

ON A CONSTITUTION FOR THE PHILIPPINES: AXIOMS AND CERTAINTIES

ALBERT H. BLAUSTEIN *

I. AXIOMS/CERTAINTIES

The Republic of the Philippines needs a new constitution. But perhaps more important than the constitution itself is the process leading to such constitution.

For among the certainties is the fact that a Philippines constitution for today and tomorrow is something which goes far beyond the classic definition of a constitution formulated by James Bryce. In his celebrated lectures as Regius Professor of Civil Law in the University of Oxford in 1884, Professor Bryce provided this oft quoted formulation: "[A constitution is] a frame of political society, organized through and by law; that is to say, one in which law has established permanent institutions with recognized functions and definite rights."¹

But before discussing the other meanings and functions of a constitution, let us note a second certainty—a second area of uniform agreement—with which we are dealing. And that certainty is the fact that every Filipino, as well as every American, will err in copying this quote. For there is not one of you (not one of us) who will spell "organized" the way it was spelled by Lord Bryce. For being an Englishman, he of course spelled it "organised". And that is the way they do it as the United Nations and throughout the Commonwealth, once known as the British Commonwealth.

This certainty may be just as significant as our understanding of the many functions of the constitution. For the spelling or misspelling of the word "organized" is a reminder of the American heritage. And this leads to the third certainty. A constitution must be autochthonous; it must be indigenous. It must meet the special needs, wants and aspirations of the people for whom it is written. Yet the American spirit and background is part of the autochthonous and indigenous nature of the people of the Philippines. Because of your background and education, you could not possibly frame a constitution which would ignore the American experience. The Filipino lawyer will bow to no American lawyer as to the meaning of *Murphy v. Madison*,² or its progeny. The danger is that the Filipino

* Constitutional Law Professor of Rutgers University Law School at Camden, N.J.

¹ I BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 136 (1901).

² 5 U.S. (1 Cranch) 137 (1803).

lawyer will go too far and will be too American in his outlook. I want to come back to this.

Flowing from this is our fourth certainty—the fact that the Filipinos are most legalistic people of East-Asia. You may even overdo it. With just under half the population of Japan it is sad to report that you have far less than half of Japan's gross national product and far less than half of the number of her engineers. But you do have more lawyers. And as you so well know, Chinese society, like that of Japan, manages to operate with fewer legal formalisms.

The fact that yours is a legalistic society is of great importance in considering the scope of constitution-making. For we know with certainty that you want a constitution as a supreme law of the land—that you want to live under government of laws and not of men. Constitution-making in your country is serious business indeed.

And from this flows the fifth certainty. So many books have been written about the various constitutions of the Philippines that someone should write a book on how to write a book about the constitution of the Philippines. It may not be true that every lawyer in the Philippines has in his top desk drawer a model constitution for the years ahead, but it is not straying too far from that truth.

II. BACKGROUND NOTE

Before elaborating on the certainties and discussing the dimensions of a new constitutional framework, I owe you a brief autobiographical note about my own background values and experiences upon which my analysis is rooted.

I profess to be a Third World expert and I profess to be a constitutional expert. I am a professor of constitutional law at Rutgers, the State University of New Jersey where I have been actively professing for 30 years. One of the seminars which I conduct is in constitution writing and analysis. I am also co-editor of three sets of books on the world's constitutions. These include the 18-volume work on Constitutions of the Countries of the World, the 6-volume work on Constitutions of Dependencies and Special Sovereignities and the set on Constitution of Member States of the O.A.S., projected in 8-volumes of which the first two volumes have been published.

My travels have brought me to more than 60 countries and this is the fourth time that I have had the honor and privilege of being in the Philippines. During the 1960's, I spent virtually every summer in Africa where I served as the adviser for the International Legal Center in establishing law libraries in the law schools throughout that continent.

This background and experience led to my participation as a constitutional consultant. In 1966 I was asked to set up the library which would back-stop the preparation of the constitution of South Vietnam. And I was later consulted about a new constitutional framework for Cambodia. I worked with the law minister in the drafting of the 1972 Bangladesh constitution and served as consultant in the 1979 constitution of Peru. In that same year I was at Lancaster House as the only non-British or non-Rhodesian counsel in the preparation of the present constitution of Zimbabwe. And during 1982 I visited in Liberia on three separate occasions as I worked as counsel to the National Constitutional Commission of that Country. And I am still serving as counsel. It is the Liberian experience which is particularly relevant to our discussions here.

III. THE CONSTITUTIONAL MISSION

We have said that a constitution must be autochthonous. It must spring from the soil; it must be attuned to what the people need and want. All this is true but it is only part of the story.

For what the people want provide us with, at best, the black letter guidelines. The people want peace, security and freedom. They know not of the significance of item vetoes or the modern legal precept that a piece of legislation should cover no more than one topic. Of course they want free speech. But they leave it to the legal profession and to our allies in the other political sciences to define its metes and bounds. For we know that freedom of speech does not permit the publication of news that a military convoy has been assembled. Nor does freedom of speech permit us to violate the rules of copyright.

These are merely illustrations which could be amplified *ad infinitum*. A sad truth is that everybody tells us that we must prepare a constitution which will be responsive to public demand and we find to our dismay that the public really knows all too little about what it wants in regard to the *totality* of our constitution-making.

There is another charge to the constitution maker. We must prepare a constitution to meet the needs of the future. We must have a modern constitution. And I want to emphasize the word modern. And I want to bring my background and experience to bear on this point. In producing the best possible constitution for the people of the Philippines, it is incumbent upon us to form a study commission. That commission must be charged with the responsibility of studying every constitution in the world for ideas which can be borrowed or adapted to the specific needs of the sovereign people of the Philippines.

In this task an outside consultant can be useful indeed. And there are other uses which Filipino constitution makers can make of outside consultants. But you are all much too wise and you would expect your consti-

tutional consultant would likewise be too wise to permit the outsider to tell you what is best for your people. High on the list of what is to be avoided in the making of a new constitution is neo-colonialism. An outside consultant can perform many useful functions but only if he realizes and the Filipino experts realize that the end result must be a constitution by and for the Filipinos themselves.

And now I must come to the warning which I warned you that I would make in connection with the second certainty. And this is your American legal heritage. In theory (I emphasize the word "theory") you are wise enough to separate your legal heritage from your ethnic and cultural heritage. There is no nonsense among the Filipino people such as existed in the classrooms of French West Africa where the school children were taught such nonsense as "Our ancestors, the Gauls. . . ."

This American legal heritage is not bad. As one looks at the legal structure of the world communities, one reaches the conclusion that it is very good indeed. But it tends to make the recipient of that heritage more American than the Americans.

I have seen this, much to my sorrow, throughout the world. I have seen all too often lawyers in such diverse places as Kenya and Sri Lanka refusing to accept a principle or a practice because it had its roots in the United States. "We follow England," they would say. And the fact that England is now pursuing the American approach seems to be of little moment to them.

Being more American than the Americans is a disease prevalent among the lawyers of Liberia. It took a lot of convincing to accept a German idea here, a French idea there, plus some very good ideas indeed from the British colonial constitutions. I know you don't want this to happen to you as well and thus my warning.

Our charge is also complicated by recent history. The genie is out of the bottle; the toothpaste is out of the tube. Circumstances which did not confront the constitution maker in 1935, 1946, 1973 and (arguably) 1981 now create priorities for the constituents charged with the preparation of tomorrow's Philippines constitution. Martial law has been declared to an end but we know that it can happen again. The new constitution must, among other things, provide for and limit emergency powers.

IV. A WORD ABOUT POLITICS

Of course it is difficult to talk about constitutionalism in the Philippines—today and tomorrow—without being to some degree political. But I can try. And I hereby inform you that I have been in a similar situation both in regard to the Zimbabwe and Liberian constitutions and I think I succeeded. And to the extent that I fail you know that I tried.

Nationals of a country have every right to be critical of the outsider who attempts to tell them what to do politically. This is your country and you know that I am aware of the limitations of the outsider. On the other hand, some of you may be conscientiously upset that I fail to take sides in regard to the political issues which you face.

On the other hand, without being overtly political, I can say that I am a constitutionalist. On the high-level, theoretical side this means that my prejudices and biases are for constitutional democracy. I am opposed to totalitarians and authoritarians on both the right and the left. I would not be ruled by Somosa or the Sandinistas; I would not be ruled by the Shah or Khomeni. I would not like to be ruled by a theocracy or by the military.

But saying that I am a constitutionalist does not mean that I am a strict constructionist—or a liberal constructionist either. Of course I am legalistic. But about my own constitution. I have not come here to discuss your legalisms, a task for which I am inadequately prepared. This is neither the time nor the place to discuss the justiciability of P.D.s 991,³ 1031,⁴ 1033,⁵ the right of the president in 1983 to designate his possible successor, or the constitutional validity of the 1973 Constitution. You know about these things far better than I.

I might say, however, in passing, that there is some new thinking on the constitutionality of constitutional amendments—and even some thinking about the constitutionality of constitutions. The Supreme Court of India has over the past several years declared certain constitutional amendments to be unconstitutional. And there are German cases agreeing with this philosophy. One German case goes so far as to say that something within a constitution might be unconstitutional if it is contrary to the total constitutional structure. But decisions like this might put us under the authority of a judicial oligarchy or, to use an Old Testament term, a kritarchy. I would not like to be ruled by judges either.

V. CONSTITUTIONAL OBJECTIVES

In undergoing the constitution-making process *de novo* we will again be reminding ourselves that a constitution is far more than a nation's birth certificate and a blueprint/framework of its government. A constitution is a nation's fundamental social contract. It is the formulation of

³ Entitled "Calling a National Referendum on October 16, 1976; Providing for a period of Educational and Information Campaign; and Establishing the Mechanics and Manner for the Holding thereof."

⁴ Entitled "Amending P.D. No. 991 by declaring the provisions of P.D. No. 229 entitled 'Providing for' the manner of voting and canvass of votes in the Barangays (Citizens' Assemblies) applicable to the National Referendum Plebiscite of October 1976, and for other purposes."

⁵ Entitled "Stating the Questions to be Submitted to the People in the Referendum Plebiscite on October 16, 1976."

national compromise and conciliation. The constitution-making process provides the forum and agenda for the discourse and dialogue necessary to reconcile the conflicting and disparate elements of a population. It fosters compromise. It forestalls the polarization which inevitably results in dictatorship, repression, revolution and counter-revolution.

We are all cognizant of this. That is why we are here together at this time. The study commission whose establishment I have recommended must delineate these areas of existing conflict and be ready to *not* provide answers but to provide precedents on how these problems have been constitutionally met elsewhere. This will provide additional ideas for the eventual policy-making decisions.

Let me give you a good example. We are all cognizant of the important Muslim minority and their special demand for group rights. And we all know that there are no easy answers. The task of the scholars and researchers is to show how such problems are being treated elsewhere. For example, one should study the constitutions of Malaysia and Fiji on this point; one should study the constitutional experience (and failures) of Cyprus and Sri Lanka; one should study the new constitutional statute providing autonomy for France's Corsica and the Catalan and Basque provinces of Spain, etc.

We can recall that the United States Constitution could only come to fruition after the resolution of four divisive issues. And the same story could be told in regard to most of the constitutions promulgated since then. As I indicated in my biographical note, I participated in the constitution-making for Zimbabwe—the constitution with more compromises than any other in history.

But a constitution is more than a framework and more than a social contract. It is also an ideological manifesto. It is the written manifestation of national purpose and national spirit. And it is important at this time in Philippines history to make that written manifestation. A clarion call is needed to foster unity and purpose. The constitution should ring with sounds of liberty and freedom—meaningful sounds which inspire public confidence. The right kind of constitution will do much to revive the spirit of the Philippines. Let it serve as a catalyst to dancing in the streets and light-heartedness and a sense of obligation in the market place. A constitution is also a text for the teaching of government and for training in democracy. It is the primary teaching tool to educate people on the meaning of democracy and to inculcate the usages and habits of democratic practices. Article XV, Sec. 8(3) of the 1973 constitution tells us that "The study of the Constitution shall be part of the curricula in all schools." Let the constitutional mandate make its appearance in the Declaration of Principles and State Policies.

Finally, a constitution is a nation's showpiece. It tells the world community what a nation is and what it stands for. It is a brief to the world court of public opinion. What is the most solemn of all government documents is also—inevitably—a nation's most significant public relations presentation.

We need not dwell upon the position of the Philippines in world public opinion. And because this is not a totalitarian society, your doors have been open to the world press and to human rights investigators, which is not the case in the Soviet Union or Cuba or, for that matter, Indonesia. The answer is not to hide imperfections but to answer with the best of all possible constitutions.

VI. WRITING THE MODERN CONSTITUTION

In preparing the modern democratic constitution which will reconcile disparate elements, serve as an ideological manifesto, etc., the Philippine constitutional study commission must consider ideas drawn from all of the modern constitutions. This is a long and difficult task. And that is why the job must be undertaken right now. We cannot await the establishment of a new constituent assembly and its deliberations.

And it would be impossible, of course, for me to make a list of all the things which should be considered or do more than make a start in recommending constitutional ideas and selected constitutional provisions.

But I can make a start.

1. *Technical Considerations.* There should be a re-thinking of the table of contents. There should be no article on "General Provisions." A constitution need not have a chapter which could be labeled "Miscellaneous." Move the contents of such chapter into other parts of the document

And get away from the American structural outline of articles, sections and clauses. It makes the constitution very difficult to read and it makes it very difficult to find provisions. Each part of a constitution should have a separate article number, running consecutively from Article 1 to possibly Article 100. The various articles can be grouped under chapters so that Chapter 1 can encompass Articles 1 through 9, Chapter 2 can cover Articles 10 through 16, etc.

2. *Autonomous Public Agencies or Commissions.* Your 1935 Constitution provides for a Commission on Elections, a General Auditing Office and a Civil Service. Article XII of the 1973 Constitution establishes Constitutional Commissions with sub-divisions on Civil Service, Elections and Audits. And the 1973 Constitution also has Article XIII on Accountability of Public Officers.

The modern constitution should go further. And you should think further because of existing allegations concerning nepotism, favoritism and corruption. In a chapter on Autonomous Public Agencies, I would strongly recommend consideration of three other commissions, supplementing your Civil Service Commission, Commission on Elections and Commission on Audit. These would be the Judicial Service Commission, the Ombudsman Commission and a Defense Force Service Commission.

a. *Judicial Service Commission.* In recommending this commission, I am recommending a re-thinking of judicial selection. I think that this is too important a matter to be left to the sole discretion of a President or Prime Minister. This is not a point to be dwelt on at length at this meeting. There is certainly more than enough American literature on the subject showing how the various states have gone away from the early rule in which judicial appointments were made by the respective state governments.

b. *Ombudsman Commission.* The ombudsman is at once one of the oldest and one of the newest constitutional ideas. It is enshrined in the constitutional organization of Scandinavia and has made its appearance in many of the new constitutions. It may be decided by the Filipino people that the ombudsman post should not be created, but the issue must be considered.

c. *Defense Force Service Commission or Military Commission.* This was not considered in a 1935, 1973 or 1981 document based upon the American tradition. But the Philippines of 1985 is certainly a very different place from the United States of 1789. The toothpaste is out of the tube—the issue of how the military should be selected should be raised to a matter of constitutional consideration.

In the United States, as you so well know, all appointments to the rank of general must have senate approval. I would recommend something like this for the new Philippines constitution. But I would go further and establish a board which would make recommendations for all military officers of high rank. Again, we should not go into details at this juncture.

3. *Political Parties.* There are authorities on the subject of elections and the subject of political parties who think that this a subject matter for legislation rather than for constitutions. I would certainly agree—for Switzerland and Scandinavia. But I think this is too important a matter to be left to the will of Parliament. It is a subject demanding national compromise and must instill public confidence. And besides, the Philippines has already taken the first step in establishing an elections commission. If there should be any doubt as to the importance of provisions about political parties, one need only glance at the German Constitution of 1949 in which a response had to be made to the free establishment of political

parties, at the same time creating safeguards so that no Nazi party might again arise.

Again this is too detailed a subject for detailed consideration here, but I would like to recommend that the chapter on political parties and elections begin with the article which I drafted for the new Liberian Constitution. Article 80(a) reads as follows:

Since the essence of democracy is free competition of ideas expressed by political parties and political groups as well as by individuals, parties may freely be established to advocate the political opinions of the people. Laws, regulations, decrees or measures which might have the effect of creating a one-party state shall be declared unconstitutional.

4. *Official Misconduct.* Article XIII of the 1973 Constitution does not go far enough. More specific terminology is needed relative to conflict of interests, etc. Several of the constitutions of the new nations which were formerly part of the British Empire have valuable provisions on this.

5. *Emergency Provisions and the Role of the Military.* This is a topic high on my priority agenda and I am now preparing a book on the subject. Constitutional provisions in this category must be set forth in three separate headings. First would come those general provisions both asserting that the military authority must always be subject to civilian control and the specific provisions designed to accomplish this objective. For example, a provision such as that in the American constitution limiting congressional appropriations for the military to a two-year period. I would be inclined to recommend a one-year limitation.

The second heading concerns the limitation on emergency powers. Here I would recommend consideration of the provisions of the 1982 Liberian Draft Constitution and such constitutions as that of Belize in 1981. One must set forth the conditions on which a state of emergency can be declared and limitations on its use. For example, one should specifically provide that the legislature be in session all during the emergency period, receiving reports from the executive charged with enforcing martial law. No constitutional changes should be permitted during this period.

The third heading includes the selection of military officers and their general powers.

6. *Declaration of Principles and State Policies.* I use this term because it is the term used in the Constitution of 1973, supplanting the heading, Declaration of Principles in the 1935 Constitution. We see this in constitutional literature under the heading of Directive Principles of States Policy, derived from the Indian Constitution.

One is surprised to see this in the 1935 Constitution—albeit the fact that it is here only in embryo form. For the concept of having one major

chapter or article on government policies and another on human rights has its real foundation in Article 45 of the Irish Constitution of 1937. It is amplified and developed in the Indian Constitution of 1947, providing guidelines for many of the newer constitutions. This is treated at length and well in the 1979 Constitution of Nigeria.

This is essential in preparing a constitution which must serve as an ideological manifesto. For human rights to the average citizen is not always the same thing as human rights from the point of view of the legal community. The right of literacy is just as real as the right to *habeas corpus*. The difference is that *habeas corpus* is justiciable and can be legally enforced by the lawyer community.

What has been done in these modern constitutions is to formulate policy guidelines for legislative and administrative action. These encompass governmental objectives. But the constitutions must carefully note that such policies are not justiciable, clearly dividing the line between policies and enforceable rights.

This requires special study—especially since the human rights documents of the United Nations failed to make such a distinction.

VII. RECOMMENDATIONS FROM FOREIGN CONSTITUTIONS

In preparing the best of all constitutions for the Filipino people, I think that we are all in agreement that we must go beyond the American model and prior Filipino constitutions. Let us look at a few ideas from other constitutions as an *idea* of what suggestions and contributions might come forth from a study of foreign documents. There is no attempt to be exhaustive, but just to put some thoughts into the hopper.

1. *Incorporation of International Documents by Reference.* Should the preamble to the new Philippines constitution recite adherence to the United Nations Universal Declaration of Human Rights and the International Covenants?

2. *Freedom of Speech Expanded.* The famous American First Amendment prohibits government interference with freedom of speech. It was a wonderful statement for its time. But that time was two hundred years ago. The second stage of freedom of speech demands the duty of the state to supply the necessary security so that one may speak freely. It is the duty of the London police officer to patrol the area around Speakers Corner in Hyde Park to make sure that speakers are not molested, even if they are speaking against the government. The modern protection of freedom of speech should go even further today in view of the development of electronic media. And as corollary, the right of privacy must be strengthened. The modern constitution should consider such provisions as these two from the 1976 Constitution of Portugal:

ARTICLE 40

Right to broadcasting time

1. The political parties and trade union and professional organisations shall have the right to broadcasting time on radio and television in keeping with their representativeness, according to criteria to be laid down in the information statute.
2. In election periods the competing political parties shall have the right to regular broadcasting time fairly apportioned.

ARTICLE 35

Use of data processing

1. All citizens shall have the right to information on the contents of data banks concerning them and on the use for which it is intended. They shall be entitled to require the said content to be corrected and brought up to date.
2. Data processing shall not be used for information concerning a person's political convictions, religious beliefs or private life except in the case of non-identifiable data for statistical purposes.
3. Citizens shall not be given all-purpose national identification numbers.

3. *Human Rights Enforcement.* And how does one enforce human rights, restricted by the American qualification of meeting the "cases and controversies" prerequisite or the constitutional requirement that actions against the government on behalf of human rights safeguards may only be brought by those who are directly affected? Perhaps the answer is found in the phraseology of the German Constitution.

4. *Term of Office.* One of the criticisms of your 1981 amendments is the direct election of the president for a six-year term with no injunction against re-election. Here again a study should be made on all of the various alternatives. The prevailing view is a two-term limitation, frequently with a proviso that the party may run again after someone else has held office. In my own view, this is a very important provision from the point of view of the man on the street—so important, in fact, that I recommended that this be entrenched as a non-amendable provision in the Draft Liberian Constitution. And while on the subject of presidential terms, one thinks of presidential election. How shall the constitution provide for presidential election if no candidate receives a majority? Shall the issue be determined by the House of Representatives as in the United States? Or should we (preferably) have a run-off election between the two highest candidates?

5. *Constitutional Inviolability.* And perhaps the best way to end a discussion of constitutions is to quote from the famous Article 136 of the 1917 Constitution of Mexico:

This constitution shall not lose its force and effect, even if its observance is interrupted by rebellion. In the event that a government whose principles are contrary to those that are sanctioned herein should become established through any public disturbance, as soon as the people recover their liberty its observance shall be reestablished, and those who have taken part in the government emanating from the rebellion, as well as those who have cooperated with such persons, shall be tried in accordance with this Constitution and the laws that have been enacted by virtue thereof.