THE 1981 AMENDMENTS: THE PRESIDENCY IN THE WAKE OF A CONSTITUTIONAL MUTATION

RAUL C. PANGALANGAN*

In the Plebiscite of April 7, 1981, the Philippines amended, for a second time, a Constitution that was cursed with troubles even before it was born.

The endless debates and scandals that rocked the 1971 Constitutional Convention,[1] the crises and the law suits that challenged the validity of the Charter's ratification, and the long string of Supreme Court cases that marked each agonizing step of the journey — all these have made of the 1973 Constitution a *constitutionalist's nightmare par excellence.*

With the 1981 Amendments, the sorcerer's spell is hopefully broken. And while it may continue to be a living nightmare for the rest of our plebeian kinsmen, for the constitutionalists, *at least,* the Amendments satisfactorily provide a restful pause from the labyrinthine journey, and supply enough solid ground from which to jump off to further searching questions, so that if at all we must worry about our future, we could at least do it systematically.

I

SEPARATION OF POWERS: DOCTRINAL STRENGTHS AND HISTORICAL LIMITS

The 1981 Amendments deal essentially with changing our form of government, from the parliamentary system envisioned in the 1973 Charter, to a *modified* parliamentary set-up, which at its core, alters the nature of the nation's most powerful office, the Presidency.

These changes have elicited a howl of protest from critics of government,[2] who dread to see an authoritarianism — born as *emergency powers* and reared as a *transitory government* — become instituted as a permanent

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* *Member,* Student Editorial Board, Philippine Law Journal

1 "At every step, the framing of the 1973 Constitution had to run the gauntlet of constitutional challenge." Cortes, *The Framing of the 1973 Constitution in Historical Perspective,* 48 PHIL. L. J. 475 (1973).

These controversies — from R.B.H. No. 2, 6th Cong., 2nd Sess. (1967) calling for the Convention, to the pre-inaugural maneuverings, the language issue, and finally the operational problems that plagued the Convention — are discussed in Cortes, *supra* at 463-475, in ESPIRITU, I PARLIAMENTARY GOVERNMENT 38-45 (1976), and in MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION 39-44 (1978).

2 *See* WEEKEND, March 29, 1981, p. 13.

and thoroughly legitimate arrangement, that shall approximate what an American historian has so aptly labelled as the "Imperial Presidency".[3]

Whether or not such gnawing fears are well-founded shall hinge upon the central concept of separation of powers, specifically as between the Executive and the Legislative powers. It is the Amendments' continued protection of this doctrinal jugular that shall determine whether, indeed, democracy in the Philippines has been technically knocked-out.

The Doctrine of Separation of Powers. History often humbles what doctrine tends to reify. Hence, before we rush headlong into analyzing the Presidency from the standpoint of this theory, we must first take stock of its strengths and limitations.

Baron de Montesquieu, in *The Spirit of the Laws* (1748), proclaimed:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
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> Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[4]

It was carefully noted, however, that this doctrine, so fundamental to constitutions in many countries, actually emerged at first as —

> ... merely a convenient means of coping with the increasing business of state. The specialization of function was a *simple need,* and the consequent delegation was a *simple fact* .... XXX ... this single fact became a *theory,* a theory that the basis of liberty lay in not only the convenient specialization of these functions but their absolute distinction in different hands. This ... was a misconception ...[5] (Underscoring mine)

Indeed, contemporary applications of the doctrine have strayed far from the original conception of the tripartite system, as embodied in the *Federalist* discussions.[6] Each organ derived its mandate from a different source — the House of Representatives from the electorate by direct vote, the Senate from the state legislatures, the President from a college of electors federally constituted, and the judiciary from appointment by the President and the Senate. Aside from bringing each office farther and farther from *direct popular control,* their terms of office were differentiated, "so that a complete renewal of the government at one stroke is impossible", in order to fully protect government from "popular distempers".[7]

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[3] SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).
[4] In GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 51 (1974).
[5] ESPIRITU, *op. cit. supra* at 18-19.
[6] BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 159-164 (1935).
[7] *Id.* at 162.

The doctrine was meant to preclude, through checks and balances, the predominance of any single group in government, and in general, the better to insulate the government from the fickle wills of the body politic.

THE MALOLOS CONSTITUTION

The Malolos Constitution, drafted by the Revolutionary Congress in 1898, *expressly*[8] secured the separation of powers doctrine. Yet, it created a powerful Legislature and a weak Executive within a semi-parliamentary framework.

The unicameral Assembly of Representatives had the power to choose — and impeach — the President.[9] Contrary to parliamentary practice, this President had a fixed term,[10] removable only by impeachment, and was expressly *vested* with Executive power.[11] This Executive power was exercised through a cabinet,[12] without whose countersign all orders of the President were rendered void for "lack of proper requisite."[13] In turn, this cabinet was collectively responsible to the Legislature.[14]

The President was powerless to dissolve the Assembly without the prior consent of two-thirds of its members;[15] his veto may be overruled by two-thirds majority;[16] and finally, his prerogatives as commander-in-chief were subject to prior approval by the Assembly.[17]

Most ominously, whenever the Assembly adjourned, a Permanent Commission of seven members was constituted to act in its behalf.

In the words of Felipe Calderon, veritably the author of the document —

> In fact, the legislative power, although I proclaimed at the beginning the separation of the three powers, had been vested with such ample powers ... that *it controlled the executive and judicial powers in all their acts,* and in order to make this control a constant one ... I had established a so-called Permanent Committee ... with full authority to adopt emergency measures. In one word, it may be be affirmed that *the congress of the republic was the omnipotent power of the entire nation.*[18] (Underscoring mine)

The Bone of Contention. This system led the Schurman Commission to observe:

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[8] MALOLOS CONSTITUTION, Title II, Art. 4, in MACAPAGAL, A NEW CONSTITUTION FOR THE PHILIPPINES 124-138 (1970).
[9] MALOLOS CONST., Title VIII, Art. 58.
[10] MALOLOS CONST., Title VIII, Art. 58.
[11] MALOLOS CONST., Title VII, Art. 56.
[12] MALOLOS CONST., Title VII, Art. 56.
[13] MALOLOS CONST., Title IX, Art. 74.
[14] MALOLOS CONST., Title IX, Art. 75.
[15] MALOLOS CONST., Title VIII, Art. 70.
[16] MALOLOS CONST., Title VIII, Art. 62.
[17] MALOLOS CONST., Title VIII, Arts. 65 and 66.
[18] MAJUL, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION 161-162 (1967).

> ... It is a system of general distrust, of divided power, of indirect responsibility ... undoubtedly an attempt along those Spanish lines with which alone the Filipinos were familiar, to circumvent knavish and oppressive rulers ...[19]

The facts and the underlying reasons, however, were entirely different.

The Revolutionary Congress was split into two groups. The "constitutionalists", led by the *ilustrado* Calderon, ultimately prevailed with their concept of an all-powerful parliament and a weak executive.

The other group, inaccurately called the "absolutists", led by the paralytic lawyer Apolinario Mabini, moved for a strong executive, though merely as a temporary expediency during the Revolution. Mabini distinguished between "what is *fundamental* and what is *accessory*, what is *material* and what is *contingent*". The bill of rights, the declarations of independence and of republicanism — these were fundamental. The form of the government "entrusted with the duty of cementing that declaration"— this was accessory. Hence, faced with the exigencies of revolutionary war, Mabini declared, "Drown the Constitution and save the principles."[20]

Calderon parried Mabini's proposed amendments to energize the enfeebled Presidency, by invoking —

> ... the indisputable and fundamental basis of constitutionalism, which is the division and *absolute separation of the attributes of the powers of society;* a principle that states that it is never the case that anyone of these powers could invade the sphere of action of the other ...[21] (Underscoring mine)

Calderon cleverly used the doctrine, however, to cloak his real intent, his desire for a strong Legislature as a counterforce for his fellow *ilustrados* against the Executive, in the person of General Emilio Aguinaldo, whose political base *then* were the plebeian military, to wit:

> ... any person who knows how the insurrection was organized is well aware ... that Andres Bonifacio recruited his men from among the most *ignorant* classes.
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> x x x
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> Being fully convinced ... that in case of obtaining our independence, we were for a long time going to have a really oligarchic republic in which the *military* element, which was *ignorant* in almost its entirety, would predominate, I preferred to see that oligarchy neutralized by the *oligarchy of intelligence,* seeing that Congress would be composed of the most intelligent elements of the nation. THIS IS THE PRINCIPAL REASON WHY I VESTED THE CONGRESS WITH SUCH AMPLE POWERS ...[22] (Underscoring mine)

Regardless of the merits or demerits of Calderon's reasoning, one conclusion is clear: that far from being an impartial doctrine of law, the separation

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[19] Quoted in CORTES, THE PHILIPPINE PRESIDENCY 20 (1966).
[20] MAJUL, *supra.*
[21] *Id.* at 72.
[22] AGONCILLO, MALOLOS: THE CRISIS OF THE REPUBLIC 308 (1960).

of powers, in this instance, was used to serve partisan ends reflecting class biases. Indeed, a historian remarked:

> It was suggested that if the actual leader of the masses during the Revolution was an *ilustrado*, the insistent demand for a strong legislative as against a weak or symbolic executive might not have taken the form it actually assumed.[23]

THE AMERICAN-SPONSORED ORGANIC ACTS

From the beginning of the American military occupation of Manila, the Military Governor exercised *all* powers of government. In 1900, however, with *President McKinley's Instructions to the Second Philippine Commission,* legislative power was transferred to said commission, though executive power was retained by the Military Governor, resulting in the concurrent existence of both military and civil government.[24]

With the *Spooner Amendment,* in 1901,[25] the executive power was transferred to the President of the Philippine Commission, who at the same time became the Civil Governor. With the subsequent abolition of the office of Military Governor, the military regime was phased-out.

The *Philippine Bill of 1902* marked the first of a series of concessions by the Americans to the demands of aspiring Filipinos for a share of political power.[26] It provided for a bicameral legislature, the upper chamber being composed of the Philippine Commission (comprised largely by Americans), and the lower chamber consisting of popularly-elected Filipinos.

By 1916, through the *Philippine Autonomy Act of 1916,* the so-called "Filipinization" of the legislature became complete. More popularly known as the Jones Law, this document created a bicameral legislature wherein both houses, the Senate and the House of Representatives,[27] were elective and consequently, Filipino. However, the balance of powers among the different organs of state was heavily skewed in favor of the *appointive* Governor-General, on whom was vested the "supreme executive power",[28] such that —

> The American Governor-General was the supreme authority. *The doctrine of separation of powers was used to preserve that authority by confining the Filipino-controlled Legislature to strict lawmaking.* There was thus

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[23] MAJUL, *op. cit. supra,* note 18 at 196.

[24] MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE CONSTITUTION 8 (1978).

[25] This was actually a rider to the Army Appropriation Act of 1901. (FRANCISCO, CONSTITUTIONAL HISTORY 48 (1950).

[26] The legal significance of this document lies in that, by its authority, the United States governed the Philippines, no longer under the President's commander-in-chief powers, but through the U.S. Congress. (MENDOZA, *op. cit. supra* at 10)

However, it is remarkable that an *organic act* would devote 41 out of a total of 88 sections, to *mineral claims,* including specific modes for laying out claims. Perhaps, this is in consonance with McKinley's Instructions, that there are "commercial opportunities to which American statesmanship cannot be indifferent." (see the Instructions to the First Philippine Commission, AGONCILLO, *op. cit. supra,* note 22 at 329).

[27] Philippine Autonomy Act, Sec. 12.

[28] Philippine Autonomy Act, Sec. 21.

> inaugurated a tradition of a strong executive which was to become a feature of the constitutional system of the nation even after independence.[29] (Underscoring mine)

When, by the authority of the Tydings-McDuffie Act of 1934, a new constitution was drafted and eventually ratified, the Philippine Commonwealth was created as a preparatory stage before independence. From then on until 1973, we were governed by the 1935 Constitution.

That constitution, in the very words of Claro M. Recto, President of the Constitutional Convention that drafted it, "was frankly an imitation of the American charter." It borrowed that tripartite separation of powers. Significantly, however, it created a strong Executive, such that, again quoting Recto, "the President of the Philippines could easily convert himself into an *actual dictator within the framework of the charter.*"[30]

These characteristics may be traced to two separate factors. *First,* the document was drafted with an eye on the eventual approval by the American President, as required by the enabling charter. "The Convention as a whole also realized that its work would have to be submitted to an American President,"[31] said Recto. *Second,* it is indisputably held that the Constitution's provisions on the Executive were "custom-tailored for Manuel L. Quezon", at that time *the* Filipino leader.[32] As a matter of fact, the very first amendment to this Constitution swept away its much-lauded provision on a single six-year term for the President, and replaced it with a maximum of two four-year terms, evidently to enable Quezon to stay in office longer.

OBSERVATIONS

Based largely, but not exclusively, on this fleeting glance over the politics behind constitutional doctrines in the Philippines, we have the following observations.

First, the doctrine, as applied, was an effective deterrent against the outright dictatorship by one individual over other individual leaders in government, or by one organ of state over another. It was moreover the indispensable premise for the constitutional guarantees to individual liberties and the rule of law.

Second, while the doctrine is open to flexible interpretations it is widely conceded that elaborate safeguards of check and balance may be air-tight in law but loose and flabby in practice, due to intervening factors,

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[29] MENDOZA, *op. cit. supra,* note 24 at 17.

[30] Recto, *Our Constitution* in Part IV UPLC CONSTITUTIONAL REVISION PROJECT 5, 8 (1970). Substantive discussions on the 1935 Constitution are in the following section.

[31] *Id.* at 6.

[32] *The Other Side,* The Manila Times, June 13, 1970, p. 5. See also SINCO, PHILIPPINE POLITICAL LAW 238, 239 (1962), CORTES, THE PHILIPPINE PRESIDENCY 50-52 (1966), MACAPAGAL, A NEW CONSTITUTION FOR THE PHILIPPINES 12, 15 (1970), and MENDOZA *op. cit. supra,* note 24 at 25-26.

i.e., ideology and party loyalty, the personal charisma of leaders, political horsetrading, and even, "judicial statesmanship".

Third, the contemporary majesty of the doctrine is a far cry from its mundane beginnings. Therefore, we must never forget that it has not always been a *doctrinal imperative* and was before, rather simply a *pragmatic necessity,* and that actually, the doctrine was originally conceived as a device to stem the "tyranny of the majority" and to shield government from the fickle dispositions of its own constituents.

Fourth, what principally determined the balance of powers between each organ of state was the political strategy of the *ilustrados,* in the case of the Malolos Constitution, or of the colonial power, in the case of latter organic acts. These groups fortified whichever department was most susceptible to their control.

Fifth, there is a persistent predilection for strong government, which is often expressed in a powerful Executive and in the resultant "cult of leadership". Even in the Malolos Convention, the contending factions agreed that strong government was necessary, the only issue being which branch of government was to be mightiest.

Finally, critics have widely assailed the accelerated growth of Presidential powers in the Philippines today, and yet among themselves, they cannot agree as to *why* it must be opposed.

Generally, conservative liberals assert that a strong executive *per se* is a threat to democracy for being a travesty of the separation of powers. Adherents of the 1981 Amendments, however, frontally assault this apparent "fetish" for the doctrine. Indeed, they openly praise the absence of such separation of powers as the Amendments' chief merit, for they hold the doctrine culpable as the culprit which has continually stalemated the government's drive for economic growth.

> ...The President, the Prime Minister and the Batasang Pambansa work together in a well-balanced system of coordination and cooperation. THEY ARE NOT HAMPERED BY THE DOCTRINE OF SEPARATION OF POWERS.[32a] (Emphasis mine)

On the other hand, progressive critics consider a strong Executive merely as a corollary to the need for strong government, such that the ultimate question, really, is whether that government is "strong *for* the people, or strong *against* the people."[33] Both views, we must carefully note, are rooted in the principle of republicanism and in the rule of law.

[32a] COMELEC, *Primer on the Plebiscite of the Proposed Constitutional Amendments* 16 (1981).

[33] For a substantial discussion, though in *a different vein,* see Fernandez, *Position Paper on the Proposed Constitutional Amendments in the April 7, 1981 Plebiscite* in 1981 CONSTITUTIONAL AMENDMENTS 26-30 (1981).

The only difference is that conservative liberals posit an illusory tug-of-war between *political liberty* and *economic growth,* a delusive dilemma which is reducible to purely a *matter of preference,* depending rather on whether the chooser could *literally* afford to spurn the state's proffer of social benefits and opt for political liberties instead.

Progressives believe, however, that a program for economic growth whose benefits accrue to the majority actually has no reason to fret at that majority's assertion of their political rights. Indeed, the more widespread the social bounty, the more a government would welcome the people's expression of their political will, equivalent presumably to a beneficiary's vote of clear approval. Conversely, a sham program which enriches the few and stunts the majority's good always cowers at the wrath of a politically expressive populace.

Bread and freedom, so they say, necessarily go hand-in-hand.

II

A SURVEY OF THE EXECUTIVE VIS-A-VIS THE LEGISLATIVE (1935-1981)

The evolution of the Presidency shall be traced through different periods in our constitutional development, for our purposes, categorized as:

1. The period of operation of the 1935 Constitution —
   A. From the proclamation of Independence (July 4, 1946) to the proclamation of martial law (Sept. 21, 1972), as the period of the normal operation of this constitution;
   B. From the proclamation of martial law to the ratification of the 1973 Constitution (January 17, 1973), as the period under the commander-in-chief clause of the 1935 Constitution;

2. The period of operation of the 1973 Constitution —
   A. From the date of ratification to the 1976 Amendments (October 16, 1976), as the period under the Transitory Provisions;
   B. From the 1976 Amendments to the 1981 Amendments; and finally,
   C. From April 1981 onwards.

The 1935 Constitution

The period of "normal" operation of the 1935 Charter lasted from 1946 to 1972. Due either to its orthodoxy or to its 26-year lifespan, this document was widely and meticulously discussed.

In mandating the tripartite system for the Philippines, the 1934 Constitutional Convention carefully phrased the operative clauses of the separation of powers doctrine.

In three successive articles, the document expressly provided that the Legislative power shall be *vested* in a Congress of the Philippines,[34] the Executive power shall be *vested* in a President,[35] and the Judicial power shall be vested in one Supreme Court and in such other inferior courts as may be authorized by law.[36] The separation of powers, according to Justice Laurel, was the "fundamental principle of the 1935 Constitution."[37]

First of all, as between the executive and the legislative branches, there is what has been referred to as a watertight separation of functions and organization. Each derived its mandate independently of the other.[38] Each enjoyed a separate tenure of office, again independent of the other and without the mutual power of removal in parliamentary governments.[39] "Each department (had) exclusive cognizance of matters within its jurisdiction and (was) supreme within its own sphere,"[40] the President over executive departments, Congress over its own.[41]

Indeed, there was an express prohibition against legislators holding other offices in government,[42] directed against the current practice then of legislators being appointed to the Cabinet.[43]

The legislature had exclusive power over the legislative process, and the principle of non-delegation of legislative powers was carefully protected.

On the other hand, a situation of interdependence between the two had also been seen as an expression of check and balance.

For instance, the President had the power to veto legislative bills, and in turn, the legislative was empowered to override his veto.[44] The President's power of appointment was subject to approval by a legislatively based Commission on Appointments.[45]

Congress had exclusive power to approve appropriations,[46] though the President had the initiative in presenting[47] the basis of the general appro-

[34] CONST. (1935), art. VI, sec. 1.
[35] CONST. (1935), art. VII, sec. 1.
[36] CONST. (1935), art. VIII, sec. 1.
[37] Angara v. Electoral Commission, 63 Phil. 139 (1936).
[38] CONST. (1935), art. VII, sec. 2 and art. VI, secs. 2 and 5.
[39] CONST. (1935), art. VII, sec. 4 and art. VI, secs. 3 and 6.
[40] Angara v. Electoral Commission, *supra*, note 37.
[41] CONST. (1935), art. VII, sec. 10, par. (1).
[42] CONST. (1935), art. VI, sec. 16.
[43] SINCO, PHILIPPINE POLITICAL LAW 135 (1962).
[44] CONST. (1935), art. VI, sec. 20.
[45] CONST. (1935), art. VII, sec. 10, par. (3).
[46] CONST. (1935), art. VI, sec. 23, par. (2).
[47] CONST. (1935), art. VI, sec. 19, par. (1).

priations bill. Also, Congress had the final power to ratify treaties negotiated by the President.[48]

The Constitution, however, by its skeletal grant of power to the Executive, created a very strong Presidency. It has been noted that the President is not merely *"supreme* or *chief executive* but *the* executive". As administrative head of government, with the power of control over local governments, and with the traditional Executive primacy in foreign affairs, the Presidency has been considered the single most powerful office in the nation.

To top it all, the President enjoyed prerogatives as Commander-in-Chief of all the armed forces in the Philippines, with the power to suspend the writ of *habeas corpus* or place the Philippines under martial law.[49]

> ...By giving this power to the President, the Constitution... has further enhanced his authority and rendered his office legally more powerful still than that of the American President... the conclusion is well-nigh inescapable that the Constitution has created *an office hardly distinguishable from that of a dictator.*[50] (Underscoring mine)

This was in hindsight explained by Recto:

> ...we had invested the Executive with rather extraordinary prerogatives ... we cannot be insensitive to ... events ... how dictatorships ... have served as the last refuge of peoples when their parliaments fail .... Learning our lesson from the truth of history, and *determined to spare our people the evils of dictatorship* ... (we have established) an executive power which ... will not only know how to govern but will actually govern, with firm and steady hand ....[50a] (Underscoring mine)

"Once in the saddle, Napoleon rides." — HUGO

THE COMMANDER-IN-CHIEF CLAUSE

With the declaration of martial law, September 21, 1972 became for the Philippines its own Eighteenth Brumaire.[51]

> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested upon me by Article VII, Sec. 10, Par. (2) of the Constitution, do hereby place the entire Philippines ... under martial law, and, IN MY CAPACITY AS THEIR COMMANDER-IN-CHIEF, do hereby command the armed forces ... to enforce obedience to *all* decrees, orders and regulations promulgated BY ME PERSONALLY, or upon my direction.[52] (Underscoring mine)

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[48] CONST. (1935), art. VII, sec. 10, par. (7).
[49] CONST. (1935), art. VII, sec. 10, par. (2).
[50] SINCO, *op. cit.*, 257.
[50a] MACAPAGAL, A NEW CONSTITUTION FOR THE PHILIPPINES 12-13 (1970).
[51] This day, November 9, 1799, marks the *coup d'état* which resulted in the establishment of Napoleon Bonaparte's military dictatorship. See MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE (1852).
[52] Proc. No. 1081, 68 O.G. 7624, No. 39 (September 25, 1972).

Hence, by the very provisions of our Constitution, the President assumed extraordinary powers. In lightning strokes, the corollary principle of *non-delegation* of legislative powers was waylaid, in a situation which must have wished for a fall-back principle of *non-usurpation* of such powers.

With General Order No. 1, the President proclaimed that he shall "govern the nation and direct the operation of the *entire* government", and thus exercise all the functions of government, executive, legislative and judicial.[53] The Supreme Court later on affirmed as valid and constitutional the President's exercise of legislative powers, that as Commander-in-Chief and martial law enforcer, the President had authority to make laws as was necessary to preserve the Republic.[54] Furthermore, the day after, the President issued General Order No. 3, which brought beyond the ambit of judicial review all questions regarding the validity or constitutionality of the President's acts.[55] This was a legislative act; it was moreover an unconstitutional act, for it tampered with a constitutional grant of judicial jurisdiction.[56]

Significantly, the President took one step farther. He called for a Plebiscite-Referendum on the newly drafted Constitution and on martial law.[57] Within one month, he called for the creation of Citizen's Assemblies, in order to broaden the base of democratic participation.[58] And while a case challenging the President's power to call for a plebiscite was pending in the Supreme Court, the President issued Proclamation No. 1102, *announcing* a *fait accompli* ratification of the new Constitution by the Citizen's Assemblies.[59] (This was later challenged and upheld in *Javellana v. Executive Secretary.*)[60]

Regarding the subsequent implementing decrees, it was remarked that—

> ... the President did not invoke his Commander-in-Chief powers nor martial law but powers vested by the Constitution in the President of the Philippines ... because it was issued in response to the will expressed by the people in the referendum.[61]

Hence, through popular consultations, the President was able to act by virtue of the express will of the people, by authority of the *constituent power* itself.

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[53] 68 O.G. 7777, No. 39, (September 25, 1972).
[54] Aquino v. COMELEC, G.R. No. 40004, September 31, 1975. 62 SCRA 275 (1975).
[55] 68 O.G. 7779, No. 40, (October 2, 1972).
[56] CONST. (1935), art. VIII, sec. 2, par. (1).
[57] Pres. Decree No. 73, 68 O.G. 9634, No. 50 (December 11, 1972).
[58] Pres. Decree No. 86, 69 O.G. 227, No. 2 (December 31, 1972).
[59] Planas v. COMELEC, G.R. No. 359225, January 22, 1973. 49 SCRA 105 (1973).
[60] G.R. No. 36142, March 31, 1973, 50 SCRA 30 (1973).
[61] Cortes, *The 1976 Amendments and the People's Participation in Government: The Baranggays and Sangguniang*, in 1976 AMENDMENTS AND THE NEW CONSTITUTION 1-37 (1978).

"There are some frauds so well conducted that it would be stupidity not to be deceived by them."
—CHARLES CALEB COLTON (1825)

TRANSITORY GOVERNMENT

A Brief Chronology. The constitutional injunction against a Presidential term beyond eight years was circumvented by a protracted series of events that let loose a Pandora's Box of dilemmas, juridical or otherwise.[62]

First, through R.B.H. No. 2, 6th Cong., 2nd Sess. (1967), as amended, a Constitutional Convention was called to amend the 1935 Constitution. That Convention, in 1971, in a dramatic reversal of its own pronouncements, voted to shift from the presidential to the parliamentary form of government. To provide for a smooth transition from the old to the new, they drafted the Transitory Provisions.

In the meantime, the Supreme Court, in the case of *Lansang v. Garcia,*[63] upheld the legality of the President's suspension of the writ of *habeas corpus.* By the terms of the 1935 Constitution, the grounds for both the suspension of the writ and the proclamation of martial law were identical, that is, "in case of invasion, insurrection, rebellion, or imminent danger thereof, when the public safety requires it."[64] Indeed, barely a year later, Proclamation No. 1081 would extensively quote the factual situation which in *Lansang v. Garcia* was used to justify the suspension of the *writ.*

Concentration of powers. This period was governed by the Transitory Provisions of the newly effective 1973 Constitution.[65] Precisely because of its nature, the transitory government was governed by the 1935 Constitution, insofar as the powers of the President were concerned, particularly his commander-in-chief powers; and by the 1973 Constitution through its Transitory Provisions which provided for a form of government which straddled the old presidential and the new parliamentary set-ups.

Hence, the *incumbent* President was *the Executive,* since he exercised the prerogatives of the 1935 Constitution President and of both the President and the Prime Minister under the 1973 Constitution.[66]

He was likewise the *sole* legislative power, because by virtue of the Plebiscite of January 15, 1973, the people rejected the convening of what was supposed to have been the transitory legislature, the *interim* National Assembly.[67] Furthermore, the President's power to legislate was expressly recognized.[68]

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[62] *See* Fernandez, *From Javellana to Sanidad: An Odyssey in Constitutionalism,* in 1976 AMENDMENTS AND THE NEW CONSTITUTION 38-54 (1978).
[63] G.R. No. 33964, Dec. 11, 1971. 42 SCRA 448 (1971).
[64] CONST. (1935), art. VII, sec. 10, par. (2).
[65] CONST. (1973), art. XVII.
[66] CONST. (1973), art. XVII, sec. 3, par. (1).
[67] *See* notes nos. 23 and 24, *supra.*
[68] CONST. (1973), art. XVII, sec. 3, par. (2).

In *Aquino v. Military Commission No. 2*,[69] the Supreme Court upheld the jurisdiction of military tribunals, created under the authority of the President, to try civilians even while civil courts were open and exercising their regular functions, amounting to an executive usurpation of a judicial function.

Judicial independence was jeopardized by the provision that —

> Sec. 10 The incumbent members of the Judiciary may continue in office until they reach the age of seventy years, *unless sooner replaced in accordance with the preceding section hereof.*[70] (Underscoring mine)

The preceding section provided that all officials of the existing government shall continue in office "until otherwise provided by law or decreed by the incumbent President of the Philippines."

In 1975, a Supreme Court Justice delivered before the Integrated Bar of the Philippines, "A Plea for the Rule of Law", wherein she mentioned some principles contained in the Declaration of Delhi (1959).[71]

> The irreconcilability of the principle of irremovability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character allowing at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial.[71] (Clause IV, Report of Committee IV)

Lastly, the Supreme Court upheld the President's power to exercise the constituent function of proposing and presenting amendments for ratification in a plebiscite. In *Sanidad v. COMELEC*,[72] the President's exercise of this constituent power was seen as a logical extension of his legislative powers, especially in the absence of any other legislative body.

In conclusion, the President under the Transitory Provisions was bestowed with almost the same powers that he enjoyed under the commander-in-chief clause of the 1935 Constitution, the only difference being that under transition government, the President could have exercised those same powers *independently* of martial law.[73]

THE 1976 AMENDMENTS

The 1976 Amendments principally altered the Transitory Provisions of the 1973 Constitution. The interim National Assembly whose convening was indefinitely suspended by the referendum of January 1973, was replaced by an *interim* Batasang Pambansa. This assembly was supposedly a step forward to "normalization". It was meant to *share* the legislative function

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[69] G. R. No. 37364, May 9, 1975.
[70] CONST. (1973), art. XVII.
[71] Muñoz-Palma, *A Plea for the Rule of Law*, in 3 INTEG. BAR PHIL. 184 (1975).
[72] G.R. No. 44640, October 12, 1976. 73 SCRA 333 (1976).
[73] *See* Tan, *The Philippines After the Lifting of Martial Law: A Lingering Authoritarianism*, 55 PHIL. L. J. 420 (1980).

with the President. In the end, however, it largely maintained the *status quo,* and even granted more powers to the President than it ostensibly took away.

Two amendments expressly vest the President with legislative power. Amendment No. 5 affirms the President's legislative prerogative under martial law:

> The incumbent President shall *continue to exercise* legislative powers until martial law shall have been lifted. (Underscoring mine)

Amendment No. 6 indefinitely extends the duration of the power of executive legislation:

> When in the judgment of the President/Prime Minister, there exists a grave emergency or a threat or imminence thereof, or whenever the *interim* Batasang Pambansa or the regular National Assembly fails or is unable to act adequately on any matter for any reason that *in his judgment* requires immediate action, he may, in order to meet the exigency, issue the necessary decrees, orders or letters of instructions, which shall form part of the law of the land. (Underscoring mine)

The 1976 Amendments, therefore, created dual sources of legislation for the government. Yet side by side with the President, the *interim* Batasang Pambansa paled in comparison.

First, the President had the power to dissolve the *interim* Batasang Pambansa. On the other hand, the Batasan was powerless to remove the President/Prime Minister, because he owed his office to the Constitution itself.

Second, by express provision of the amendments, the Batasan did not have the power to ratify treaties, such that the President/Prime Minister's prerogatives in foreign affairs were practically absolute.

Third, while the Batasan's power to legislate was circumscribed by rules on procedure and parliamentary practice, the President's power was free and unencumbered.[74] His signature alone brought his acts into effectivity.

Fourth, by virtue of the incumbent President's powers as Prime Minister under the new set-up, he had the power over parliamentary deliberations in that no bill except those of local application can be calendared without the prior approval of his handpicked Cabinet.[75]

Fifth, the acts of the Batasan were subject to the President's veto, while Presidential legislations were beyond reach of the Batasan.

Finally, the grant of legislative powers beyond martial law is of indefinite duration. Indeed, the President is the sole judge in determining

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[74] Tolentino, *The Effect of the 1976 Amendments on the Legislative Process: The Batasang Pambansa,* in 1976 AMENDMENTS AND THE NEW CONSTITUTION 63 (1978).

[75] CONST. (1973), art. VIII, sec. 19, par. (3).

whether a case for his exercise of legislative power exists. It is "his judgment" of whether a grave emergency exists, or whether the Batasan failed to "act adequately" that determines when he may exercise the power to legislate. "The sufficiency of the factual basis for his determination cannot be inquired into by the Judiciary; the Courts cannot substitute their judgment for his."[76]

In hindsight, the predominance of the President is reflected in the output of legislation in the past years. From June 12, 1978 up to January 16, 1981, the Batasan had an output of 128 legislative acts, compared to the President's 188 decrees, the great bulk of which were of general application.[77]

We could safely conclude, therefore, that if the 1976 Amendments changed anything, it actually made the President's legislative powers even more secure.

> "Build high walls, store large quantities of grain — and be slow to adopt the status of emperor." — ADVICE OF THE SAGE CHU SENG TO A USURPER OF POWER (1368)[78]

III

"A PIOUS FRAUD"[79]

From the 1935 Constitution, through the Transitory Provisions of the 1973 Constitution, to the 1976 Amendments, we have seen how the immense concentration of powers in the Presidency became institutionalized. The powers, themselves, had been there from the beginning; *what has changed is merely their juristic status, the source of their authority.*

Whether these powers are enhanced, and whether their juristic source of authority is further sanctified, is the central issue in the 1981 Amendments.

The Original Provisions

The original provisions of the 1973 Constitution — by now merely a hypothesis perpetually left untested — mandated a parliamentary government which reduced the Presidency to a figurehead position,[80] performing innocuous ritual functions as the ceremonial head of state,[81] and in the

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[76] Tolentino, *op. cit. supra,* note 74 at 62.

[77] The period is computed from the date when the *interim* Batasang Pambansa was first convened, up to the date of the lifting of martial law.

This is without prejudice to the 158 decrees signed on June 11, 1978, on the eve of the Batasan's opening. Opposition claims on similar charges of "midnight" legislation have been officially denied. See *New Decrees Not Antedated, FM declared,* Business Day, February 17, 1981, p. 8, col. 3.

[78] BLOODWORTH, THE CHINESE MACHIAVELLI 250-251 (1978).

[79] "Pia Fraus" from OVID, METAMORPHOSES IX. 711.

[80] CONST. (1973), art. VII.

[81] CONST. (1973), art. VII, sec. 1.

words of a Jesuit constitutionalist, "a symbol of a symbol".[82] Though harmless, he enjoyed constitutional immunity from suit.[83]

In parliamentary tradition, it created a unicameral National Assembly that was *vested* with Legislative power.[84] Further provided was that the Executive power shall be *"exercised"* by the Prime Minister with the assistance of his Cabinet.

It was carefully noted that, in parliamentary tradition, the Prime Minister merely *exercises* Executive power, there being no express grant of such power.[85] It has been widely interpreted to mean that such power is lodged with the legislature, with the Prime Minister merely exercising that right as an agent of that assembly.[86]

Furthermore, check and balance in parliamentary government is actually meant to take place between the majority and the minority party, the Government and the Opposition — and not between the legislature and the executive, since both are presumed to be controlled by the *majority party.* But sad to say, pre-conditions for successful parliamentary government in our country, like a disciplined party system,[87] are as yet a dim prospect. Until then, we shall have to see *our* parliamentary system through the old looking-glass of the separation of powers *as we have known it.* Moreover, it is best to test the viability of a system by presuming, and by subjecting it to, the worst scenario.

The Relationship between the Legislature and the Prime Minister. The National Assembly is vested with Legislative power.[88] Yet, it is the Prime Minister who has the initiative in legislation, with his powers to present the program of government[89] and to control the calendaring and deliberation on bills.[90] In turn, the Assembly has exclusive power over appropriations.[91] In the final stages of the legislative process, the Prime Minister has the power to veto the bills approved by the Assembly, a veto which the Assembly may override by a two-thirds majority.[92] The Prime Minister's initiatives in foreign policy are furthermore subject to the National Assembly's power to ratify the treaties he negotiates.[93] Also, the Assembly is entitled to a "question hour" wherein the Prime Minister or any Minister in his Cabinet may be required to appear and answer questions by the Assembly.[94]

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82 BERNAS, THE PHILIPPINE CONSTITUTION 107 (1974).
83 CONST. (1973), art. VII, sec. 7.
84 CONST. (1973), art. VIII, sec. 1.
85 FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 249 (1977).
86 SANTOS, THE CONSTITUTION OF THE PHILIPPINES 208 (1976).
87 ESPIRITU, *op. cit. supra,* note 1 at 121-140.
88 CONST. (1973), art. VIII, sec. 1.
89 CONST. (1973), art. IX, sec. 2.
90 CONST. (1973), art. VIII, sec. 19, par. (3).
91 CONST. (1973), art. VIII, sec. 18, par. (1).
92 CONST. (1973), art. VIII, sec. 20, par. (1).
93 CONST. (1973), art. VIII, sec. 14, par. (1).
94 CONST. (1973), art. VIII, sec. 12, par. (1).

Finally, the core of this check and balance mechanism is the power of the Prime Minister to recommend the dissolution of the Assembly and the Assembly correspondingly to change the Prime Minister through a withdrawal of its confidence.[95]

Beyond these powers, however, the vanquished supporters of the Presidential system in the Constitutional Convention pursued the strengthening of the Executive,[96] such that in the end, we created a *hybrid* parliamentary system characterized by a very powerful Prime Minister.

> In actual practice, parliamentarism presents itself in two widely divergent forms, depending on whether the Parliament is superior in political power to the Cabinet or whether the latter is in a position to control the former. The supremacy of the Assembly over the Government is reflected by the *classical* ... French type of parliamentarism. The ascendancy of the Cabinet over the Parliament is ... the British ... *cabinet* government. Ours, however, unwittingly became a *prime ministerial* government.[97] (Underscoring mine)

The powers referred to include the Prime Minister's power to appoint his Cabinet,[98] his consequent power of control over ministries,[99] and his power to suspend the writ of *habeas corpus* and declare martial law.[100] The prerogatives of the Prime Minister which even the President in the 1935 Constitution did not enjoy are: *first,* his complete control of legislation, since no bill except those of local application shall be considered by the Assembly unless recommended by the Cabinet[101] and since it is he who determines the program of government and the guidelines of national policy; *second,* his power to dissolve the legislature;[102] *third,* his power to enter into international treaties or agreements without the concurrence of the National Assembly,[103] expressly inspite of an earlier provision to the contrary;[104] *fourth,* his absolute power to contract foreign and domestic loans for the government;[105] *fifth,* his power of appointment which is complete and final in the light of the abolition of the Commission on Appointments under the new Constitution;[106] and finally, there is an omnibus provision granting to the Prime Minister all the powers formerly vested in the President.[107]

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95 CONST. (1973), art. VIII, sec. 13.
96 Espina, *Distribution of Powers under the Parliamentary system,* in THE LIVING CONSTITUTION 73 (1976).
97 ESPIRITU, *op. cit.* 65.
98 CONST. (1973), art. IX, sec. 4.
99 CONST. (1973), art. IX, sec. 11.
100 CONST. (1973), art. IX, sec. 12.
101 CONST. (1973), are. VIII, sec. 19, par. (3).
102 CONST. (1973), art. VIII, sec. 13, par. (2).
103 CONST. (1973), art. XIV, sec. 15.
104 CONST. (1973), art VIII, sec. 14, par. (1).
105 CONST. (1973) art. IX, sec. 15.
106 Serrano, Felixberto, Roundtable Discussion on Form of Government, as quoted in ESPIRITU, *op. cit.* 75.
107 CONST. (1973), art. IX, sec. 16.

It has moreover been remarked that the Prime Minister's veto power is just one of the "few outlandish details" in our supposedly parliamentary set-up.[108]

What we were supposed to have, therefore, was a purely ceremonial President and a "super Prime Minister"[109] who was powerful in his own right yet subject still to the constitutional counter-balancing of the juristic seat of both legislative and executive power, the National Assembly.

THE KING'S GAMBIT IN THE 'NEW' REPUBLIC

The powers of the Prime Minister under the 1973 Constitution existed within the framework of parliamentary check and balance. The net effect, however, of the 1981 amendments is to grab all of the Prime Minister's powers away from him, and vest them on the President. The result is that the *President has the Prime Minister's powers but not the Prime Minister's limitations.* Thus, Prime Ministerial prerogatives were snatched from the soil of parliamentarism and thrust into illimitable skies beyond reach of constitutional restraints.

It was not as it appeared, a simple transfer of power from one office to another, as it were, a mere mechanical act of juggling provisions from one section of the Constitution to another. Neither was it, as some people perfunctorily concluded, the mere changing of titles occasioned by a proud and elder leader.

It was, in fact, the transplantation of the already immense powers of the Executive from the office of the Prime Minister, where they were fenced in by constitutional safeguards inherent in a parliamentary system, upwards to the office of the President, where such safeguards were totally absent, precisely because of the erstwhile innocuous nature of the office.

It is not enough, then, to say that the 1981 Amendments emasculate the Prime Minister and correspondingly strengthen the Presidency. That much is true; that much is obvious. *What is of legal and practical significance is that the transfer of power was not accompanied by a transfer of constitutional restraints.*

Let us examine the changes in *logical sequence.*

> The President shall be elected by *direct vote* of the people . . .[110] (Underscoring mine)

What innocently appears as a jingoistic propaganda line designed to win voters, is actually the starting point of a clever scheme to bring the Presidency above the separation of powers doctrine. By *direct voting,* the Presidency thus derives its *mandate separately and independently* of the

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[108] Tangco, *Prime Ministerial Government,* in THE GOVERNMENT UNDER THE NEW CONSTITUTION 20 (1975).

[109] ESPIRITU, *op. cit.* 109.

[110] CONST., art. VII, sec. 3.

legislative assembly, the Batasang Pambansa. The Prime Minister, if we recall, was elected by the National Assembly from among its members.[111]

Its first consequence, quite monumental for a parliamentary system, is that *while the President is vested with the power to dissolve the Batasan,*[112] the Batasan does not have the counterpart power to dislodge him, his mandate having been derived elsewhere, by direct vote of the sovereign people. Again, in the previous arrangement, the Prime Minister was in office by grace of the legislative assembly. The parliamentary principle of *immediate accountability* is thus impaired. This mutual power of removal, the legislature to withdraw its confidence and the Prime Minister to dissolve it, is the cornerstone of parliamentary check and balance. For it to be eliminated altogether is bad. Ironically, for it to be eliminated *only in half* is worse.

Furthermore, the President has a *fixed term* of office of six years.[113] Hence, while in the original parliamentary set-up, the Prime Minister was continuously stalked by the possibility of a no-confidence vote, for he was immediately accountable to Parliament, today under the semi-parliamentary system, that dark shadow of electoral repudiation looms for the President only periodically at six years' intervals.

While the Prime Minister in the old arrangement was responsible to the National Assembly, the President under the 1981 Amendments is responsible, not to the Batasan but to the people directly. Hence, the *question hour,* that much-vaunted institution of responsible government, is nullified as far as the President is concerned. He is beyond reach of such interrogations. Again, only the Prime Minister is so obligated.[114]

The President and his Prime Minister. The President is the locus of power under the 1981 Amendments.

> The Prime Minister is responsible to two entities — the Batasang Pambansa which elects him from among its members, and which may cause his replacement on a no-confidence vote, and the President who nominates him to the position.[115]

After a vote of no-confidence, "the President *may* submit a nominee" for the office of the Prime Minister.[116] The use of the permissive "may" has been interpreted to mean that notwithstanding the Batasan's withdrawal of confidence, it is not *mandatory* upon the President to nominate a new Prime Minister.[117] Whether or not the President actually deems it prudent

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111 CONST. (1973), art. IX, sec. 3.
112 CONST., art. VIII, sec. 13, par. (2).
113 CONST., art. VII, sec. 3.
114 CONST., art. VIII, sec. 12, par. (1).
115 Sponsorship speech for Resolution No. 104, Transcript of the Batasang Pambansa sitting as a Constituent Assembly. February 24, 1981, p. 9. Hereinafter referred to as BP-A Transcript.
116 CONST., art. VIII, sec. 13, par. (1).
117 CRUZ, PHILIPPINE POLITICAL LAW (Supplement) 23 (1981).

to make use of this permissive power, the point is that he legally has a *choice.*

The "operating relationship" between the President and the Prime Minister is spelled out as —

> ... the President shall be concerned principally with major policy and decision-making processes. The Prime Minister shall be responsible for the day-to-day supervision and the details of administration of the government. Matters elevated for Presidential aciton shall be those of SUCH NATIONAL IMPORTANCE OR SIGNIFICANCE AS WOULD REQUIRE DECISION OF THE PRESIDENT HIMSELF ... Initially, the Prime Minister ... shall exercise recommendatory powers with respect to matters requiring Presidential decision ...[118] (Underscoring mine)

The Prime Minister and his Cabinet will prepare the program of government, although again it is subject to Presidential approval.[119] While the Prime Minister may recommend the dissolution of the Batasan, again, it is not mandatory for the President to follow his "recommendation".[119a]

It is the President who appoints the members of the Cabinet,[120] such that the office of the Prime Minister is not even an effective base of political power. And finally, over these Ministries, the President has the power of control, while the Prime Minister has merely the power of supervision.[121] Politically speaking, therefore, this is even more advantageous for the President. With the Prime Minister, the President shall have a buffer zone that shall absorb the impact of adverse public opinion. At the same time, it leaves the President's hands free to tackle the more inspiring works of leadership, and leaves the drudgery of day-to-day administration to a Prime Minister. Indeed, with the Prime Minister, the President shall have a *workhorse* in times of quiet, a *scapegoat* during turmoil.

The President as Legislator. Under the omnibus provision transferring to the President all the powers lodged in the President of the Philippines under the 1935 Constitution, the Constitution as amended, preserves a relic of both transitory government and martial law.[121a]

> All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the law of the land, and shall remain valid, legal, binding, and effective even after lifting of martial law or the ratification of this Constitution, ...[122]

These legislative prerogatives were further affirmed in the 1976 Amendments, through Amendment No. 6, which states —

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118 Exec. Order No. 708 (1981).
119 CONST., art. IX, sec. 2.
119a CRUZ, *supra,* note 117.
120 CONST., art. IX, sec. 1.
121 These are spelled out in detail in Exec. Order No. 708 (1981), "Reorganizing the Office of the President and Creating the Office of the Prime Minister".
121a The latest changes do not repeal Amendment 6 of the 1976 Amendments. BP-CA Transcript, *supra,* p. 76.
122 CONST., are XVII, sec. 3, par. (2).

> Whenever in the judgment of the President (Prime Minister), there exists a grave emergency or a threat or imminence thereof, or whenever the interim Batasang Pambansa or the *regular National Assembly* fails or is unable to act ... he may in order to meet the exigency, issue the necessary decrees ... which shall form part of the law of the land. (Underscoring mine).

With these powers, the President becomes, not only chief legislator, but even more, he is by himself a legislature. To top it all, by authority of this grant of legislative power, the following powers had been decreed:[123]

> (a) Public Order Act of 1981 (P.D. 1737), vesting the President with the power of preventive detention, the power to close down or suspend publications, and the power to suppress organizations deemed subversive;
> (b) Security Code of 1978 (P.D. 1498), vesting the President with the power to order the detention of persons for taking part in mass actions, to detain persons for membership in organizations deemed subversive, and to detain persons for subversive publications.[123]

Batasan's Regular Sessions. This form of government with dual legislatures emerged under the transitory government.[123a] The Amendments do not substantially alter this arrangement. If at all, they merely provide the finishing touch that shall in effect further clip the wings of the Batasang Pambansa.

The President is by himself a legislature that is continuously in session and is never adjourned. On the other hand, the Batasang Pambansa, by its nature, must go on a periodic recess and is thus not continuously in session. Hence, even without the President's *legal* ascendancy and merely by his *physical* advantage, the Batasan is already handicapped as a "partner" in legislation.

The Batasan, however, sitting as a Constituent Assembly for the purpose of amending the Constitution, may have further aggravated the handicap when it proposed to do away with the constitutional limitations on the length of its own regular sessions.

The Constitution originally provided that the legislature shall convene once a year and shall continue in session until thirty days before the convening of its regular session the following year. However, "it may recess for periods *not exceeding thirty days each,* and *not more than ninety days during the year.*"[123b] The 1981 Amendments delete this limitation and provide that the assembly "shall continue to be in session for such number

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[123] Fernandez, *Position Paper on the Proposed Constitutional Amendments in the April 7, 1981 Plebiscite, op. cit. supra,* note 33 at 32-33.

[123a] *See* previous discussion on "The 1976 Amendments". We must carefully note that the following provision has been deleted in the amended Constitution:

> "No bill except those of local application shall be calendared without the prior recommendation of the Cabinet." CONST. (1973), art. VIII, sec. 19, par. (3).

[123b] CONST. (1973), art. VIII, sec. 6.

of days as it may determine.[123c] The length of the regular sessions, therefore, is left to the *discretion* of the assembly.

The assembly may of course choose to either lengthen its regular session beyond the *original maximum* number of days, or to shorten it beyond the *original minimum.* Considering, however, that the original maximum was for all intents already the practical limit — one-year minus thirty days, not including Saturdays, Sundays, and legal holidays — it appears that the assembly's discretion was meant to be applied to further shortening the *minimum* days of the regular session. Indeed, this Amendment's express rationale is the need of the assemblymen for more time to dialogue with their constituents, since the original schedule supposedly occupied too much of their time.[123d]

Since the President is empowered to legislate whenever the legislature "is unable to act adequately or any matter ... that ... requires immediate action",[123e] the Batasan's frequent use of this discretionary power might invite more executive incursions into legislation.

PRESIDENTIAL SUCCESSION

If there was one issue that belied the government's claims to legitimacy, it was the thorny issue of presidential succession, for what constitutional set-up would fail to provide for that which is inevitable and necessary?

It has been correctly observed that the President could not legally designate any particular person to succeed him in case of death, resignation or disability because his powers attach to him personally and not to an office.[124]

Hence, in order to avert the possibility of internecine strife in such event, and to enhance our acceptability to our "allies" and to international lending institutions, the 1981 Amendments, as the constitutional solution, provide for succession. An essay entitled "The Dilemma of Dealing with Dictators" states:

> When should the U.S. stand by a client, despite his internal regime, and when should the U.S. begin to distance itself from him?
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> x x x
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> ... it is wiser to support a regime in a country that has a *system of succession* assuring a measure of continuity than in a nation that does not... (which) loses stability by the absence of the autocrat ... *The Philippines, however, has no credible mechanism to assure an orderly succession.* Marcos' one-man rule recalls Louis XIV's declaration, *"L'état c'est moi,"* and the warning sometimes attributed to Louis XV, *"Après moi le déluge."* [124a]

[123c] CONST., art. VIII, sec. 6.
[123d] BP-CA Transcript, February 26, 1981, pp. 10-11.
[123e] 1976 Amendment No. (6).
[124] Tolentino, *Executive-Legislative Government,* in THE GOVERNMENT IN TRANSITION 208 (1980).
[124a] TIME, September 24, 1979, p. 15.

Hence, an Executive Committee shall be constituted,[125] which shall collectively succeed to the Presidency until a new President shall have been elected and qualified, under alternative provisions on the disability of either the President or the President-elect.

The wisdom of this innovation has been disputed. One constitutionalist expressed his profound wonder at why the 1981 Amendments did not instead revive the old method of succession in the 1935 Constitution, featuring an elective Vice President.[126] Such wonder may cease, however, if we consider historical precedents in centralized governments abroad, where *individual* successor-designates often became impatient. It is then supposed that the company of a *collective* body would make each member of the Executive Committee better inclined for what is presumably a long wait.

Another point of criticism is that the Committee, vested with such immense prerogatives, shall be composed of the Prime Minister and fourteen other members, *at least* one-half of whom are from the Batasang Pambansa.[127] That almost one-half shall be *appointees*, and not *elective* officials, goes against the grain of representative government.

IMMUNITY FROM SUIT

In 1975, a proponent of the parliamentary set-up of the 1973 Constitution said:

> If the President can be removed only for high crimes, a Prime Minister can be ousted on mere lack of confidence.[128]

On this score, the new amendments do not have much to boast of, because the President now shall enjoy immunity from suit during his tenure and even after.

Two Formulas on Duration of Immunity. First of all, the immunity applies even to acts done *before* the effectivity of the 1981 Amendments, since, as it was carefully explained on the floor of the Batasan, remedial statutes may be validly given retroactive effect.[129]

Second, even without this provision, the President already enjoys immunity from suit as head of state. This original immunity by itself, however, gives rise merely to *suspended immunity* because it has been interpreted to mean that the President enjoys immunity only while he is in office but not after his tenure — even for acts done officially while he was still in office.

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125 CONST., art. IX, sec. 3.
126 CRUZ, *op. cit. supra*, note 117 at 9.
127 CONST., art. IX, sec. 3.
128 Tangco, *Prime Ministerial Government*, in THE GOVERNMENT UNDER THE NEW CONSTITUTION 45 (1975).
129 BP-CA Transcript, February 26, 1981, p. 20.

Hence, the Amendment goes one step further and actualizes the second formula of *pervasive immunity* which extends the mantle of protection beyond the President's tenure of office.

In short, this Amendment grants immunity from suit *regardless of when the suit is brought,* provided that the act sued upon was an official act done while the President was in office.[129a]

Coverage as to Persons. The immunity covers official acts of the President and of others pursuant to his specific orders during his tenure. Since the "accessory follows the principal", the President's agents are likewise immuned from suit so long as the act sued upon was committed under a *valid order* of the President. Considering further that such orders may be issued even to private persons, the Batasan's deliberations affirmed that even private persons may enjoy immunity.[129b]

This actually complements a previous guarantee of similar immunity embodied in P.D. No. 1791, issued on January 16, 1981, the eve of the litfing of martial law, which granted immunity from courts suits to Cabinet Ministers and other officials and to military personnel, which was in part, actually merely being consistent with the National Security Code, whereby all acts done by military officers and personnel were, in effect, ratified.[129c]

Acts covered. This immunity lies only for *official acts,* such that no immunity shall shield the President or his agent for illegal or unconstitutional acts because these acts cannot legally be considered as official acts. If they are illegal, then they are not official. Immunity lies only for acts *intra vires,* but not acts *ultra vires.*[130]

In the light of this explanation, still the changes may seem superfluous, since —

> As a general rule, a public officer is not liable to one injured in consequence of an act performed within the scope of his official authority, and in the line of his official duty.[131]

Again, however, it was emphasized that the immunity above mentioned is not as broad as the Amendment's, since what the Batasan meant to provide for was immunity from *suit,* not just from *liability.*[132]

An oppositionist in the Assembly argued that with this provision, people with genuine grievances against a public official shall instead be compelled to seek redress through extra-legal methods and take the law unto their hands, alluding to a growing sector of the population which has shunned legal-parliamentary means of attaining justice. A strictly legalistic

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129a BP-CA Transcript, February 25, 1981, p. 175.
129b BP-CA Transcript, February 26, 1981, pp. 21-24.
129c BP-CA Transcript, *ibid.*
130 BP-CA Transcript, *id.* at 25-27.
131 42 Am. Jur. 84.
132 BP-CA Transcript, *op. cit.,* 20.

view may calm this apprehension, for a genuine grievance would most probably be translatable into an actionable right enforceable through judicial action. Still, however, political realities in the Philippines would justify such qualms.

Finally, this amendment shall co-exist with other provisions in the same constitution, among them, the declaration that a public office is a public trust.[133] Should a test case be brought on this issue, we could only speculate on how the two contradictory provisions shall be reconciled.

In a way, our fears are either *too early* — for we must await the judiciary's interpretation of this newly-installed immunity, or *too late* — for quite simply, the amendments legally confirm what *realpolitik* had long ago decreed.

A MANDARIN TECHNOCRACY

With the further strengthening of the Presidency, we have fully laid the constitutional basis for a burgeoning "government of experts", the military and civilian technocracy.[134] The President, as head of government, by regeneration grows such bureaucratic tentacles that slowly erode whatever independence is left in other organs of state. In the words of Recto:

> In actual practice the art of modern government consists in the *automatic enactment* into law of the theories of *executive specialists* who, technically proficient though they may be, have no direct authority from the people. *It is the leadership of the incompetent by the irresponsible.*[135]

Already, communities have lamented the insensitivity of government due to acts by public officers who are accountable, not to the people, but to the appointing power. We cannot discount the full potential of this phenomenon in tampering with whatever balance of power which we enshrine in our Constitution.

TERM OF OFFICE

Buried beneath all the "monumental" changes in our form of government is a "minor alteration", which ultimately decided, for many people, whether or not they were in favor of the 1981 Amendments.

The amendments changed the term of office of the President. While in the 1935 Constitution the term of office of the President was four years with one re-election, or a maximum of eight years, under the new provisions, that term is extended to six years, *with no limit as to re-election.*

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133 CONST., art. XIII, sec. 1.

134 Ascher, "A Country Risk Report to the World Bank on the Philippine Situation," as reprinted in Business Day, February 17-19, 1981.

135 As quoted in Barrera, *A Semi-Parliamentary System — An Alternative?* in GREGORIO ARANETA MEMORIAL LECTURES 92 (1970).

Critics of the 1935 Charter *unanimously flayed* this issue of re-election, and just as unanimously suggested a term of six years *without re-election.*[136]

Indeed, a 1970 survey[137] showed that 46.71% favored a term of four years *without re-election,* only 14.76% favored four years *with re-election,* and 30% favored six years without re-election.

By these standards, it is quite amazing that we shall now overwhelmingly ratify a six-year term with re-election, unlimited at that. At this stage, we could only echo Recto's lament:

> The author of that pious sentiment, the voice of the people is the voice of God, was probably not acquainted with the refinements of modern POLITICAL VENTRILOQUISM.[138] (Underscoring supplied)

CONCLUSION

The separation of powers doctrine had been suspended as far back as the martial law proclamation and had never been resurrected in full measure since then. The 1981 Amendments expectedly retained the immense concentration of powers in the Presidency and has fossilized them — not as transitory or emergency powers — but as the normal order of things. It is therefore the illicit grafting of the shoot of tyranny upon the legitimized root of parliamentary democracy.

The powers have remained reasonably constant and constantly concentrated. What has changed is the juristic authority by which they were wielded. It has metamorphosed from emergency powers in 1972, to transitory government from 1972 to 1981, and has ascended to its crowning glory as a *bona fide* constitutional set-up in 1981. It is the constitutional *coup de grâce* to an institutional *coup d'état.*

The Amendments have rectified Presidential prerogatives. They have rectified the problem of succession, that is, should the incumbent be sooner reckoned by the gods above. And if Waterloo be his temporal destiny, he is shielded by the umbrella of total immunity from the censure of those whose rights he had transgressed.

In this sense, the 1981 Plebiscite is but the culmination of that tortuous path from Sept. 21, 1972, when authoritarian powers in their most blatant form were wielded, through the process whereby its jagged edges were sharpened and honed until they were razor-fine.

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[136] Among them are: Recto, *Our Constitution;* Sumulong, *The Constitution: A Pragmatic Approach;* Laurel, *Due Process of Law;* and Salonga, *Amending the Constitution,* all in PART IV UPLC CONSTITUTIONAL REVISION PROJECT 4, 36, 52, and 58, respectively (1970): CORTES, *op. cit. supra,* note 1 at 278-281; and MACAPAGAL, *op. cit. supra,* note 8 at 15-19.

[137] Feliciano, *Opinions on the Philippine Constitution of Voting Residents in the Greater Manila Area,* in PART III UPLC CONSTITUTIONAL REVISION PROJECT 54 (1970).

[138] Recto, *supra,* note 136 at 12.

Should our constitutional polity thrive and flourish, future generations will wonder at how our republic, after having been derailed from the constitutional pathway, was brought to track once more.

They would perhaps go and search for a "missing link" that shall bridge the gnawing gap between a *de facto* authoritarianism (eventually sanctified by judicial fiat) and a *bona fide* constitutional government that later emerged, and curiously, without disturbing the *status quo* of power at all. If they should stumble upon the yellowed, cobwebbed pages of the 1981 Amendments, they shall have discovered that missing link, engineered as a *constitutional mutation* that fascinatingly began as a constitutional dictatorship and emerged as a hybrid, disfigured "democracy".

THE REAL GUARANTEE

We have observed how the logic of history has often overpowered the guarantees of law and government. We have seen how even the firmest constitutional safeguards have been short-circuited by the follies of men. It is worthwhile then to recall the words of Jose Rizal in *El Filibusterismo:*

> ... as long as we see our countrymen feel *privately ashamed,* hearing the growl of their rebelling, and protesting conscience, while *in public they keep silent and even join the oppressor in mocking the oppressed;* as long as we see them wrapping themselves up in their selfishness and praising with forced smiles the most despicable acts, *begging with their eyes for a share of the booty, why give them liberty? ... Whoever submits to tyranny, loves it!* (Underscoring supplied)

The *nation,* not the *constitution,* is the finest safeguard of liberty and of republican institutions. In a sense, we had been barking at the wrong tree all along. That we chose the wrong tree speaks ill of our wits; that we learned to bark at all speaks nil about our guts.

Until Rizal's prognosis is negated, we the citizens, and *even our constitution,* shall continue to be pawns in the vast chessboard of power politics. Until then, we could only stare and wonder what the next move will be, or *who the players really are,* and hope that our liberties and fortunes be spared in that final, and inevitable, checkmate.