THE AMERICAN CONSTITUTION

*Democratic 'checks and balances'**

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IN July 1976, the United States of America will be celebrating the bicentenary of the adoption of the Declaration of Independence and, naturally, a whole nation will be nostalgically reviewing the many landmarks which colour and give meaning to the two hundred years of United States history. As usually happens on such occasions, special attention will be devoted to the very origins of the United States and, no doubt, also to the day when the thirteen rebellious former British colonial settlements took the plunge and decided to draft a constitution that would unite this nation, still in its early stages of existence, as well as to its eventual development into the really democratic and, at the same time, practical instrument of government which America has today.

The thirteen states had already been eleven years independent when delegates representing these States met in Philadelphia in 1787, giving life to the Convention whose task was that of correcting the shortcomings of the articles of confederation which had been existing since the Declaration of Independence.

It was generally felt that the Articles of Confederation gave too much importance to the states, with the consequence that the union would practically be non-existent, especially when the main factor which had kept them together, the common struggle against the British, no longer existed once they had freed themselves from British domination; hence, the need was felt for a fundamental law that would unite the states into one country, a union whereby each state would have its main interests protected, but which would make their interest converge in the government of the United States of America.

The delegates, after many compromises, managed to draft a constitution, federal in nature, providing for a Presidential Executive system, with a legislature, composed of two houses, and a federal judiciary, composing the three main organs of central federal authority, with each state having its own elected legislature and go-

* This Article states the position as at the 20th September 1974.

vernor.

The 'Founding Fathers' of the American Constitution had one major problem to solve, namely, that of trying to constitute an efficient political system with the necessary constitutional safeguards to prevent it from endangering the liberties which the Americans had acquired at such a high cost of human lives. It is this aspect of the United States Constitution which I intend to analyse and I am going to do so for two reasons: the first being that this is the fundamental characteristic of the constitution; secondly, that the American Constitution happens to be the first constitution to be drafted to meet these specific requirements.

Thus, the 'Founding Fathers' decided to build the Constitution on the so-called doctrines of the 'separation of powers' and that of the constitutional 'checks and balances'. These two doctrines propounded by such eminent writers as Montesquieu, Locke and Adams were contained in a formula through which the relations of the Executive, Legislature and Judiciary, according to the first doctrine, would avoid the concentration of too much power in the hands of one organ, by giving each organ a definite clear cut sphere for which it, and only it, would be responsible. On the other hand, according to the doctrine of the 'checks and balances', each organ should have enough means to control the others, should one of them abuse its powers. We shall now pass on to analyse how the 'Founding Fathers' dealt with the problem.

At the Convention, after much debate, it was decided that the National Executive should be in the hands of one man, namely, the United States President. His powers are not clearly defined in the Constitution, but as Article 2, section 1 states, his main function is that of Chief Executive of the United States Government. His powers are, indeed, separated, for he is independent from Congress, in the sense that his stay at the White House is not directly dependent on Congress, as the President is elected on a nationwide basis for a period of four years.

Originally, the President would be re-elected indefinitely but this situation was changed by the 22nd Amendment which limited the President's stay at the White House to two terms.

The President, as head of the Executive, cannot legislate, and this factor has given rise to a very complicated state of affairs where, on account of the 'checks' of the Legislature on the President, a continual struggle arises between these two organs.

In these last 30 years, that is before Watergate, the President had managed to take the initiative by exploiting his constitutional role as chief policy maker. In fact, it is interesting to note that

from the Constitutional point of view, the President's Position has not changed, no matter how his power happened to be influenced by the political climate of the day: he always embodies the unity of the United States: as Commander-in-Chief of the Armed Forces, he can ignite an atomic holocaust. Yet, despite his tremendous power, the Constitution makes of the Chief Executive a very poor man as he depends totally on Congress for his finances, whilst his measures require their approval by Congress for them to become law.

The President's predicament was reflected very clearly by President Kennedy when, although enjoying a Democratic majority in Congress, he complained that his majority which existed on paper, rarely materialised in reality, for although the Democrats out numbered the Republicans by 263 members to 214 in the House of Representatives and by 64 to 35 in the Senate, as Kennedy himself pointed out 'some Democrats have voted Republican for 25 years and that makes it very difficult to secure the enactment of any controversial legislation.' One can imagine the problems which a President faces when faced by a hostile Congress, as often is the case.

This situation is indeed strange, to say the least, to any one who is used to the rigid party politics and party discipline generally followed in a parliamentary democracy, but the American party structure is weakened by many factors, one of which is the fact that United States Congress is federally based, with the consequence that the party members prefer satisfying a highly demanding constituency than a party whip; after all, the party system was not envisaged by the 'Founding Fathers'.

We have considered how the President can find in Congress a check to his powers. We shall now consider how a strong President not weakened by Vietnam Wars and Watergate scandals can fulfill his role also as leader of the Legislature.

Art. II Section III of the Constitution states that the President: 'shall, from time to time, give to Congress information of the state of the Union and recommend such measures as he shall judge necessary and expedient'. Here, we have the national Leader addressing himself to Congress, but this does not necessarily mean that every legislative proposal recommended by him to Congress originates in the mind of the President or even within the confines of the White House. Most proposals, in fact, come from agencies of government and from interest groups. What the President does is to determine priorities and to focus attention and pressure on the high priority measures.

Then, we have the powerful weapon of the Presidential veto. Now, although the veto is, indeed, a significant constitutional lever in the President's hands, it is, however, of a negative character. The President, according to the Constitution, has 10 days in which to return a Bill to Congress with his objections pointed out. Congress, however, can override the Presidential veto, if it can muster a two-thirds majority; infact, herein lies the efficacy of his 'check', for the President, normally can rally one-third of Congress to defeat the counter measure of Congress. Indeed, the fact that Congress possesses a sufficient democratic overall majority to defeat a Presidential veto, as was recently seen in the vital Turkish arms deal, is sufficient proof to show the hard times the Chief Executive can go through.

The President has also the power to call special sessions of Congress. This power has been used, on occasion, to meet particular emergencies; it has often been used as a political weapon to focus attention on Presidential programmes.

In the system of 'checks and balances' the President's main contact is with the Legislature, but we must not forget that the President also nominates judges who have to be approved by Congress. As yet, the President's main influence and his main headaches are mainly found in Congress, a Congress that had been relegated for a long time to the background of the United States politics by the emergence of the so-called 'Imperial Presidency' but Congress is trying to recover a lot of the ground it has lost, now that the Executive has lost most of its credibility and its political support.

Now we shall analyse how Congress can utilise its checks on the President to assert its newly found authority. In the constitutional convention, the 'Founding Fathers' were presented with two plans of how to constitute the national legislature. One was the so-called 'Virginia Plan' which provided for a bicameral legislature with population representation in both Houses; whilst the other was the 'New Jersey Plan' which provided for a unicameral body with equal representation of the states. The result of this controversy was a compromise, namely, to create a bicameral Congress, with a House of Representatives based on population and a Senate based upon equal state representation – two from each state. Thus, the equal representation of the states in the United States Senate illustrates the practical application of the federal principle of the Constitution; the population representation in the House of Representatives reflects the centralising ideology of the 'Founding Fathers' of the Constitution and their recognition of the democratic spirit.

Congress's main function, of course, is that of legislating as well as that of levying taxes and making appropriations. The Constitution allows Congress to recommend constitutional amendments by a two-thirds majority in each House; at the request of two-thirds of the states, Congress 'shall call a convention for proposing amendments'. Furthermore, Congress has authority to supervise the administration, a function which, incidentally, is not explicitly granted by the Constitution, but can be implied from the impeachment authority, senatorial power and the need to investigate the implementation of legislation. Congress also has the responsibility in the judicial sphere as, for example, the approval or otherwise of judicial appointments and the establishment of Federal Courts (other than the Federal Supreme Court).

A vital role in the 'checks and balances' of the Legislature on the Executive is played by the Committees of Congress. They play such a significant role that a further illustration of their structure, especially since they are so different from the Committee structure in our Parliamentary system, is, in my opinion, vital to understand Executive-Legislative relations.

The Committee stage in a Parliamentary system of the Westminster model does not play such a vital role in the legislative process for the simple reason that the political parties are strong and unified and exercise a considerable whip-hand in Parliament. Thus, the Standing Committees are large; they lack a continuing jurisdiction over specific substantive areas and furthermore, have a fluctuating membership. This weakness is reflected by the fact that the Committees are not sources of power but vehicles for detailed work.

By contrast, the Congressional Committees are not so strongly dominated by party considerations. In fact, it has been suggested that the Committee structure is one of the reasons why the parties in the United States are not so powerful as one would think them to be. The Congressional Committee is a strong, proud and independent unit; the senior members of Committees have often served 20 years or more, long enough, that is, to have become experts in the field. They are capable, therefore, of tackling the increasing complexities of modern legislation and of holding their own in any encounter with officials of the Executive Departments. The Committees are very touchy on their jurisdictional prerogatives. The power of the Congressional Committee mainly lies in the fact that it has the faculty of determining what Bills will be reported out and which will be delayed or even 'buried' in obscurity; furthermore, Congressional rules and traditions offer only the narrowest of opportunities for a Congressional majority to 'disinter' a Bill that

has been buried in Committee.

As already pointed out above, party allegiances are very often put aside and party lines are often crossed, for the legislator may have to lobby for important state interests which may not be convergent with his leader's position. Another factor which contributes to the power of the Committees is the so-called minority system through which the powerful post of the Committee Chairman is elected. This system frequently promotes to the chairmanship a man who is out of step with the opinion of his party with respect to the issues under his jurisdiction, yet the seniority tradition protects him from the loss of his post, however heretical his views may be. However, there is a strong drive, especially among young democrats, to change the seniority system.

It is amazing how much the American legislative process and the relations between the Executive and the Legislature depend on the Committee Chairman: his position is a very powerful one. He has the sole power to call meetings in some Committees and, in all of them, he can call, or refuse to call, additional meetings beyond those scheduled, and can determine the schedule of hearings. This powerful gentleman with, at least, the tacit connivance of some members, can prevent another member from gaining a vote on a Bill; but his strongest advantage on the Committee lies in the fact that he is a very experienced person who has more information and understanding about the measures coming before the Committee than anyone else. This advantage is not only pressed home against his Committee members, but also in dealing with administrative officials; his knowledge and experience force administrative officials to respect his views. A disadvantage in this structure arises when the post of Chairman is occupied by a weak legislator and this is, indeed, no small eventuality owing to the above mentioned seniority system, for this could create a dangerous power vacuum, with no member able to lead the Committee, for he would lack the prerogative of the Chairman.

It is of vital importance to understand the way Committees function, because they are of great importance in the Executive-Legislative relations which are being analysed in the light of their respective 'checks and balances'. Thus, one of the most substantial and detailed legislative supervisions of Executive agencies is the area of fiscal control, the central processes of which are the authorisation for the expenditure of funds, the appropriation of funds and the audit or review of their actual expenditure. At the Congressional level, the primary units for fiscal supervision are the Appropriation Committees.

Another device used by Congress to check the Executive is the so-called Committee investigations which have come into the limelight since the Second World War, especially after the so-called Army-McCarthy Hearings in 1954. Most of the investigations have a distinctive and legitimate legislative purpose; however, some Congressional investigations provide a means by which the Committees can supervise Executive agencies, examining their implementation of delegated power in particular circumstances. Unfortunately, this 'check' on the Executive sometimes acquires a partisan flavour, especially when elections are approaching, particularly when Congress is controlled by the opposite party, but these enquiries are, on the whole, very positive. Their value has been demonstrated during the Watergate Scandal and its aftermath. First of all, we have the Senate Watergate Committee chaired by Senator Erwin, that played a prominant part in the investigations; then, we had the judiciary Committee voting that proceedings be commenced against President Nixon in the House of Representatives, and even more recently, we have a Committee investigating C.I.A. activities, an enquiry surrounded by controversy. It can be easily seen that this is a major weapon in the system of the 'checks and balances' in the United States system.

Perhaps the most direct and visible control over Administrative organisation and procedure has been the so-called 'legislative veto'. A case that could be cited in the field of executive re-organisation, is the 1932 Re-organisation law, in which Congress required that a President's re-organisation plans be submitted to Congress 60 days before going into effect, subject to disapproval by either House.

Another important method of control is the legislature's approval of appointment. The United State's Senate gives its advice and consent to thousands of appointments, most of them routine. The Senators' interest in the average appointment is limited to preserving their control over patronage through the technique of 'senatorial courtesy'. Occasionally, with respect to more important appointments, senators question the competence or suitability of a nominee or point out possible conflicts of interest resulting from his appointment.

The ultimate and most important 'check' of the Legislature over the Executive is its constitutional power to impeach the Chief Executive, the President, should he over-reach his constitutional powers or in the case of misconduct.

As already mentioned above, one of the most important 'checks' which the Legislature has over the Executive is that Congress

controls the finances so badly needed by the Executive. This does not only help Congress to keep an eye on the executive, but it enables it also to share in the country's policy making and, at this particular historical moment, this weapon could prove to be the decisive one in the Legislature's comeback. One of the most glaring examples is the recent Trade Reform Act, where Congress, mainly through the amendments proposed by Senator Jackson, amended the Soviet-American Trade Agreement to such an extent that the deal had to be called off, for it proved unacceptable to the Soviet Union. Congress again 'checked' the Presidential foreign policy by refusing him the necessary funds to supply Turkey with arms.

It seems clear that the United States is facing a constitutional crisis, as, prior to Watergate and Vietnam, the United States President was the chief policy maker; but the consequent loss of confidence in the White House, following Vietnam but particularly Watergate, has encouraged Congress (especially after the two-thirds majority obtained by the Democrats recently) to regain the previously lost ground, and the so-called 'Imperial Presidency' is definitely no longer applicable, at any rate, for the time being.

Yet the situation, constitutionally speaking, is awkward. Senator Javits reflected the situation admirably when he said that 'we have half the authority and now we are called on to have half the responsibility', but the Senator expressed his doubts whether Congress would live up to this responsibility, as it is not really built to lead and take policy initiative in foreign affairs. It can investigate, it can use its financial power and it can restrain the Presidency from over-reaching itself, but it is top-heavy for policy making. The point is proved by the fact that there are five Congressional Committees which influence foreign policy, one of the spheres most hotly contested between the Executive and the Legislature.

Having analysed the ways in which the doctrine of the 'separation of powers' and of the 'check and balances' operate between the Executive and the Legislature, it is now appropriate to see how the Judiciary fits into the picture. Some of the 'Founding Fathers' felt that a strong Legislature would call for the combined powers of the executive and of the judiciary to control it. Fortunately, this proposal was not accepted as the Presidency would always have at its disposal the 'power of veto' and it was felt that the Judiciary had to be independent in order to fulfill its function properly.

In fact, in comparison with the Executive and the Legislature, the Federal Judiciary is considerably free from any 'checks' which would endanger its independence; the few 'checks' to which the Federal Judiciary is subject are: the Judges are nominated by the

President whilst they are subject to approval by Congress, which has also the responsibility of establishing Federal Courts, except the supreme Court. The latter Court, however, is not empowered by the American Constitution with any powerful 'checks' which it could utilise over the other two organs: in other words, it is not empowered by the Constitution to declare legislative acts or executive measures as unconstitutional in the way that, say, the Maltese Constitutional Court is.

The Supreme Court took its function as guardian and interpreter of the Constitution on its own initiative, as a consequence of the celebrated case 'Marbury vs. Madison'. Nor does the Constitution authorise the Supreme Court to negative acts of the state legislature, a power which it acquired through the Federal Judiciary Act of 1789. In 1914 the Appellate Jurisdiction of the Supreme Court was enlarged to permit it to pass on state acts which state Courts had condemned as against the Federal Constitution.

Thus, the Supreme Court, through its many Constitutional decisions, in practice, has proved to be a guarantee of American democracy through its power to review and interpret it and not through constitutional 'checks' on the Executive and on the Legislative organs. The Court takes special care to enforce the Civil Rights provisions which were incorporated in the Constitution in the form of amendment.

Let us now consider a few cases which illustrate the Supreme Court's function as a democratic 'check'.

The decisions of the Supreme Court can have a very important effect even in the structure of the two organs. One such case concerns the question of 'malapportionment'. On March 26, 1962, the Court delivered a controversial decision of far-reaching implication in a Tennessee case (Baker v. Carr) involving appointment of the state legislature. Its background was the malapportionment of state legislatures, ensuing in a general inflated over-representation of rural and small town voters at the expense of large cities and their suburbs. The implication of this fact is of considerable importance, in view of the fact that the unrepresentative state legislatures have the responsibility for apportioning Congressional districts in their state, with the consequence that this rural dominance is reflected in Congress also. The results of this malapportionment speak for themselves: before 'Baker v. Carr', in 27 states there had been no redistricting for at least 25 years. It was estimated that in 24 states a majority in the state legislature could elected by less than 40 per cent of the population; in other states, the percentage was considerably less.

Hence, in 'Baker v. Carr' a number of Tenneessee voters lodged a complaint against the denial of the guarantee of the Fourteenth Amendment to 'equal protection of the law'. Now, the Court's decision set at rest a single question: that the right to equal protection under apportionment laws is within the reach of judicial protection under the Fourteenth Amendment. The Court, however, did not enter into the complicated electoral details of the matter, or into which factors could warrant exception to it or whether this standard should apply to both Houses of Legislature.

The first clear indication of the Supreme Court's approach towards apportionment standards came in March 1963 when it invalidated the Georgia County Unit system used in Primary Elections. Justice Douglas said: 'The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg address to the Fifteenth, Seventeenth and Nineteenth Amendment can mean only one thing: One man, one vote'. The Court thus, started to eliminate apportionment which gave too little consideration to population.

Another important function of the Court is the protection of minorities and to see that their constitutional rights are duly safeguarded; this is, especially so, in the case of black discrimination, which, especially in the South, is so very difficult to eradicate. An important constitutional decision was reached in the case of Brown v. Board of Education of Topeka (1954). The Supreme Court ruled in this case that segregation is discriminatory. The Court reasoned 'does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factor may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.' The Court further found that the 'policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.' The Court also declared that 'separate educational facilities are inherently unequal' and the negro children were held to be deprived thereby 'of the equal protection of the laws guaranteed by the Fourteenth Amendment.'

As the Mitchells say in their book 'A Biography of the Constitution of the United States': 'the Supreme Court ban on segregation in public schools marked the beginning of a new phase in the progress of American democracy: the legal removal of racial barriers in many other areas of our society.'

The Supreme Court does not hesitate to declare executive measures to be unconstitutional whatever their political importance.

One of the best cases to prove this is that of 'Schechter v. United States' (1935). The period was that of the 'Great Depression', where the United States, still in the depth of the depression, elected Franklin D. Rossevelt to lead the country in the task of the great economic recovery. Roosevelt immediately showed that he intended taking the bull by the horns: he started, through determined legislative and executive actions, to issue a stream of laws and orders from the White House with the intention of setting the economic recovery on its way. Amongst the measures taken was the National Industrial Recovery Act which went against the economic policy of the day by allowing businessmen to associate together; the Act also provided that competition should be dampened by punishing so-called 'price cutters', 'wage-cutters' and anyone giving special service and privileges to favoured customers. The Code eventually became law following approval by Roosevelt and everybody in the governed group was bound to conform with it or be subject to be fined for breach thereof.

In 'Schechter v. United States' Schechter was accused by the Code authority of infringing the Code. When the case reached the Supreme Court, two points were considered, namely, whether the activities of the live poultry industry of New York City, which was subject to the Code, was involved in inter-state commerce, for, if it were, it would fall under the jurisdiction of Congress; the second concerned the delegation of legislative power to the President who, by approving the Code, gave it the force of Law.

The Court's decision in both cases went against the United States Government, whilst on the second point the Court declared that Congress had not been sufficiently specific in directing how the power delegated to the president was to be exercised by him. Congress could not give up its legislative role transferring to the President 'an unfettered discretion to make whatever laws he thinks may be needed'. The statute 'instead of prescribing rules of conduct... authorises the making of codes to prescribe them'. The Supreme Court held that the act as it stood was unconstitutional in that Congress in failing to specify the requisite guide lines to an administrative agency, through the President, gave altogether too much liberty. This decision made the National Industrial Recovery Act ineffective, with the result that Roosevelt's measures were weakened. Although he expressed the desire to re-organise the Supreme Court, so as to make it more receptive to his needs, he refrained from doing so.

The Supreme Court, through a series of constitutional decisions, has been a highly responsible protector and interpreter of the

Constitution, always ready to safeguard the Rule of Law and to eliminate arbitrariness so far as it lay in its power. The prestige of the Federal Judiciary was enhanced through its part in dealing with the Watergate Scandal. Always probing for the truth, the Federal Judiciary refused to allow the truth to be concealed under the term 'Executive Privilege' and, hence, ordered President Nixon to hand to the Court the Watergate tapes.

American citizens can, indeed look at the American Constitution with its democratic safeguards as one of the most noteworthy Amecan achievements. The fact that public opinion, Congress and the Federal Courts forced the President to climb down and, eventually, to resign shows that the Constitutional system, with its democratic 'checks and balances' under the protection of an independent judiciary ensuring its safeguards and interpretation, proved its efficacy and reliability at the very moment when disillusion with the political system could not be stronger.

BIBLIOGRAPHY

Malcolm E., Jewell/Samuel C. Patterson: *The Legislative Process in the United States.*

Broadus and Louise Mitchell: *A Biography of the Constitution of the United States.*

Louis W. Koenig: *The Chief Executive.*