4 of the Revised Constitution: "The Prime Minister shall appoint the Members of the Cabinet who shall be the heads of ministries, at least a majority of whom shall come from the National Assembly. Members of the Cabinet may be removed at the discretion of the Prime Minister."

[34] Article X, Section 1 of the Revised Constitution reads as follows: "The Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law. The National Assembly shall have the power to define, prescribe, and apportion the jurisdiction of the various courts, but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section five hereof." Section 5 of the same article, insofar as applicable, is worded thus: "(1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers, and consuls, and over petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*. (2) Review and revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and decrees of inferior courts in (a) All cases in which the constitutionality or validity of any treaty, executive agreement, law, ordinance, or executive order or regulation is in question. (b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto. (c) All cases in which the jurisdiction of any inferior court is in issue. (d) All criminal cases in which the penalty imposed is death or life imprisonment. (e) All cases in which only an error or question of law is involved."

must be a natural-born citizen and a member of the Bar.[35] It has, too, the prerogative to fix by law the salaries of all members of the judiciary from the Chief Justice down.[36] Then, there is this new provision. The National Assembly must be furnished by the Supreme Court within thirty days from the opening of its regular session an annual report on the operations and activities of the judiciary.[37] On the other hand, the judiciary still retains the function of judicial review to annul the acts either of the National Assembly or of the Prime Minister. The procedure for the exercise by the Supreme Court of this power is therein prescribed.[38] Moreover, one of the cases of appellate jurisdiction, of which the Supreme Court may not be deprived, refers to litigations in which the constitutionality or validity of any treaty, executive agreement, law, ordinance, or executive order or regulation is in question.[39] The rule-making power on pleading, practice, and procedure in all courts and admission to the practice of law, with express mention of the integration of the Bar, has been retained.[40] The Revised Constitution has likewise transferred to the Supreme Court administrative supervision over all courts and the personnel thereof, a matter that under the separation of powers doctrine ought not to have been exercised by the Executive under the 1935 Constitution.[41] Moreover, while it is the Prime Minister who appoints the Justices of the Supreme Court and judges of inferior courts, the power to discipline the latter and, by a vote of at least eight members, order their dismissal, is granted the Supreme Court.[42]

It only remains to be added that there is certainly a greater need for judicial independence under the Parliamentary system. Otherwise, if the judiciary in effect becomes another arm of what under the text of the Constitution appears to be the dominant agency, the National Assembly, then there is the possibility of constitutional rights being at

[35] *Cf.* Article X, Section 3, par. 2 of the Revised Constitution.

[36] *Cf.* Article X, Section 10 of the Revised Constitution.

[37] *Cf.* Article X, Section 2 of the Revised Constitution.

[38] Article X, Section 2, par. 2 of the Revised Constitution, insofar as pertinent, reads as follows: "All cases involving the constitutionality of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court *en banc*, and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of at least ten Members."

[39] Article X, Section 5, par. 2 (a) of the Revised Constitution reads thus: "All cases in which the constitutionality or validity of any treaty, executive agreement, law, ordinance, or executive order or regulation is in question."

[40] *Cf.* Article X, Section 5, par. 5 of the Revised Constitution.

[41] The same Article, Section 6 of the Revised Constitution reads as follows: "The Supreme Court shall have administrative supervision over all courts and the personnel thereof."

[42] The same Article, Section 7 of the Revised Constitution, insofar as pertinent, reads thus: "The Supreme Court shall have the power to discipline judges of inferior courts and, by a vote of at least eight Members, order their dismissal."

the mercy of an administration bent on pursuing its own policies even if great doubts as to their validity may honestly be entertained. Such a point of view was made manifest in a separate opinion in *Garcia v. Macaraig*:[43] "It is to be admitted that the realities of government preclude the independence of each of the departments from the other being absolute. This is so especially as between the legislative and executive departments. What the former enacts, the latter implements. To paraphrase Roosevelt, the letter of the Constitution requires a separation, but the impulse of a common purpose compels co-operation. It could be carried to the extent of such powers being blended, without undue danger to liberty as proved by countries having the parliamentary forms of government. This is especially so in England and in Switzerland, where the tradition of freedom possesses strength and durability. It does not admit of doubt, however, that of the three branches, the judiciary is entrusted with a function the most sensitive and delicate. It passes upon controversies and disputes not only between citizens but between citizens and government, the limits of whose authority must be respected. In a system like ours, every exercise of governmental competence, whether coming from the President or from the lowest official, may be challenged in court in an appropriate legal proceeding. This is an aspect of the theory of checks and balances likewise provided for in the Constitution. It is thus indispensable that judicial independence should, by all means, be made secure. Not only that. The feeling that judges are not in any way subject to the influence of the executive and legislative branches must be pervasive; otherwise, there would be loss of confidence in the administration of justice. With that gone, the rule of law is placed in dire peril."[44]

a. *The dominance of the National Assembly not always assured as the Prime Minister given broad and extensive authority*

The Revised Constitution, as worded in accordance with the concept of parliamentarism, yields the implication of the supremacy of the legislative branch, the National Assembly. To repeat, while legislative power is *vested* in a National Assembly,[45] the executive power shall merely be *exercised* by the Prime Minister, assisted by a Cabinet of his

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[43] Adm. Case No. 198-J, May 31, 1971, 39 SCRA 106 (1971). It must be noted that this concurrence from the pen of the lecturer was written prior to the Revised Constitution.

[44] *Ibid*, 116-117.

[45] According to Article VIII, Section 1 of the Revised Constitution: "The Legislative power shall be vested in a National Assembly."

choice.[46] Moreover, the charter leaves no doubt as to the President of the Philippines being merely "the symbolic head of state."[47] As previously noted, the Prime Minister, elected by a majority of all the members of the National Assembly from among themselves, is responsible, along with his Cabinet, to such legislative body for the program of government.[48] He is thus required, at the beginning of each regular session of the National Assembly, and from time to time thereafter, to present such program to the National Assembly and recommend for its consideration such measures as he may deem necessary and proper.[49] What is more, there is to be a question hour once a month or as often as the rules of the National Assembly may provide, during which the Prime Minister, or any Minister, may be required to appear and answer questions and interpellations from any member thereof.[50] The National Assembly likewise may withdraw its confidence from the Prime Minister, but only by electing a successor by a majority vote of all its members.[51] All such powers are intended to assure the dominant role of the legislative body.

If that were all the Constitution provides, then the concentration of powers in the National Assembly, with the Prime Minister clearly in a subordinate position, would leave no doubt as to the secondary role of the Prime Minister. If note be taken however of other provisions in the Constitution, then perhaps a feeling of certitude on the matter will not be fully warranted. For, in the very same section that recognizes the prerogative of the National Assembly to withdraw its confidence from the Prime Minister, the countervailing power is given the latter to advise the President in writing to dissolve the former, whenever the need arises, for a popular vote of confidence on fundamental issues.[52] Nor is this all. The Prime Minister is, in legal contemplation, an agent, with the National Assembly the principal, but every bill passed by the latter shall, before it becomes a

[46] According to Article IX, Section 1 of the Revised Constitution: "The Executive power shall be exercised by the Prime Minister with the assistance of the Cabinet. The Cabinet, headed by the Prime Minister, shall consist of the heads of ministries as provided by law. The Prime Minister shall be the head of the Government."

[47] According to Article VII, Section 1 of the Revised Constitution: "The President of the Philippines shall be the symbolic head of state."

[48] This is in accordance with Article IX, Sections 2 and 3 of the Revised Constitution.

[49] So it is according to Article IX, Section 10 of the Revised Constitution.

[50] *Cf.* Article VIII, Section 12, par. 1 of the Revised Constitution.

[51] So Article VIII, Section 13, par. 1 of the Revised Constitution provides.

[52] According to Article VIII, Section 13, par. 2 of the Revised Const tution: "The Prime Minister may advise the President in writing to dissolve the National Assembly whenever the need arises for a popular vote of confidence on fundamental issues, but not on a matter involving h s own personal integrity. Whereupon, the President shall dissolve the National Assembly not

law, be presented to him for his approval, with the veto power exercised by the President likewise granted him.[53] Such veto power likewise extends to any item or items in an appropriation, revenue or tariff bill.[54] It is he, also, as was the case with the President under the 1935 Constitution, who submits to the National Assembly a budget of receipts and of expenditures as the basis of the General Appropriations Bill.[55] The Revised Constitution moreover has conferred on the Prime Minister the powers formerly lodged in the President of the Philippines. Thus, he has control of all ministries,[56] and is the commander-in-chief of all the armed forces of the Philippines, with power under the circumstances therein mentioned to suspend the privilege of the writ of *habeas corpus* or place the Philippines, or any part thereof, under martial law.[57] He appoints the heads of bureaus and offices, the officers of the armed forces of the Philippines from the rank of brigadier general or commodore as well as other officers,[58] grants reprieves, commutations and pardons as well as remits fines and forfeitures, including in such grant of authority the competence to proclaim an amnesty with the concurrence of the National Assembly.[59] The Prime Minister is vested with a competence the President under the 1935 Constitution did not possess. He may contract and guarantee foreign and domestic loans on behalf of the Republic.[60] Also, like the President, he can be authorized by law for a limited period and subject to such restrictions prescribed by the National Assembly to exercise powers necessary and proper to carry out a declared national policy as well as to fix, within specified limits and subject to such limitations and restrictions as may be imposed by the National Assembly, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts.[61] Thus it is that the potentialities for a strong leadership by a Prime Minister conscious of the equally prominent role

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earlier than five days nor later than ten days from his receipt of the advice, and call for an election on a date set by the Prime Minister which shall not be earlier than forty-five days nor later than sixty days from the date of such dissolution. However, no dissolution of the National Assembly shall take place within nine months immediately preceding a regular election or within nine months immediately following any general election."

[53] *Cf.* Article VIII, Section 20, par. 1 of the Revised Constitution.

[54] *Cf.* Article VIII, Section 20, par. 2 of the Revised Constitution.

[55] According to Article VIII, Section 16, par. 1 of the Revised Constitution.

[56] According to Article IX, Section 11 of the Revised Constitution: "The Prime Minister shall have control of all ministries."

[57] *Cf.* Article IX, Section 12 of the Revised Constitution.

[58] *Cf.* Article IX, Section 13 of the Revised Constitution.

[59] *Cf.* Article IX, Section 14 of the Revised Constitution.

[60] According to Article IX, Section 15 of the Revised Constitution: "The Prime Minister may contract and guarantee foreign and domestic loans on behalf of the Republic of the Philippines, subject to such limitations as may be provided by law."

[61] *Cf.* Article VIII, Section 17, par. 2 of the Revised Constitution.

thrust upon him by the Revised Constitution exist. Such being the case, there is nothing improper, much less illegal, in this dignitary likewise exercising a check on what otherwise could have been the well-nigh plenary authority of the National Assembly in a parliamentary system.

4. *Separation of powers and constitutional rights*

It is submitted therefore that the doctrine of separation of powers, in a much modified form of course, is equally a feature of the Revised Constitution. The next question is whether what survives suffices to vitalize constitutional rights, to secure which, it bears repeating, is the basic postulate of constitutionalism. Under a governmental organization of three separate and independent departments, the assumption is that such an objective can be assured. As traditionally put by Justice Brandeis: "Checks and balances were established in order that this should be a 'government of laws and not of men.' * * * The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[62] With a tripartite system at work, not one of the branches of which, in theory at least, can lord it over either or both of the other two, the basic purpose of safeguarding liberty is sought to be realized. This is especially so when the rights involved come under the category of liberty in a negative sense or freedom from. Under such a view, that government is best which governs least. When constitutional rights of a social and economic character—liberty in a positive sense—made their appearance, government was called upon to play an active role. There were fears that such a doctrine, if strictly adhered to, might be an obstacle. To remedy matters, there has been a relaxation of its observance, with administrative agencies being allowed to assume quasi-legislative and quasi-judicial functions. It is in that sense that Justice Laurel could assert: "The theory of the separation of powers is designed by its originators to secure action and at the same time to forestall over-action which necessarily results from undue concentration of powers, and thereby obtain efficiency and prevent despotism."[63] If it were thus with legislature and executive separated, things would go much better, if they are fused. It may be useful though, to discuss,

[62] Myers v. United States, 272 US 52, 292-293, 47 S. Ct. 21, 71 L.Ed. 160, (1926).

[63] People v. Rosenthal, 68 Phil. 328, 343 (1939).

even if in not too great detail, how political, civil, and social and economic rights will fare under the parliamentary system adopted. Political rights are identified with the guarantees intended to assure "the participation of the individual, directly or indirectly, in the establishment or administration of government."[64] Civil rights designate the immunities necessary to insure respect and dignity to the individual as such.[65] Social and economic rights, which have just come to the forefront in this country, refer to those claims on which the state must act for the promotion of individual welfare and well-being.

a. *The implication of the doctrine for political rights*

If the experience of Great Britain and other mature parliamentary democracies may furnish guidance, it would appear that the political right to full participation in one's government is a concomitant of a regime cast in that mold. It is easily understandable why. The legislative body is a creation of the popular vote. In the event the policy of its agent, the Cabinet, which is at the apex of the executive branch, is not acceptable to it, there may be need for another election. In theory then, no system is more responsive to popular will. The right of suffrage is thus fully vitalized. That means that not only may every voter go to the polls, but he is kept informed of the issues and his interest fully aroused by the political parties intent on emerging victorious at the polls. There is likely to be a guarantee therefore of full freedom of expression as well as the cognate rights of free assembly and free association.

As far as the right of association, more specifically the formation of rival political groups, is concerned, it may be subject to strain if there be a dominant party with its public support so overwhelming that it may disregard the rights of the minority. Worse still, it may seek to prevent a fair ascertainment of popular will by restrictive devices to keep its opponents from gaining ascendancy. Even if there be a change of heart then, the electorate may be frustrated in making its will prevail. The provisions of the statute governing elections may be so worded as to put obstacles to legitimate political activities. At times the prosecuting arm might be utilized to stifle the expression of dissenting views with charges of libel. Freedom of assembly might be curtailed, the offender in more cases than not being local officials. In that respect, a presidential form may be less fraught with undesirable possibilities, although it could happen that a political party would have

[64] MALCOLM AND LAUREL, PHILIPPINE CONSTITUTIONAL LAW 378 (3rd ed., 1936).

[65] *Cf. Ibid*, 414.

overwhelming strength, such as the Nacionalista Party under President Quezon in pre-World War II days. Such a danger under parliamentarism might be avoided by the spirit of moderation gaining ascendancy. Moreover, there is the added assurance that a judiciary with the power of judicial review can step into the breach of constitutionalism and lend its efforts to repair the damage done. The awareness of such risk should not obscure however the acceptance of the view that political rights are not likely to be ignored or disregarded under a parliamentary regime.

b. *The doctrine of separation of powers and its significance for civil rights*

The doctrine of separation of powers in its traditional sense is made to order for civil rights—liberty in a negative sense. They constitute in Laski's apt words "areas of conduct the State is not normally entitled to invade."[66] Precisely it is through such a principle that the risk of dictatorship is guarded against, the fear of despotism minimized. The immunities authenticated by history as essential to the respect due a human personality and constitutionally guaranteed are thus rendered secure from intrusion by State agencies. There is plausibility in the apprehension that if all functions are vested in only one department, abuses might be unnoticed, or if discerned, might go unremedied. Such misgivings need not arise if not one but two other departments may, if so minded, interpose a barrier to an illegitimate exercise of authority infringing on liberty. With legislature and executive speaking and acting as one, the restraint comes from the judiciary solely. It is called upon to set aside acts devoid of support in the Constitution. It need not, however, be the courts at the ramparts always. Since the danger of transgression of civil rights may normally proceed from the executive officials under the control of the Prime Minister, independent-minded assemblymen, even if belonging to the same party, should be alert to the abuses of authority. Equally so, in what could be expected to be atypical cases of legislative acts trenching upon this forbidden domain, a prime minister may resort to the veto power, to frustrate such lapses from the commands of the Constitution. When, however, such political agencies unhappily are of one mind and thus pose a danger to civil rights, the judiciary, as above noted, should step in. It can and must act as a check by nullifying legislation or executive action that offends against civil liberties.

That is to speak in terms of what may possibly occur. The probabilities may be something else. Where intellectual freedom is concerned, relating to liberty of speech, of press, of assembly and of asso-

[66] LASKI, THE STATE IN THEORY AND PRACTICE 50 (1935).

ciation, possessing as they do significance in the field of civil rights, what has been written on these cherished rights, when viewed from their political aspect, should indicate that a parliamentary form of government is not to be feared as a transgressor. As to freedom of the body, including man's home and his possessions, as in the case of unreasonable search and seizure, privacy of correspondence and communication and right to freedom of locomotion, the likelihood of a tyrannical parliament enacting legislation to be enforced by a complaisant prime minister is remote. The remainder of the Bill of Rights provisions that are embraced by this category are intended to protect an accused. To the extent that anti-social acts are properly made subject to repression, there can be no constitutional objection. Again with written guarantees in the Constitution itself to assure that life or liberty can only be forfeited under just and fair procedural norms and with a Supreme Court faithful in the fulfillment of its solemn trust that there be due observance of its commands, the unity that may be exhibited by legislature and executive in this respect is not a fearsome thing. As a matter of fact, it may be the inferior courts that do not manifest due respect for the rights of an accused. What must come into play then is the corrective powers of the Supreme Court. All that has been said serves to emphasize the crucial task of the highest judicial tribunal in this field. It is fortunate then, that as discussed earlier, the modification to which the doctrine of separation of powers is subjected under parliamentarism poses no obstacle to its discharge. Both as a matter of fact and of law, the Supreme Court is called upon to live up fully to such responsibility.

c. *The utility of the doctrine in its present form for social and economic rights*

It is in the field of social and economic rights that the shift to parliamentarism is expected to be productive of great benefits. For while the principle of separation of powers, even if not adhered to rigidly, does lend itself to safeguarding political and civil rights, it may, at times, pose barriers to the promotion of the former, the independence of the executive from the legislative branches precluding at times that harmony of effort so badly needed for the implementation of any policy adopted. It does not admit of doubt that where the traditional rights are concerned, dealing as they do with a sphere of freedom beyond reach of state action, the ideal condition is for government to refrain from any interference with the mode and manner a human being orders his life. His ways must be respected; he is to be left alone. Such a constraint against the exercise of the regulatory function is inappropriate

in the case of social and economic rights—liberty in the positive sense. Here precisely, an individual, unaided and alone, may be unable to attain the requisite degree of health and well-being without succor from the public authority. This is one time where that government is not best if it governs least. Rather it must act boldly. It cannot afford to stand idly by and look upon mass poverty as the unalterable decree of Providence. It must be responsive to conditions crying out for correction by taking affirmative and, it is to be hoped, effective steps. A statement attributed to President Roosevelt comes to mind. Better a government that makes occasional mistakes, rather than a government frozen in the ice of its own indifference. Where, however, the executive is, according to the Constitution, an agent of a supreme legislative body, there is correspondingly a greater probability of co-ordinated activity. Efficiency is thus promoted. Instead of friction, there is harmony. So, at least, it may be expected. In that sense, the gain for social and economic rights under a parliamentary regime is undeniable.

With the legislative and executive functions to be directed from the same quarters, the enactment of the necessary legislation and thereafter its vigorous implementation by the administration would not be difficult. The assumption, of course, is that one party is in control of both branches. The idea of working at cross purposes is unthinkable. It could be that the Prime Minister, in theory a subordinate, may, because of his unchallenged leadership of the party, really be at the command post. Either way, a government by deadlock, where welfare measures are not promptly attended to whether in their passage or in their implementation, is not likely to arise. The expectation may be legitimately entertained then that the sad condition of the vast majority of our people would be improved. For such a desirable state of affairs to become a reality, there must be also a judiciary faithful to the commands of the Constitution and thus far from sympathetic to the opposition that certainly will come from those whose property rights are adversely affected. No other way could there be for a translation of social and economic rights into reality and for the modified version of separation of powers under parliamentarism to attain its objective.

5. *Concluding remarks*

So, for the present at least, I would review matters. The doctrine of separation of powers, while not a thing of the past, has been subjected to modification. There is no question though that it has survived. There appears to be no justification for the assumption that it is now devoid of relevance. That, for me, is to go too far. There

continues to be three separate branches exercising the three functions of government through their own personnel, except that at the top rank of the executive hierarchy is the Prime Minister to be assisted by a Cabinet. That dignitary as well as a majority of his ministers comes from the National Assembly. In that sense concentration, rather than separation is the principle adopted. Nonetheless, it is not entirely implausible that even on the assumption of parliamentary supremacy, in theory and, very likely, in actuality, the Prime Minister may play the leading role in the task of administration. As far as the judiciary is concerned, however, its being a separate and independent department is, as it ought to be, a feature of the Revised Constitution. To that extent, the traditional doctrine has remained unaffected. In the perspective thus supplied, it can be said that while perhaps no longer the fundamental principle that it was under the 1935 Constitution, the doctrine, altered as it is in important respects, is still a living vital force under the revised charter. For this lecturer then, there is change as well as continuity.