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Résumé de l'article

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La doctrine de la sécurité nationale fournit la base idéologique d'une conception de l'État opposant ce dernier à la collectivité des pouvoirs. La loi martiale engendre sa propre logique inconciliable avec celle qui soutend les droits humains, notamment dans les pays du sud-est asiatique où les droits humains ne sont pas constitutionnalisés.

L'auteur traite de la protection des droits humains dans les États militarisés et plus spécifiquement aux Philippines, où l'arrivée au pouvoir du gouvernement actuel permet d'espérer l'instauration d'une véritable démocratie conciliant les exigences du développement et le respect des droits humains.

The Militarized Society and the Law

Caésar ESPIRITU *

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Individual freedom versus national security is the issue in Western democracies. The issue is even more complex in developing countries.

There, human rights are almost anathema to the concept of national security, in spite of the fact that the preamble of the United Nations Charter states in its second clause: "We, the peoples of the United Nations, determined 'to reaffirm faith in fundamental human rights...' while the very first purpose of the United Nations under Article 1 of the Charter is "to maintain international peace and security..."

Introduction: Militarization of Societies

The obvious inconsistency between the observance of order and security and respect for human rights finds concrete manifestation in the "militarization" of many societies of our world today. As a result, in many instances, there is no legitimate authority left within the state structure to forestall abuse of power and authority. In many developing countries — there are a few notable exceptions, of course — people have been tortured, held without trial, and often butchered on grounds of national security. They thus come to live in a state of constant fear and terror.

The growth of militarization has created a political environment in which the sharing of decisions in political processes has been precluded. As guardians of the ruling class, men in uniform decree what is right or wrong. Force is used to arbitrate disputes or conflicts of opinion, and organized violence has become an essential ingredient of the apparatus of power in the name of national security.

1. Militarized Societies: Links and Effects

1.1. The "Doctrine" of National Security

In the Philippines, the militarization of the country was given an ideological framework with the adoption by the martial law regime of the

"doctrine" of national security. This doctrine, which provides the theoretical *raison d'être* of many contemporary military regimes in Latin America, has inexorably led to the surrender of civil liberties to what may be called the National Security State through the institutionalization of states of exception or martial law. In some parts of Latin America, it is hardly coincidental that defense lawyers, judges, priests and intellectuals who have advocated respect for fundamental rights through peaceful means have been the object of official repression.

The doctrine of national security provides the ideological basis for the effort of state institutions to construct what may be called "the organic conception of the state". A state is to appear as a living being above social classes and above individuals, with its own dimensions and capacity to define its own goals. This state, with its own will and its own aims, is opposed to a conception of society composed of people ; indeed, the notion of people (they are the ultimate repository of sovereignty in the democratic theory) is rejected ; if anything, they are considered internal enemies.

1.2. "Trade-Off" Between Rights and Development

At the present, and all through the remaining years of this century, most countries of the Third World will be obsessed with their development efforts. For many of them, the obvious linkage between development and human rights lies in the visible downgrading of civil and political rights in order to achieve order, stability and economic growth. This is the logical offshoot of the idea so popular among authoritarian rulers that developing countries cannot afford the luxury of promoting both civil and political rights on the one hand and economic rights on the other. The argument is that since the fundamental right is that of economic security which can be secured only by pursuing a "growth first" strategy, then a diminution of civil and political rights on the one hand and economic rights on the other hand becomes imperative. People are made to believe that this is the only way the "higher right" of the people to economic security can be safeguarded.

For the political and economic elites in many developing societies, if hydroelectric dams are necessary for economic development, then surely they would have to be constructed even if this should mean tribal genocide for indigenous minorities. If export trade zones have to be created for, say, Canadian multinationals, it should not matter if women are exploited with their wages kept at near-starvation levels. If foreign investments have to be attracted, it should not matter if strikes are banned and unions, disbanded. If modern commercial agriculture has to be established in the name of export-led growth, the use of violence by state agencies to terrorize farmers into giving up their small landholdings should be countenanced.

In the meantime, violations of the integrity of the human person — extrajudicial killings, tortures, arbitrary arrests — coupled with violations of individual freedoms — of speech, of assembly, of associations — as well as denials of due process and restrictions on the privileges of the writ of habeas corpus are fostered.

1.3. Throwing out the Principle of Checks and Balances

Let us look at the Philippine situation again.

The idea of checks and balances was slowly allowed to fade away under martial law in the Philippines. The National Assembly was weakened to the point of subservience and impotence.

Of course, the same thing could be said of the judiciary under martial law.

The former President claimed absolute powers, rather than powers subject to checks and balances. He said:

> It must be borne in mind that once martial law is proclaimed, all the powers of government are of necessity assumed by the authority that administers the martial law, and the operation of the regular government, including its legislature and the judiciary, is subjected to its imperatives. Of course, the Constitution itself is not ousted, but by the power of the Constitution itself vested in the Executive to issue the proclamation, it yields the application and effects of some of its provisions to the demands of the situation, as the administrator may in his bona fide judgment so determine.

With the President laid this claim to executive supremacy, the judiciary rationalized its own powers along the same line. Thus, in a famous case (*Garcia-Padilla v. Enrile*) in 1983, the Supreme court said in self-depreciation:

> The Supreme Court can, with becoming modesty, ill afford to assume the authority to check or reverse or supplant the presidential actions. On these occasions, the President takes absolute command, for the very life of the nation and its government which, incidentally, includes the courts, is in grave peril. In so doing, the President is answering only to his conscience, the people, and to God.

2. The Rule and Roles of Law

2.1. Rule of Law?

In spite of this, some eminent jurists did claim that the rule of law was observed during the martial law years. Like you in this conference, our people are used to worshipping on the altar of the rule of law.

According to an eminent Chief Justice of our Supreme Court, who retired only in 1985, there were "guiding principles which covered the application of martial law — the old landmarks of the law were still there to serve as guides and the precedents were there to serve as guarantees for continuity.

Beautiful words. Because of the guiding principles, he continued, the rule of law had been scrupulously observed during the emergency rule in the Philippines.

The Chief Justice supports his claim that the rule of law had been observed during emergency rule in the Philippines in these words:

> ... What we have, in the language of President Marcos, is constitutional authoritarianism... There is emphasis on the role of authority, but there is no disregard of the limitations of the Constitution as found in both the present and the past Charters. What is more, martial rule itself under the conditions therein set forth was itself recognized as a mode of coping with emergency conditions... It is my submission that a dispassionate appraisal of the Philippines' experience yields the conclusion of the observance of the traditional concept of the rule of law. The power that the government exercises is traceable to its interpretation of the Constitution and applicable jural norms. There is no obstacle to its acts being challenged in court. It cannot be said, therefore, that under martial rule, the Philippines has departed from its long-standing tradition of adherence to the rule of law.

But what do we really mean by the rule of law? In spite of the rights in the Constitution to whom everyone pays lip service in the Philippines, the goals of national security and economic development had been allowed to overrun individual rights. And yet all governmental policies had been and must be robed in legal dress. Everyone, including government officials, wishes to abide by a structure of legality. In a strange way, our people believe in the idea of law. Law plays the role of legitimizer of government policies, putting up a facade of legality to the processes that many times work out injustice among the people. Thus, repressive laws are laws and, therefore, must be obeyed.

Is this what is meant by rule of law? Is it simply a system that maintains law and order? If so, one can talk, like Don Carlos in Schiller's novel, of the peace and order of the churchyard.

What I have to say may be strange, if not heretical, to western ears. The rule of law assumes the secure establishment of an operative legal system. It means a secure and procedurally regularized legal system aimed at ensuring justice to everyone... It is thus opposed to personal or arbitrary rule.

Quoting Dicey, our Chief Justice stresses the conventional idea of the supremacy of law.

But supremacy of the rule of law refers not to just any kind of law. Rather, it envisions law that is just. Unjust laws are the worst instruments of tyranny.

The fact is that the rule of law is a major virtue, surely a fundamental one, but nevertheless just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality. It is a product of political power, reflecting and supporting social forces and interests. A non-democratic system which does not recognize that "all men are created equal", which suppresses dissent and uses force rather than reason and persuasion to command allegiance may, in principle, conform to the rule of law; the South African legal system is the clearest example of this. No one who believes in the inherent dignity of the human being will say that it is better than the legal systems of constitutional democracies. Indeed, in that it reflects and supports an unjust social order, it is an immeasurably worse legal system, but it excels in one respect: in its conformity to the rule of law.

2.2. Law, the Protector of the Strong

To understand how law and human rights collide in the lives of the people of many developing societies, one should understand that law does not operate in a vacuum. Its nature and function, as well as its actual application, is culture-bound. That is why Gunnar Myrdal talks of Asian societies as being "soft states" in his monumental *Asian Drama*. He means the quality of application of the laws in Asian societies is substantially different from those in Western societies in spite of their commitment to the rule of law and to equal protection of the law in their Constitutions.

Obedience to law is a hallmark of Western culture — overt obedience, at least. But in many developing countries, the majesty of the law is not seen in the same light as in a developed society. It is almost an abstract logical science in the West; it is a body of rules in developing societies, the enforcement of which varies according to circumstances. Its implementation is negotiable.

Most developing countries have placed economic growth and national security above all other goals. In the process, the ideals of justice and equality have been glossed over or in many cases even sacrificed. Or to paraphrase a human rights activist in Indonesia, "put in the waiting list for the coming decades."

This policy has been achieved through law, for all government actions have somehow been justified on legal terms, i.e., they have been garbed in legal dress.

Indeed, under a regime of law — state law that is to say, law is the instrument by which order in society is maintained, interests balanced and social progress pursued. The people of Southeast Asia who have had the benefit of education have normally looked to law for the promotion of social justice, economic security, equality, and freedom. For in theory law secures justice for everyone. The reality, of course, can be different — at least, in the context of the lives of their people. Many times the law reflects and protects the interests of the predominant groups in society.

One major reason for this is that the struggle for constitutionalism has occurred later in time in the developing countries than in the industrialized societies. It confronts remnants of feudalism and an elite mentality of paternalism in the developing societies while by and large, these are now past stages in the social and political histories of the industrialized societies.

A society like the Philippines, which is plagued by a severe imbalance in the distribution of its wealth and income, is bound to develop a dual standard of justice ; one for the rich, and the other for the poor. There is, on one hand, an excess of individual freedom for a privileged minority and on the other hand a denial of it to the majority.

3. The many Faces of Law in Southeast Asia

The living law has many faces in Southeast Asia. Several aspects of the law and its enforcement are clearly discernible ;

a) The law may be just and worthy of respect and obedience, especially if it calls for equal justice for all. But its implementation may partake of different standards for the strong and for the weak. Indeed, to think that because in constitutional theory a government of laws and not of men is supposed to prevail in these communities — they do not thereby have men enforcing the laws and making decisions for them — is a misunderstanding of the system by which men and women order their lives in civil society. Thus, many times it is law enforcement — and even its administration — that has resulted in the miscarriage of justice.

b) One must understand that in some areas of the world, the governments themselves have been the major law-breakers e.g., the head of state, the military, the police, the internal revenue official, the forestry official, the ordinary bureaucrat.

c) Finally — and this can be the worst of all situations — the law itself is what creates injustice or may be the instrument of oppression. This happens particularly when the rule of law so deeply embedded in

> western constitutional theory, is transformed in much of the Third World into the law of the ruler and human rights are sacrificed because of the need of elites to perpetuate themselves in power or protect their privileged economic positions or both.

Clearly, what is required is not simply the upholding of the existing law, for many legal rights — especially those rights arrogated by a repressive state against its own citizens — may be violative of human rights.

It is also clear that human rights law becomes hostage to power structures in many communities. The people — citizens of these "democratic" societies — have been forced to regard themselves as instruments of a larger social purpose rather than as persons with the capacity to make decisions for themselves about their own situations.

Ultimately, what we are talking about is power, not just really pure law. Power structures and relationships determine development and underdevelopment both among and within nations, and human rights are clearly a hostage to power structures and relationships in the repressive regimes, where dictatorial governments have clothed themselves in constitutional dress and where law, whether despotic or constitutional in form, is clearly administered on the side of the strong.

Our President, Mrs. Aquino, has put into words what many people have felt about our glorious revolution:

> A non-violent victory of freedom over a government supported by the army is rare in history. A victory of freedom which comes about through the protection of the military by the population is unprecedented.

It takes more than good intentions or an anti-Marcos ideology, however, to bring under control a country wrecked by crises. It is an undisputed fact that the economy of the country, savaged by the Marcos Government for 20 years, has yet to take any discernible upturn. Abject poverty continues to reign, particularly in the countryside where 70 per cent of the population lives.

One prospective destabilizing factor on the road back to democratic processes is the military.

The rapid expansion of the military since 1972 had enabled it to acquire political power. The disbandment of Congress, suspension of the electoral process, arrest and detention of leading traditional politicians, and proscription of political parties and their activities, facilitated the military's acquisition of political power.

The end of the constitutional dictatorship of Marcos did not diminish the high visibility of the military. In a sense, it has increased further in the new regime. For it was the military (or one segment of it) which had acted as the

catalyst of the postelection crisis by staging the rebellion that sparked the street revolution. For having performed that admirable role, the rejuvenated armed forces will, for weal or for woe, be assured of a more influential position in public affairs.

Finally, the continuing problem of lack of participation of all the people in the political and administrative processes, as a concomitant of the existing inequality of wealth and power in the Philippines, continues.

Neither the cabinet nor the members of the Constitutional Commission show any significant participation by the peasantry or working classes. Although their mass and creativeness in street action was mainly responsible for the success of the revolution, it looks like those in the lower rung of the Philippine social pyramid will remain the fodder of revolutions.

Conventional republican principles of government were what did not work out too well in the Philippines political landscape since the turn of the century, given the great social and economic inequalities long existent in the country. Local elites had continued to dominate the legislative process — and even constitution — framing.

In the wake of the February storm, the structures that bred social and not merely political discontent stand intact and operational. Traditional political parties even if now coming in new guise and carrying new labels, have served to keep the masses out of power by making elections intra-elite contests.

Ultimately, an authentic democratic process for the Philippines is, or should be a liberating process which will create conditions for peoples, particularly those at present oppressed and marginalized, to identify their own needs, mobilize their own resources and shape their own future. Only then can there be lasting security. This is still a dream that awaits realization.