

THE FRAMING OF THE 1973 CONSTITUTION IN HISTORICAL PERSPECTIVE*

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If man were immortal, he would view events from the vantage point of eternity; but being only mortal he employs another yardstick and asks: "What would these mean in history?" The stream of events which began in the past forms part of the currents of the present as they flow into the future. "History", according to Cardozo, "in illuminating the past, illuminates the present and in illuminating the present, illuminates the future."¹

On November 29, 1972, the Constitutional Convention, which began its work on the first day of June the year before, approved on third reading the draft of a new constitution. The drafting of this constitution never ran smoothly. The conditions of the times, the events that took place during the eighteen-month period of the deliberations, the interaction of 312 delegates among themselves and with a turbulent, impatient and demanding society—all these and more influenced the work of that Convention.

But when the history of this Constitution is written, it will not begin with the inaugural session on June 1, 1971 nor end with the closing ceremonies on November 30, 1972. It will reach back to Filipino struggles for freedom and national identity and attempt to pierce the veil that conceals the future. It would be presumptuous for me at this stage even to attempt to give that history. In the first place, it is premature since the whole record is not in; the time, too soon. In the second place, though lawyers dabble in history as they inquire into the facts of every case, I cannot produce the credentials of a historian. This afternoon I propose to dwell on what, to my mind, to a historian evaluating the 1973 Constitution when the time is ripe and the records are complete, considering the chronology of events, the roster of men and women, and the conditions accompanying the framing of the Constitution, were the factors which influenced the adoption of its more important features. At the outset, let me sound a caveat that what today I may point out as highlights may to the historian be no more than footnotes in that history.

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

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¹ NATURE OF THE JUDICIAL PROCESS 53 (1921).

For constitution-making is not done in a vacuum. Those who draw up the instrument are products of the society they represent, they act and react to the events occurring and conditions existing at the time of their deliberations. While seeking solutions to the problems and evils of the present, they draw up a document which is intended primarily for the future. The framers of the Constitution are expected to avoid the mistakes of the past, answer the needs of the present and anticipate those of the future—difficult tasks rendered even more so when done in a period of crisis.

But not a few constitutions were written by a people at war. Our own Constitution of Biak-na-Bato, the Makabulos Constitution and the Malolos Constitution were of this category.

In tracing the development of constitutionalism in this country, it is the Malolos Constitution which is taken as a starting point. General Aguinaldo, aiming for support of the country's leaders, had called a Congress at Barasoain. Against the advice of Mabini, he invited the delegates assembled to write with their votes the immortal book of the Filipino constitution as the supreme expression of the national will.² Mabini thought the time was not auspicious. He cautioned that it would be better to wait until the war was over and the people were in "sufficiently calm mood," but other revolutionary leaders in 1898 thought differently. Aguinaldo's address at the inaugural session of the Congress on September 15, 1898 included an invitation for the assembly to draft a constitution for the first Republic in Asia.

Finally adopted on November 28, 1898, the Malolos Constitution was not proclaimed by Aguinaldo until January 21, 1899. Two weeks later, the Philippine-American war began. The Malolos Constitution was short-lived—no more than eighty days separated Aguinaldo's proclamation and the Treaty of Paris of April 11, 1899 when Spain ceded the Philippines to the United States. But this Constitution became a source of inspiration and ideas for constitution-makers in 1934 and 1971.

One of the more important features of that Constitution was the establishment of a parliamentary type of government. Supremacy was lodged in the Assembly which elected the President, and the Secretaries of the government were responsible to it. A permanent Commission sat when the Assembly was not in session.

The 1935 Convention toyed with the idea of creating a similar commission to act for the National Assembly. Although this did not

² "... escribir con estos votos el libro inmortal de la constitución Filipina como Suprema expresión de la voluntad nacional." CALDERON, MIS MEMORIAS SOBRE LA REVOLUCION FILIPINA, Apendice (1), 4 (1907).

push through the creation of constitutional agencies within the legislature, like the Commission on Appointments and the Electoral Tribunals, must have been more easily accepted by the 1935 Convention because of the previous experiment in the Malolos Constitution.

When in 1971 the Constitutional Convention began its deliberations, the system of government adopted in the Malolos Constitution was re-examined. One of the arguments advanced for adopting a parliamentary system was that if the United States had not acquired the Philippines and the First Philippine Republic had survived, the government under the Malolos Constitution would have been parliamentary in form.

The Malolos Constitution is treasured more for its symbolic value than for its positive contribution to the development of constitutionalism in this country. Since it was never actually tried and tested, we can only conjecture how well it would have worked.

Neither the provisional Constitution of Biak-na-Bato nor the Malolos Constitution was the product of Filipino originality in constitution-making. The first was a copy of one constitution; the other was taken from several constitutions.

The 1935 Constitution was drawn up pursuant to an enabling act of the United States Congress. The drafting of that Constitution was subject to conditions imposed by the Tydings-McDuffie Law.³ The constitution had to be republican; prescribed provisions had to be incorporated in it; and it could only go into effect if the President of the United States certified that it conformed to the conditions imposed by the enabling act. There is no denying these historical facts and that at the time it was drawn the Philippines was a colony of the United States. But the decision to make the constitution for the 10-year transition period required by the Tydings-McDuffie Law also the constitution of the future independent Republic was one made by the 1934 Convention itself.

At the beginning of its deliberations, Delegate Camilo Osias presented a resolution proposing that the constitution to be drafted should be not only for the transition period but for the independent Philippine Republic as well. Debates on the proposal lasted more than a month, and the issue never came to a vote for the Convention shelved it. However, every committee assigned to draft the various parts of the constitution and the Convention itself assumed that the constitution they were drafting was to be for both the Commonwealth and the Republic.

³ The Philippine Independence Act, 48 Stat. 459 (1934).

The agitation for a rewriting of the 1935 Constitution started in the early 1950's and began to produce results in March 1967 when Congress, sitting as a constituent assembly, adopted three resolutions: two proposed amendments directly, the third called a convention.

The members of Congress wanted to make sure that they could sit as delegates in that convention. Since there were doubts as to whether they could be members *ex-officio* because of the constitutional provision against their holding any other office or employment in the government without forfeiting their seats, they proposed an amendment lifting the prohibition. This, together with the proposal to increase the number of seats in the House of Representatives was submitted to the people for ratification in the 1967 elections. The holding of a plebiscite to coincide with a general election was vigorously opposed. The Supreme Court was asked not only to enjoin the plebiscite but also to pass upon the legitimacy of the very Congress that proposed the amendments. The Supreme Court voted 6:4 to declare the statute calling the plebiscite unconstitutional, but the move to stop the plebiscite failed for want of the necessary two-thirds vote.⁴ But the people themselves decided the question more effectively by rejecting the two proposals.

Congress, by adopting the three R. B. H.'s in March 1967, employed two methods for introducing amendments to the constitution: the first by proposing amendments directly, and the second by calling a convention for the purpose.⁵

The question of which of these methods was preferable had been the subject of much discussion. Three previous amendments had been initiated by the legislature sitting as a constituent assembly. The call for a constitutional convention in 1971 was to be the first under the 1935 Constitution. Before the convention could meet, there were problems to be resolved regarding the apportionment and election of delegates, funds for the convention, etc.

The three resolutions of March 1967 were closely interrelated. Hence, the repudiation of the proposal increasing the membership in the House of Representatives from 120 to 180 and immediately apportioning 160 seats,⁶ affected the composition of the convention to be elected in November, 1970. Under R. B. H. No. 2 each congressional district would have been represented by 2 delegates. Had the proposal been ratified, the convention would then have had 320 members, but with its

⁴ *Gonzales v. Commission on Elections*, G.R. Nos. 28196 & 28224, November 29, 1967, 21 SCRA 774 (1967).

⁵ CONST. art. XV (1935).

⁶ In the plebiscite conducted on November 14, 1967, there were 3,299,485 votes against it as embodied in R.B.H. No. 4 adopted on March 1, 1968.

disapproval, the basis for representation reverted to the existing 110 congressional districts, thus carrying on to the convention the malrepresentation which for years had plagued the House of Representatives. Congress had not adopted a re-apportionment scheme after the Supreme Court struck down its attempt at re-apportionment in the *Macias v. Commission on Elections* case.⁷ The under-representation resulting from this is best shown by the fact that as of the 1970 census, Rizal with a population of 2.8 million had only 2 representative districts, while Cebu with 1.6 million had 7 and Albay with 673,354 inhabitants had 3. If R. B. H. No. 2 had been left as it was, each district would have elected 2 delegates, but representation on the basis of population would have been impossible.

In the meantime, public interest in the constitutional convention mounted. At the opening of the annual session of Congress in January, 1970, students, laborers, and other groups, reported by the dailies to number some 100,000 gathered before the legislature, demanding a non-partisan constitutional convention. Violence broke out, 4 students were killed, and many others were injured. From then on student activism escalated and demonstrations, marches, boycotts and other activities usually accompanied by violence became more frequent—not only before Congress, in Plaza Miranda, at Malacañang and Mendiola, and at the university belt, but also throughout the country, giving voice to the growing disaffection and discontent in Philippine society and a sense of urgency to the convention. As student activism intensified, and unrest in the country spread, many looked to the constitutional convention as one last chance at reform through lawful means. Others, however, considered it an exercise in futility.

It was in the context of this milieu that the Senate and House of Representatives once more met in joint session and by the required 3/4 vote amended R. B. H. No. 2 through R. B. H. No. 4 adopted on June 17, 1969. This fixed the number of delegates at 320 to be apportioned among the existing representative districts according to the number of their inhabitants, and provided that each representative district would have at least two delegates. Other details relating to the specific apportionment of delegates, their election, and the holding of the Constitutional Convention were to be embodied in an implementing legislation.

The adoption of legislation to implement this resolution became the focus of widespread public concern. Civic, religious, and other groups joined student activists and labor in demanding a non-partisan constitutional convention. The chairman of the Committee on Codes and Con-

⁷ G.R. No. 18684, September 14, 1961, 58 O.G. 8988 (Dec., 1962).

stitutional Amendments reported Senate Bill No. 77 on May 1, 1970; it was sponsored on second reading on May 6 by Senator Pelaez. Discussion of every provision went on for some 15 days from May to July,⁸ until it was approved on second reading in the early morning of July 25, 1970.⁹

The most controversial provisions were on apportionment, the prohibition against intervention of all groups, whether political, civic, religious, educational, etc. and the provisions for funding. Constitutional questions involving the freedom of association, the extent of the powers of a constituent assembly particularly as to appropriation of public funds, the membership in the convention and the question of what matters are essential to a call for a constitutional convention and cannot be considered details for implementing legislation came up. Some of these were subsequently raised before the Supreme Court in *Gonzales v. Commission on Elections*,¹⁰ *Mutuc v. Commission on Elections*,¹¹ *Badoy, Jr. v. Commission on Elections*,¹² *Del Rosario v. Commission on Elections*¹³ and *In re Subido*.¹⁴ The act when finally approved on August 24, 1970 contained detailed provisions insulating the election of delegates from the intervention not only of political parties but also of all manner of aggragation which would have enabled persons with organizational backing to have an edge over others who had none. It was hoped by this means to ensure a truly representative convention, whose members would be free from commitments to vested interests. Campaign expenses, gimmicks and other activities were strictly regulated. The election registration board, board of inspectors and board of canvassers were reconstituted so as to exclude the participation of political parties.

The Supreme Court upheld the constitutionality of the challenged provisions of the Act. A six-month period intervened between the election of delegates in November and the date fixed by R.B.H. No. 2 for the inauguration of the convention. There were proposals for advancing the opening date—earlier it had been proposed by Senator Tolentino that the convention itself be postponed to 1974. This was vigorously opposed. The delegates-elect organized pre-convention meetings to take up such matters as the site of the convention, its organization, rules and a possible agreement as to its officers.

⁸ May 6-8, 11, 13 & 14; June 23 & 25; July 16-17, 21-25, 1970.

⁹ The session adjourned at 1:46 a.m.

¹⁰ G.R. Nos. 32443 & 32432, September 11, 1970.

¹¹ G.R. No. 32717, November 26, 1970.

¹² G.R. Nos. 32546 & 32551, October 17, 1970.

¹³ G.R. No. 32476, October 20, 1970.

¹⁴ G.R. Nos. 32436 & 32439, September 9, 1970.

The Inaugural —

Even before it started, the Convention became embroiled in factional strife. The preparation of the inaugural program sparked a controversy: should the president be invited or not? Both the Senate President and the Speaker of the House were to officiate in the opening session. To those who wanted the Convention to begin as it meant to operate, *i.e.*, free of any interference from the Executive, this matter assumed importance.

Aguinaldo had formally opened the Convention that met in Barasoain, but that was a revolutionary congress and he had called it to help him carry on the struggle. In 1935, the Governor General had been invited to the inaugural rites but declined to attend. Quezon who was President of the Senate and the recognized Filipino leader accepted the invitation and addressed the session.

In 1971, the decision was not easily made. First, the delegates invited President Marcos to attend but not to address the body. The President declined the invitation. The invitation was renewed after more discussion and a vote taken. The result—117 to 101 on the proposal to ask the President to give the keynote address. A few delegates boycotted the session and about 15 of them walked out before the President's speech.

Convention Presidency —

Unlike the 1935 Convention which by opening day had come to an agreement as to its organization and elected its permanent officers on the first day, the 1971 Convention could not agree until the eve of its inauguration on who would be temporary chairman. Five contenders came out for the top post and began to campaign for it long before inauguration day. The delegates whose election had been carefully safeguarded from partisan political interference were soon plunged into the sort of maneuvering and dealing that was familiar to old hands at politics. Two former presidents of the Republic vied for the position, both eventually won it. On June 11, President Carlos P. Garcia was elected president of the Convention but he had hardly assumed this position when he died on June 14th; another election was held; this time President Diosdado Macapagal was chosen. Unlike the position of Claro M. Recto in the 1934-1935 Convention, that of presiding officer in the 1971 Convention enjoyed powers which had been whittled down. As President Macapagal was to say later on, he could not even on his own authority order paper clips. The Convention had decided on "diffused leadership." Committees were organized—59 in all, 51 of them organic—and the presiding officer had no power to appoint the chairman;

each committee elected its own. He had no say on the agenda. His rulings could be reviewed, and before long some members displeased with his rulings voiced threats on the floor to declare the presiding officer's position vacant.

The Language Issue —

Matters came to a head on the language question which had aroused controversy even before the opening of the Convention with the printing of identification cards. Some delegates objected to the use of Pilipino — a compromise was reached by using both English and Pilipino. But the controversy was to recur with greater intensity when the question of what language was to be used in writing the new constitution came on the floor of the Convention. It will be recalled that the Makabulos Constitution was written in Tagalog, the Malolos Constitution in Spanish, and the 1935 Constitution in English and Spanish with the English text prevailing in case of conflict. The 1973 Convention was locked in long and impassioned debates on the language issue, with regional groups ranged against the proponents of Tagalog or Pilipino. The Convention became a veritable Tower of Babel. At one session there were interpellations in Visayan, Ilocano and Muslim. A resolution introduced by Delegate Quirino to adopt English as the official language was discussed in plenary session. Amendments were proposed: Spanish was accepted but not Pilipino. The presiding officer at one point ruled that English be used in the debates, so that the delegates could understand each other.¹⁵ The language question was placed on the agenda on August 16 — more than a month later it was still being discussed. This controversy precipitated President Macapagal's resignation (which he was prevailed upon to reconsider) after a particularly heated exchange on the floor on September 17. The provision as finally approved reads: "This Constitution shall be officially promulgated in English and in Pilipino, and translated into each dialect spoken by over fifty thousand people, and into Spanish and Arabic. In case of conflict, the English text shall prevail." While English and Pilipino are made official languages, provision is made for the development and total adoption of a common national language to be known as Filipino.

Working Basis —

The Constitution of Biak-na-Bato was lifted from the Constitution of Jimaguayu, Cuba and "passed off as the brainwork" of Felix Ferrer and Isabelo Artacho. At the Malolos Congress, constitutional plans were

¹⁵ Later he modified his ruling to allow discussion in Pilipino where it would be proper.

prepared by Paterno, Mabini and Calderon. Through astute maneuvering, the Calderon plan was adopted with some modification. It drew from the Constitutions of Belgium, Mexico, Guatemala, Costa Rica, Brazil and France. The 1935 Constitution was largely patterned after the United States Federal Constitution but used other sources including the Malolos Constitution, the Mexican Constitution, and the German Constitution under the Weimar Republic. Filipino constitution-making has not been characterized by originality.

The 1971 Convention was not concerned with originality either. The delegates were prepared to draw from outside sources and from varied ideologies. But they were not prepared to accept the 1935 Constitution as working basis. Some delegates urged that the Convention should start from scratch; others pointed out that the Convention was called to "propose amendments to the constitution", which raised the question of whether it meant that the Convention had no power to revise the Constitution. Different opinions were aired. One was that the Convention had power to "overhaul" the 1935 Constitution. Some went so far as to leave out from their oath of office, the duty to obey and defend that Constitution. The delegates were, however, reminded that unlike the Congress at Malolos, they were not a revolutionary convention which could start from a blank page. Their power was to propose amendments and until the proposals were ratified, they would have no effect whatsoever. The 1935 Constitution and all its restrictions applied to the Convention without, however, detracting from its power to introduce changes, no matter how radical, from the preamble to the very last section — provided the proposals were ratified.

Habeas Corpus —

The organization of the Convention through the election of its officers, the creation of organic committees, the adoption of rules and other preliminary matters engaged the attention of the body for the first two months.

While this was taking place, another general election was in the offing. The state of public disorder and lawlessness steadily worsened and rose to a dramatic pitch on the evening of August 21, 1971 in what history will refer to as the Plaza Miranda incident. The President's response to the crisis was Proclamation No. 889 suspending the privilege of the writ of *habeas corpus*.¹⁶ This action was challenged in the Supreme Court.¹⁷ While upholding the suspension, the Supreme Court also as-

¹⁶ 67 O.G. 6864 (Aug., 1971).

¹⁷ *Lansang v. Garcia*, G.R. Nos. 33964-5, 33973, 33982, 34004, 34013, 34039, 34265, & 34339, December 11, 1971.

serted its power to inquire into the existence of the cause on which the suspension was based. Constitutional issues of great significance were thus developing even as the Convention went about its work.

Voting Age —

The lowering of the voting age from 21 to 18 was on the platform of numerous aspirants for the Constitutional Convention. It had also been sponsored in Congress. Considering the upsurge of student power, it would have been most unusual if this proposal had not come up.

After three months of session, the Convention had yet to come up with concrete results in its protracted and often stormy debates. In the meantime the general election of November 8, 1971 was drawing near. It was at this stage that the Convention came to grips with the proposal to lower the voting age to 18 — and not before disgusted students created an uproar by entering the session floor demanding action. On September 27, 1971 the Convention approved 18 as the voting age, voted ₱75,000 from the Convention's unexpended funds for the printing of the ballots and set the machinery going for the submission of the proposed amendment to the people for ratification at the November 8th election. Some delegates went further, each pledging ₱250 of what was coming to him from the Convention, to help defray expenses of the plebiscite.

This move was frustrated. The Supreme Court in the case of *Tolentino v. Commission on Elections* held that the piece-meal submission of proposed amendments violated the Constitution.¹⁸ This case presaged the thorny constitutional issues that were yet to come in the course of the drafting of the 1973 Constitution.

Form of Government —

When the decision to call a constitutional convention had been reached, various groups, among them the U.P. Law Center, began studies on constitutional revisions. The results of these studies were published in a hefty volume, each delegate having been furnished a copy, and were serialized in the metropolitan papers and given wide circulation.

The form of government under the new Constitution was considered an issue of top priority, since it would affect a substantial part of the Constitution. At the start a majority of the delegates were for retaining the system of government under the 1935 Constitution and only a few advocated the parliamentary system. The Committee on the Executive first reported out its proposal in favor of the presidential system with

¹⁸ G.R. No. 34150, October 16, 1971; motion for reconsideration denied, November 4, 1971.

certain amendments in October 1971. But in February 1972 the same Committee approved the parliamentary system.

It was in the course of the debates over the form of government that the Convention almost closed shop. This was brought about by the Quintero exposé in May, 1972 over an alleged dole which delegates were said to have been regularly receiving from sources interested in certain proposals in the Convention.¹⁹

The issues before the Convention had become more complex. With the Quintero case a heavy cloud hung over it and by June 12, 1972, the deadline originally set for completion of its work, there were grave doubts as to whether the Convention would be able to accomplish its assigned task.

Funding Problems —

To add to the Convention's travails, the problem of funding was ever present. R.H.B. No. 2 as originally adopted had provided that the office of delegate shall be "honorary" and that delegates who do not receive any salary from the government shall be entitled to a *per diem* of ₱50 for every day of attendance in the Convention or its committees and necessary travelling expenses (to and from their residence for attending sessions of the Convention or of its committees). The Convention Act of 1971 had increased the *per diem* to ₱100. One of the first acts of the Convention was to provide for technical and secretarial assistance of up to ₱2,000 per month per delegate. Not all delegates, however, availed themselves of this privilege.²⁰ By the first week of the Convention, it was estimated that its expenses were ₱60,000 per day or ₱7,000 an hour or ₱101.70 per minute. A month later, the Manila Daily Bulletin reported that at the rate the Convention was spending,²¹ the original ₱12 million appropriated for it would be exhausted by November, 1971 and an additional ₱5 million would enable it to work only up to January or February, 1972.

It did not help the Convention much when comparisons were drawn between it and the 1935 Convention which began its work in July, had a completed draft by October, and had signed it on February 8, 1935 on a ₱500,000 appropriation, borrowed personnel, and a ₱5.00 *per diem* per delegate.²²

¹⁹ The Convention created a Committee to investigate and while this was pending, the NBI (on a warrant issued by Judge Elias Asuncion) raided the residence of Delegate Quintero in Sta. Ana and seized currency amounting to ₱379,320 found in an unlocked drawer. (Manila Times, June 1, 1972).

²⁰ See Philippines Herald, August 15, 1971 where Delegate Anacleto D. Badoy gave 6 reasons for renouncing the allowance.

²¹ ₱2.4 million a month.

²² Act No. 4125, approved May 26, 1934.

Even before the opening day of the 1971 Convention, delegates-elect had asked President Marcos to certify two appropriation measures²³ for an additional ₱12 million for expenses and ₱15 million for the plebiscite.²⁴

The Convention had chosen to meet at the Manila Hotel at a monthly rental of ₱165,000. To save on this expense, the Convention transferred to the Quezon City Hall.

The Convention at Work. —

Because too much time was being taken up in speeches at the plenary session and to enable the various committees to get their work done, the Convention decided to limit its plenary sessions and the committees set about their work, conducting hearings and considering various proposals.

By June, 1972, it was possible to put together the proposals taken up in the organic committees, some of them approved by the committees on second reading and reported to the Convention, others still awaiting committee action. The Convention was far from completing its task but had made enough progress. However, the Quintero exposé and the inquiries it put in motion set back the Convention's work considerably.

Other events took place. The floods came in July of 1972, and on September 21, 1972 martial law was declared. Having rejected a motion to adjourn until the lifting of martial law, the Convention went ahead at a speed that had not been there during the previous 15 months. It approved first the transitory provisions, then the rest of the constitution and by November 29, 1972 the task of framing the 1973 Constitution had been done.

But the drafting of amendments and their ratification are parts of one act—that of constitution-making. The Convention had by resolution asked President Marcos to call a plebiscite which he did by Presidential Decree No. 73 on December 1, 1972.²⁵ The plebiscite was scheduled for January 15, 1973.

²³ H.B. No. 2823 and H.B. No. 2620.

²⁴ Constitutional Convention Acts: Rep. Act No. 6132, approved August 4, 1970, amended by Rep. Act No. 6176, approved May 27, 1971 — seventeen million pesos for election of delegates and twelve million for expenses of Convention; Rep. Act No. 6537, approved August 8, 1972 — thirteen million five hundred thousand pesos; Pres. Decree No. 14, October 5, 1972 — four million two hundred thousand pesos.

Appropriations for 1971 Con-Con:

₱12,000,000.00 — August 24, 1970

13,500,000.00 — August 8, 1972

4,200,000.00 — October 5, 1972

₱29,700,000.00 — Total appropriation

²⁵ 68 O.G. 9634 — 57 (Dec. 11, 1973).

The Plebiscite and Ratification Cases —

There followed a determined opposition to the Constitution proposed by the 1971 Constitutional Convention. The holding of the plebiscite was challenged in no less than 10 cases before the Supreme Court. The President's authority to call the plebiscite, appropriate funds for the purpose, and prescribe the conditions for holding it were put in issue. The petitioners also maintained that under a regime of martial law a plebiscite could not be held constitutionally because the people were not free to express their views. While the cases were pending, a presidential order was issued on December 17, 1972 temporarily suspending the effects of martial law, thus permitting a free discussion of the proposals. Then on December 23rd the plebiscite was postponed. In the meantime the barangays were established,²⁶ and on January 10-15 they were asked to vote on a series of questions including the question of whether they approved of the new Constitution and still wanted a plebiscite.

On January 17, 1973, President Marcos by Proclamation 1102 certified that the barangays had overwhelmingly ratified the 1973 Constitution. The plebiscite cases were dismissed as moot and academic.²⁷

Immediately after this, 5 petitions (often referred to as the *Javellana* case and collectively as the ratification cases) were presented challenging the validity of Proclamation No. 1102.²⁸ The petitions sought principally to restrain the Executive Secretary, the Secretary of National Defense, the Secretary of Justice, other executive officials and their subordinates from implementing the 1973 Constitution. After 5 days of continuous hearings and deliberation the Supreme Court, by a 6 to 4 vote, dismissed the petitions.

As in the plebiscite cases, each Justice wrote an opinion explaining his vote. Some reserved the right to expand their opinions further so that even after the Supreme Court resolution dismissing the petitions had become final on April 18, 1973, additional opinions were filed, the last being on June 4, 1973. An analysis in depth of the numerous points discussed in the separate opinions in the *Javellana v. Executive Secretary* case would fill volumes. The Justices expounded on constitutions, con-

²⁶ Pres. Decree No. 86, dated December 31, 1972. (86-A & 86-B amendments were introduced).

²⁷ *Planas v. Comelec*, G.R. No. 35925; *Sanidad v. Comelec*, G.R. No. 35929; *Roxas v. Comelec*, G.R. No. 35941; *Ordoñez v. National Treasurer*, G.R. No. 35942; *Tan v. Comelec*, G.R. No. 35948; *Diokno v. Comelec*, G.R. No. 35953; *Jimenez v. Comelec*, G.R. No. 35961; *Gonzales v. Comelec*, G.R. No. 35965; *Hidalgo v. Comelec*, G.R. No. 35979, January 22, 1973.

²⁸ *Javellana v. Executive Secretary*, G.R. No. 36142; *Tan v. Executive Secretary*, G.R. No. 36164; *Roxas v. Melchor*, G.R. No. 36165; *Monteclaro v. Executive Secretary*, G.R. No. 36236; *Dilag v. Executive Secretary*, G.R. No. 36283, March 31, 1973.

stitutional amendments, plebiscites, popular acquiescence, judicial review, political questions, martial law, etc. The opinions offer a fascinating subject for the legal scholar. But one day the historian may sort out the threads and possibly come up with, to borrow from Justice Holmes, a page of history which may be worth a volume of logic.

The dispositive portion, particularly the last clause, in Chief Justice Roberto Concepcion's summation of the voting in the Court has time and again been quoted:

"ACCORDINGLY, by virtue of the majority of six (6) votes of Justices Makalintal, Castro, Barredo, Makasiar, Antonio and Esguerra with the four (4) dissenting votes of the Chief Justice and Justices Zaldivar, Fernando and Teehankee, all the aforementioned cases are hereby dismissed. This being the vote of the majority, there is no further judicial obstacle to the new Constitution being considered in force and effect." (Underscoring supplied)

The 1973 Constitution: An Overview —

When the embattled president of the Constitutional Convention stated in September, 1971: "We shall be judged by the constitution we write, and not by the initial difficulties we are having,"²⁹ he spoke only of difficulties encountered at the beginning — these difficulties persisted and increased.

It is not now possible to look at the 1973 Constitution and from its provisions see how the Convention responded to the challenges of the times and prepared for those of the future. Whether the Constitution they drafted provides the answers, only history will tell.

At best any appraisal that can be made of the 1973 Constitution at this early date would be tentative — the instrument is not as yet wholly operative. As a purely academic exercise, salient features of its text can be picked out and discussed. For example:

The 1973 Constitution is in several respects a radical departure from the 1935 Constitution.

The 1935 Constitution, patterned largely after the American federal constitution, stressed individual rights and gave ample protection to private enterprise and property rights while giving the government power to interfere with these protected rights for the promotion of the general welfare. But the implementation of the latter provisions was by and large frustrated because in Philippine society the economically powerful elite also wielded political power. Widespread corruption in government gave the same ruling group control of governmental processes.

²⁹ "Macapagal Assesses CC Work"; Manila Times, September 16, 1971.

The solemn declaration that sovereignty resides in the people and all government authority emanates from them, if not an empty assertion, was no more than the statement of an idea. The electoral process was no model of democracy in action.

The Malolos Constitution was the ultimate act of freedom of a people held in more than 300 years of bondage. The 1935 Constitution was drawn preparatory to the re-establishment of an independent republic. To the 1971 Convention was assigned the task of breaking the chains many links of which had been more recently forged by Filipinos themselves.

As the work of the Convention progressed, it became increasingly clear that a complete re-writing of the 1935 Constitution was necessary.

The 1973 Constitution is not an amended version of the 1935 Constitution. By explicit provision, it supersedes the latter.

The new Constitution is a blue-print for social, economic and political reform. Its provisions are addressed not only to the various arms of government, to public officers, and economic enterprises but also to the individuals themselves — guaranteeing certain rights but also imposing explicit duties.

Structure of Government —

The government is restructured. Because of the radical departure from the presidential system, with which the country had become familiar during almost three quarters of a century, to the untried parliamentary system which will eventually be introduced, the transitory provisions in the 1973 Constitution prescribe steps to be taken for an orderly transition. Again in this area the future historian will one day be able to give enlightenment on the how and the why of the steps taken since the proclamation of the ratification of the Constitution. For the transitory provisions offer a number of alternatives — leaving the decision to the incumbent President under the 1935 Constitution to determine which of the possible governmental structures should be set in operation.

It is said that there were some 2,000 resolutions aimed at curtailing the concentration of powers which the 1935 Constitution placed in the President, and the proposals to create independent constitutional commissions with powers carved out of the Presidency, would, if approved, have brought about a government by commission. An incident of the proposal to limit presidential tenure was the controversial ban-Marcos proposal which drew fire and engaged the Convention in long drawn debates.

As finally adopted, the 1973 Constitution still retains the President — but as symbolic head of state. His powers are nominal, his term limited.

But the real executive is the Prime Minister and his Office is made even more powerful than the President under the 1935 Constitution who was considered one of the most powerful constitutional heads of state. Under the transitory provisions, the position of executive combines the powers of the President under the 1935 Constitution, and of the President and the Prime Minister under the 1973 Constitution. The Convention not only retained the concentration of powers in the executive, but further strengthened it. To what extent this decision was influenced by the conditions of the time which necessitated the exercise of the awesome powers of the presidency, first by the suspension of the privilege of the writ of *habeas corpus*, later with the declaration of martial law, will be for the future historian to disclose.

A discussion of the 1935 Constitution and its provisions on the executive is never made without reference to the influence of Manuel L. Quezon in the drafting of the original Constitution and the 1940 amendments. No history of the 1973 Constitution would be complete if it failed to mention the dominant figure of the times — the incumbent President. Again, only time will fully reveal how the presidency affected the framing of this Constitution and its implementation during the period of transition.

At every step, the framing of the 1973 Constitution had to run the gantlet of constitutional challenge. The statute calling an election of delegates, the submission to a plebiscite (which came before the Supreme Court no less than three times, the third in 10 petitions) and the ratification of the whole Constitution were subjected to acid tests. The controversies were not idle legal exercises or simple acts of litigiousness. They were expressions of deep concern and commitment to constitutionalism. Counsels gave nothing short of their best — for the constitution, against which the exercise of governmental powers must be measured, is the very foundation of our legal system.

When our own historians and those of many lands pass judgment on the framing of the 1973 Constitution they will take into account not only the Convention and the events which accompanied its work, they will evaluate the roles played by the President, the Supreme Court, as well as the rest of Philippine society.

As I mentioned at the start, the record is not complete. I am aware that this lecture is neither a comprehensive nor exhaustive treatment of the subject. It has not been meant to be. It attempts to bring out factors, which I think are of historical significance. It is not meant to be a historical appraisal. Today we went back to 1899 and 1935. If an attempt is made to look into the future it goes no further than to raise the question: "What will the judgment of history be in the year 2100?"