TOWARDS INDIVIDUAL AND SOCIAL JUSTICE: STRUCTURAL ANALYSIS OF THE 1973 CONSTITUTION, AS AMENDED

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The search for the meaning of justice has been long and difficult. Throughout the ages, great minds have attempted to offer an answer—but have only succeeded to disagree. Some have argued that justice is what the strong impose and the weak accept; others, that, on the contrary, justice is what puts limits on what the strong can impose; still others see no conflict between these two views, for the first describes the real, and the second the ideal in whose image the collective conscience of mankind gradually transforms the real.[1]

There is no one answer that promises to satisfactorily end the debate; and while man approaches the age of greater social complexities brought about by advanced science and technology, consequently trebling the need for a sharper and clearer vision of justice, the answer seems to be farther and farther away.[2]

But justice has always been and is in the heart of every man. Man may disagree about which principles should define the basic terms of their association. But despite this disagreement, they each have a conception of justice. They both acknowledge and understand the need for and are ready to affirm a "characteristic set of principles for assigning basic rights and duties and for determining what they take to be the proper distributions of the benefits and burdens of social cooperation."[3] The disagreement as to the meaning of justice as a preoccupation can still consume the lifetime of many more brilliant thinkers. But to see whether justice is done in a given situation, all it will take is to ask a man from the streets.

In other words, the contemporary problem is not to spill more ink in the much-inundated issue of what is the meaning of justice. The problem is determining whether there is justice in our community, in our

1 Diokno, *A Filipino Concept of Justice.* A paper presented to the Seminar on the Administration of Justice in the Philippines: Focus on the Poor. Sponsored by the Management Education Council, the College of Law and the U.P. Law Center, August 7-8, 1981.

2 According to Julius Stone, *Equal Protection and the Search for Justice,* 22 ARIZ. L. REV. 1 (1980), "As each identifies justice with his own demands, what can be said about justice for all of them becomes more and more impenetrable."

3 RAWLS, A THEORY OF JUSTICE 5 (1971).

society, in our institutions, in our relationships. At this age, we are not so keen as to know what justice means as what justice brings. It will be said later: the essence of justice is in its realization.

The 1973 Constitution Defines a Justice System

The 1973 Constitution does not define what "justice" means as it is used in the Preamble,[4] but it does contain provisions which outline in clear strokes the establishment of a justice system. By justice system,[5] I mean the sum of the structures and institutions embodied in the Constitution designed and intended to promote justice as one of the goals of Philippine constitutional government. What can we expect from this system? A justice system should operate to fulfill that which, for centuries, man has failed to adequately define—justice. Because man, since time immemorial, has continuously struggled to better his lot, this system ought to center on him and be premised on his "inviolability founded on justice." Since the basic rationale for all human endeavor is the pursuit of human happiness, the cornerstone of this system must be respect for human personality and its absolute worth.

According to Rawls, justice is:

> the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reasons, justice denies that the loss of freedom for some is made right by greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore, in a just society, the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising.[7]

These do not mean, however, that one man can derogate the rights of his fellowmen upon a misappreciation of the statement that advantages enjoyed by many cannot justify a sacrifice of an individual's rights. The relations of man to his society is a much discussed subject matter.[8] It

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[4] "....under a regime of *justice*, peace, liberty and equality...." *See* CONST. Preamble.

[5] According to RAWLS *op. cit. supra* note 3 at 7, the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.

[6] The concept of a "justice system" is inspired by Tribe's model of structural justice. See TRIBE, AMERICAN CONSTITUTIONAL LAW 1137 (1978).

[7] RAWLS, *op. cit. supra* note 3 at 7.

[8] See generally works on the contractarian theory of society, e.g., Rousseau, Locke.

need only be stated here that when man entered into social cooperation, he has agreed to surrender some of his rights to society. As to the exercise of these rights, society is entitled to the greatest respect from the individual and he cannot arbitrarily deny it.

From another point of view, Amalrik has advanced the argument:

> Some people say that in order to achieve social and economic rights, it is necessary to sacrifice civil rights. A less extreme view holds that it is first necessary to feed people and only then worry about freedom of expression. This view is, first, immoral, and, second, historically mistaken. It is immoral because man has not only a stomach but also a head and a heart. To be fed is no great thing — a peasant feeds his horses so that they can work. A slave who has eaten his fill retains the psychology of a slave if he has never thought about freedom while he was hungry. If you respect human beings, you should not only feed them but also convey to them a sense of their human dignity. Unless these two processes progress hand in hand, we shall live in a monstrous world.
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> The view which opposes one category of rights to the other is historically mistaken because whenever individual liberty has been sacrificed to achieve social and economic goals, social rights have suffered in comparison with their development in free countries.[9]

The whole ethos of a justice system is to strike a balance between the liberties and dignity of the individual and the needs of socio-economic justice. Neither can be sacrificed. According to Kashyap, neither need be sacrificed.[10]

This should be the foundational norm of our justice system. Is it?

The Justice System in the Constitution and Human Rights

Individual and social justice as the primary goals of a justice system must be realizable from the terms of the constitutional provisions. The fundamental law, while speaking in general terms, cannot afford to be equivocal in the matter of consecrating human aspirations.[11] The Constitution, more than being a compact for social cooperation must be a commitment to human freedom.

The justice system cannot be less vigorous.

A justice system will prove worthwhile if it can permeate into the various phases of human activities and assert its principles towards individual and social justice.[12] To do this, it should embody a set of principles

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9 SUBHASH KASHYAP, HUMAN RIGHTS AND PARLIAMENT 190 (1978), citing Andrei Amalrik, New York Times, February 3, 1977.

10 *Id.* at viii.

11 Clearness in the fundamental law is conducive to a correct and proper understanding of its provisions. It is also evidence of integrity of purpose on the part of its framers who should have no base motives to be concealed by intentional vagueness. See SINCO, PHILIPPINE POLITICAL LAW 70 (1962).

12 A theory of justice will prove worthwhile if...it singles out with greater sharpness the graver wrongs a society should avoid. RAWLS, *op. cit. supra* note 3 at 201.

that shall provide for a way of assigning rights and duties in the basic institutions of society and define the appropriate distribution of benefits and burden of social cooperation.[13] These principles are the principles of social justice.

At the same time, as much an essential part of the justice system, individual rights should be accorded the observance due them.

A justice system, to be relevant to the needs of man, must primarily address itself to the task of promoting and enforcing human rights. In the wide spectrum of human activity, human rights are an overriding consideration. For as long as such rights are duly respected and observed, some form of justice is done.

Does our justice system promote human rights?

Constitutional Rights and Human Rights

The 1973 Constitution contains a Bill of Rights.[14] It is mandated that "no person shall be deprived of life, liberty and property without due process of law, nor shall any person be denied the equal protection of the laws."[15] Then, private property is protected from expropriation: "Private property shall not be taken for public use without just compensation."[16] Corollary to this protection is the prohibition that "no law impairing the obligation of contracts shall be passed."[17] The home of the citizen is safeguarded: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall not be violated," and the issuance of warrants is strictly conditional upon probable cause duly determined.[18] Also, "the liberty of abode and travel shall not be impaired except upon lawful order by the Court, or when necessary in the interest of national security, public safety or public health.[19] To further protect privacy, "the privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety and order require otherwise."[20] Evidence obtained in violation of the above and of Section 3 has been condemned as "inadmissible for any purpose in any proceeding."[21] Then, follow the "intellectual freedoms" as called by Fernando.[22] "The right to form associations or societies for purposes not contrary to law shall not be abridged."[23] Then, "no law

13 *Id.* at 4.
14 CONST., art. IV.
15 CONST., art. IV, sec. 1.
16 CONST., art. IV, sec. 2.
17 CONST., art. IV, sec. 11.
18 CONST., art. IV, sec. 3.
19 CONST., art. IV, sec. 5.
20 CONST., art. IV, sec. 4, par. 1.
21 CONST., art. IV, sec. 4, par. 2.
22 FERNANDO, PHILIPPINE CONSTITUTION, 565 (1977), (hereinafter referred to as FERNANDO).
23 CONST. (1973), art. IV, sec. 7.

shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. "No religious test shall be required for the exercise of civil or political rights."[24] Furthermore, "no law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances."[25] Then come next the "physical freedoms."[26] "No *ex post facto* law or bill of attainder shall be enacted."[27] It is mandated that "no person shall be imprisoned for debt or non-payment of a poll tax,"[28] and that "no involuntary servitude in any form shall exist except as punishment for a crime whereof a party shall have been duly convicted."[29] A very important protection is: "the privilege of the writ of *habeas corpus* shall not be suspended except in cases of invasion, insurrection, rebellion, or imminent danger thereof, when public safety requires it."[30] Lastly, the rights of an accused are safeguarded: "No person shall be held to answer for a criminal offense without due process of law."[31] The protection of the right to bail is: "All persons, except those charged with capital offenses when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties. Excessive bail shall not be required."[32] "In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustified."[33] "No person shall be compelled to be a witness against himself. Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. No force, violence, threat, intimidation, or any other means which vitiates the free will shall be used against him. Any confession obtained in violation of this section shall be inadmissible in evidence."[34] "Excessive fines shall not be imposed, nor cruel or unusual punishment inflicted."[35] "No person shall be put twice in jeopardy of punishment for the same

24 CONST., art. sec. 8.
25 CONST., art. IV, sec. 9.
26 FERNANDO, *op. cit. supra* note 22 at 639.
27 CONST., art. IV, sec. 12.
28 CONST., art. IV, sec. 13.
29 CONST., art. IV, sec. 14.
30 CONST., art. IV, sec. 15.
31 CONST., art. IV, sec. 17.
32 CONST., art. IV, sec. 18.
33 CONST., art. IV, sec. 19.
34 CONST., art. IV, sec. 20.
35 CONST., art. IV, sec. 21.

offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."[36] "Free access to the courts shall not be denied to any person by reason of poverty."[37]

Two new rights are found in the 1973 Constitution. They are the right of access to public records[38] and the right to a speedy disposition of cases before all courts and tribunals.[39]

In addition to all these, the state is mandated to "promote social justice to ensure the dignity, welfare and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment and disposition of private property and equitably diffuse property ownership and profits."[40] To guarantee the enjoyment of a decent standard of living, the State is likewise mandated to "establish, maintain, and ensure adequate social services in the field of education, health, housing, employment, welfare and social securtiy."[41]

Lastly, recognizing "the need of shifting emphasis to community interest with a view to the affirmative enhancement of human values,"[42] the State is likewise mandated to "afford protection to labor, promote full employment and equality in employment, ensure equal work opportunities regardless of sex, race or creed, and regulate the relations between workers and employers. The state shall assure the rights of workers to self-organization, collective bargaining, security of tenure and just and humane conditions of work. The State may provide for compulsory arbitration."[43]

Are these sufficient and effective to secure and promote human rights?

To answer this question, it may be necessary to dwell briefly on what human rights are and how they may be related to the Constitution.

The term "human rights" defies exact definition.[44] There is no universally accepted definition of the term. So far, the best that there is about what human rights are, are listings which are by no means harmonious

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36 CONST., art. IV, sec. 22.

37 CONST., art. IV, sec. 23.

38 Section 6 provides: The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions shall be afforded the citizen subject to such limitations as may be provided by law.

39 Section 16 provides: All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial or administrative bodies.

40 CONST., art. II, sec. 6.

41 CONST., art. II, sec. 7.

42 FERNANDO, *op. cit. supra* note 22 at 82, citing Antamok Goldfields Mining Co. v. CIR, 70 Phil. 340, 357-358 (1940).

43 CONST., art. II, sec. 9.

44 Fred Ruiz Castro, *Address to the World Law Conference* (on World Law Day, August 21, 1977) at the Philippine International Convention Center, Metro Manila, Philippines.

and identical. It seems, however, that a common thread is woven among all definitions given—that is, that the essence of human rights is respect for human personality and its absolute worth regardless of sex, race, color, religion or other considerations alien to the development of the human person and to the attainment of human happiness.[45] It is founded on the ideal realization of equality of all men; freedom and liberty for all men; social, economic and political justice for all men. As such, it has social, economic and political connotations.[46]

On the day of the murder of Martin Luther King, Jr., Robert Kennedy talked about violence and said:

> There is another kind of violence, slower but just as deadly. That is the violence of institutions — indifference and inaction and slow decay. This is the violence that afflicts the poor and poisons relations between men because their skin is of different colors. This is the slow destruction of a child by hunger in schools without books and homes, without heat in the winter, unless we learn at last to look at our brothers as aliens, men with whom we share a city not a community, men bound to us in common dwelling, but not in common effort. And then we learn to share only a common fear, a common desire to retreat from each other, only a common impulse to meet disagreement with force. What we need is not division or hatred or violence or lawlessness but love and wisdom and compassion toward one another and a feeling of justice toward those who still suffer, whether they be white or black. My favorite poet was Aeschylus who wrote, "In our heart, pain which we cannot forget falls drop by drop until in our own despair and against our will comes wisdom through the awful grace of God." So let us dedicate ourselves to what the Greeks wrote so many years ago, "Tame the savageness of man and make gentle the life of the world."

This is human rights, according to Lowenstein.[47]

The American Secretary of State has defined human rights in three categories:[48]

> First, there is the right to be free from governmental violation of the integrity of the person. Such violations include torture, cruel, inhuman or degrading treatment or punishment, and arbitrary arrest or imprisonment. And they include denial of fair public trial, and invasion of the home.
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> Second, there is the right to the fulfillment of such vital needs as food, shelter, health care and education.
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> Third, there is the right to enjoy civil and political liberties of thought; of religion; of assembly; freedom of speech; freedom of the press; freedom of movement both within and outside one's own country; freedom to take part in government.

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[45] KASHYAP, *op. cit. supra* note 9 at 2. Even this is subjected to attack. See Gutierrez, *Human Rights: Overview* in QUISUMBING (ed.), THE NEW CONSTITUTION AND HUMAN RIGHTS, 3.

[46] *Id.* at 6. See also Henkin, *Constitutional Rights and Human Rights.* 13 HARV. C.R.-C.L. L. REV. 593 (Summer, 1978).

[47] LOWENSTEIN, *The United Nations and the Human Rights Issue,* 43 LAW & CONTEMP. PROB. 268, 273 (April, 1979).

[48] Castro, *op. cit.,* note 44 at 8. Citing Cyrus Vance, Speech delivered at University of Georgia, April 30, 1977, Athens, Georgia.

Much of what is understood today about human rights is derived from effort exerted by nations in the international level. But the concern for human rights has its roots imbedded deeper into the histories of individual states. The Bill of Rights in our Constitution putting restraint on the power of government to invade the freedoms of the citizen and the particularly cited provisions from the Declaration of Principles reflect this concern and seek to assure the perpetual veneration of human rights.

The affirmation of human rights in the Charter of the United Nations had a revolutionary effect in international law. It elevated the issue into a position of importance in international relations.[49] It made the protection and promotion of human rights an international concern and responsibility.[50] It took away the issue from being a mere matter within the sole domestic jurisdiction of states.

But what is the position of human rights in our very own hierarchy of constitutional values?[51] Is the promotion and protection of human rights a realizable goal *within the framework of our justice system?* Are our "constitutional rights" broad enough to afford protection to human rights against governmental invasion?

Strictly speaking, the term "constitutional rights" is a misnomer.

The rights of the individual are natural, not a gift from society or from government. The individual is autonomous before he enters into society. Upon his entry, much of that individual autonomy is combined with that of other individuals and transformed into popular sovereignty, which is reflected in and maintained as self-government through their chosen representatives.[52] Some of the individual's autonomy, however, is retained by him as the "unalienable rights"[53] that are immune from invasion even by his own government.[54] Both the establishment of government and the prior existence of inalienable rights are confirmed in the constitutional compact. The Constitution provides for the creation of government and at the same time, sets limits to its powers to deter invasion of the individual's rights so that men may "carry on their ordinary activities and lead normal lives."[55]

Therefore, the Constitution does not, strictly speaking, provide for constitutional rights, heretofore non-existent. It does not create, establish,

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49 F. E. MARCOS, A PERSPECTIVE ON HUMAN RIGHTS AND THE RULE OF LAW: THE PHILIPPINE EXPERIENCE, 8. (hereinafter referred to as MARCOS.)

50 *Ibid.*

51 *See* Henkin, *op. cit. supra* note 46 at 601 for distinctions between the two categories in the advancement of human rights.

52 Article II, section 1 of the Constitution provides: The Philippines is a republican state. *Sovereignty resides in the people and all government authority emanate from them.* (underscoring supplied).

53 Taken from the American Declaration of Independence.

54 Henkin, *op. cit. supra* note 46 at 597.

55 FERNANDO, *op. cit. supra* note 22 at 97.

or grant them.[56] It contemplates only that the individual's pre-existing rights shall be respected by government. It merely defines the constitutional boundaries within which the government may operate. Hence, as a negative formulation, no *ex post facto* law or bill of attainder shall be enacted; or, as a positive construction, the state shall afford protection to labor, etc.

The human rights of the individual do not derive from the Constitution; they antecede it.[57]

That human rights antecede the Constitution has far-reaching implications. It settles all doubt as to the position of the individual in the society which he has created and become part of. It calls back to mind what was said about the fundamental premise of a justice system: man's inviolability founded on justice. It demolishes all justifications for totalitarianism, dictatorship or communism. It means that any act of government or other entity, regardless of motive, that potentially dislodges the rights of man from its exalted position is condemnable within the framework of the justice system and creates in the government a positive duty, whether or not expressly mandated in the Constitution, to restore the supreme order.

Constitutional rights must be construed liberally so as to encompass every conceivable abuse of human dignity and human personality. This is warranted in the justice system as outlined in the Constitution .

This should be the scope of protection that the Constitution must accord to the people's human rights.

Does not this idea do violence to certain basic notions about law and right? Is it not a truism that law is the source of rights and that where there is no law, there is no right? Does this urging not lose sight of the lawyer's basic lesson: to invoke before the court rights based on law, not persuasion and emotions? Is this a failure to canalize legal reasoning within embankments to prevent them from overflowing, to paraphrase Judge Cardozo?

To be sure, the Constitution goes beyond the mere protection of "constitutional rights." If one must see the Bill of Rights as express limitations on the powers of the government to act and tread on paths bordering on individual freedom and the cited sections of the Declaration

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[56] Considering the two new rights inserted in the 1973 Constitution, this statement may not be absolutely correct. "The right ... to information ... shall be recognized." "All persons shall have the right to a speedy disposition of their cases ...." However, the general purpose of the Bill of Rights (i.e. to set limits on governmental powers) is not essentially altered.

[57] Henkin, *op. cit. supra* note 46 at 597.

[58] Bentham said, in attacking natural rights, "Right is the child of Law; from real laws come real rights, but from imaginary law, from laws of nature come imaginary law, from laws of nature come imaginary rights... natural rights is simple nonsense, natural and imperceptible rights rhetorical nonsense, nonsense upon stilts." MARCOS, *op. cit. supra* note 49 at 20.

of Principles as express mandates for the government to promote social justice, it will not be difficult to appreciate that, indeed, there is such a concept of human rights outside of the Constitution which constitutes a galaxy of rights, pre-existent and superior to the government and immune from its encroachments. It is not in this sense that it is said that law is a source of rights and it is not this instance that a lawyer, arguing his case before the court, invokes a right derived from the law.

In the argumentation for human rights, the lawyer cannot cite the Constitution as his basis and support to prove their existence. That every man is invested with human rights is given. The Constitution does not establish or create them. The lawyer can merely bring attention to the provisions of the Bill of Rights to illustrate that the government is expressly limited and circumscribed in its actions affecting individuals. The lawyer can merely cite the Constitution to assert that the government has the positive duty to promote social justice. But in both cases, by such limitations and mandates, it is evident that human rights are paramount; and that it was the intention of the framers to put meaning in the enthronement of human rights by leaving its greater portion unwritten and, therefore, unlimited.

By so providing for a Bill of Rights that does not create but only recognizes human rights, by so intending the Bill of Rights, as circumscription of governmental powers leaving untouched an expansive area of freedom,[59] by so mandating the government towards social justice, the Constitution has not only succeeded to cement the paramount status of human rights, but also constructed a justice system that dreams of meting out more than "legal" or "positivist justice," more justice than what can be seen by the eye.

It is too late in the day to be arguing in terms of "constitutional rights." The "headlong rate of social charge, powered above all by technological change, and by changes in human communications,"[60] requires more sober attention to the needs of man. Necessarily, there should be deeper consideration for the rights of man.

The duty of the government to protect, and advance human rights is now beyond question.

Now, we can discuss the vehicle in the justice system for the advancement of human rights—the structure of government.

Government and Human Rights

A justice system must have an idea of government. It must provide for a just procedure so arranged as to insure a just outcome.[60] Individual

[59] See Henkin, *op. cit. supra* note 46 at 602.
[60] Stone, *op. cit. supra* note 2 at 2.

and social justice need not be farfetched goals if the "instrumentality" [61] by which they are to be attained is sufficiently empowered to confront challenges at the same time that that power is limited to minimize the possibility of tyranny.

A form of government is indispensable to any concept of justice. It is government which promotes the "happiness and prosperity of the community." [62] It is government which undertakes the "quest for the common good and welfare." [63] It is the government which harmonizes conflicts between social and individual interests.[64] In the words of Madison, "Justice is the end of government." [65]

It becomes self-evident, therefore, that, under ideal conditions, the government is the most potent tool for the advancement of human rights, both as social and individual goal. As an element of the justice system the government must be able to and must work for the promotion of human rights, not only under normal conditions but more importantly, during abnormal or emergency situations.[66] The advancement of individual and social justice is a perpetual undertaking. So long as men will continue to strive for the general welfare and common good, so long shall the government be invested with that duty. Irrespective of the people who run it, a good government must be so structured to understand and avert violations or invasions of human rights. An arrangement that allows an honest man to marshall all forces of the government towards the general good cannot be a good arrangement if at the same time it can be utilized by a dictator as an instrument of suppression. The justice system must provide for mechanisms to rein in the public official to accountability. The whole framework of government must be geared towards the promotion of human rights.[67] There is, after all, substance in structure.

The main interest of a student of government is to identify the seat of power in a society; in which institutions and processes this power is channelled through and how the decision-making process is undertaken.[68] The reason for such interest is obvious. The people's pursuit of life, liberty and happiness becomes the function of government. Therefore, knowing the locus of power or the particular organ that possesses the capability to stultify or enhance national goal and objectives becomes a matter of critical importance.

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[61] FERNANDO, *op. cit. supra* note 22 at 148.

[62] F. E. MARCOS, *Martial Law and Human Rights* 36, from MARCOS, THE DEMOCRATIC REVOLUTION IN THE PHILIPPINES (1977).

[63] P. V. FERNANDEZ, PHILIPPINE CONSTITUTIONAL LAW, 13 (1977).

[64] See RAWLS, *op. cit supra* note 3 at 4.

[65] GONZALES, PHILIPPINE POLITICAL LAW 80 (1966), citing Madison, the *Federalist*, No. 51.

[66] "The beneficiary of every strong act of government ... is the individual."

[67] CHAFEE, HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION, 2 (1952).

[68] MACKINTOSH, BRITISH CABINET 3 (1977).

Philippine Constitutional Government in Our Justice System

The 1973 Constitution, as presented by the 1971 Constitutional Convention and which was declared in "force and effect" by the Supreme Court [69] provided for a parliamentary form of government.[70] This Constitution vested the legislative power in a National Assembly [71] while the executive power was to be "exercised by the Prime Minister with the assistance of the Cabinet." [72] While it was observed that the set-up was a "big departure" [73] from the British model, it proved a bigger departure from the presidential system of the 1935 Constitution. Under the modified system envisioned by the framers, the Chief Executive who was the Prime Minister was to be elected by "a majority of all the members of the National Assembly," [74] not by the people directly, as had always been the case since the adoption of the 1935 Constitution.[75] As a consequence, the Prime Minister and his Cabinet were held responsible to the National Assembly for the program of government.[76] For the first time, the Philippine Chief Executive was not directly responsible to the people, although indirectly so.

The Constitution [77] envisioned a fusion of powers; it combined the two great departments of government into one. The theory behind the language of the Constitution ("vesting" the legislative power in the National Assembly; "vesting" the judicial power in a Supreme Court, etc., and the executive power being "exercised" by the Prime Minister with the assistance of the Cabinet) was that, in a parliamentary system, all power of government, except judicial, were concentrated in parliament.[78]

But all these were shattered by the amendments of 1981.

A Super President

The tale of the much-amended 1973 Constitution is a tribute to the vacillating character of the Filipino people — or of the people in power. Less than ten years from the adoption of the new Constitution and before it could be operationalized, amendments were introduced by the Batasang Pambansa sitting as a constituent assembly.[79] As regards the form of gov-

[69] Javellana v. Executive Secretary, G.R. No. 36142, March 31, 1973, 50 SCRA 30 (1973).

[70] See ESPIRITU, PARLIAMENTARY GOVERNMENT 59 *et. seq.* (1976).

[71] CONST. (1973), art. VIII, sec. 1.

[72] CONST. (1973), art. sec. 1.

[73] ESPIRITU, *op. cit. supra* note 70 at 69.

[74] CONST. (1973), art. IX, sec. 3.

[75] CONST. (1973), art. VII, sec. 2.

[76] CONST. (1973), art. IX, sec. 2.

[77] For a while, let us leave the 1976 Amendments because they were amendments to the Transitory Provisions.

[78] ESPIRITU, *op. cit supra* note 70 at 82.

[79] The power of the Batasang Pambansa sitting as a Constituent Assembly to introduce amendments to the Constitution was challenged in Occeña v. COMELEC, G.R. No. 56350, April 2, 1981, 77 O.G. 6346 (Nov., 1981). It was held that the existence of the power was "indubitable."

ernment and the allocation of powers, said amendments had the overall effect of constitutionalizing a very, very powerful chief executive in the person of the President.

Article VII was totally recast. It is interesting to note that the President who was a mere "symbolic head of state" [80] and who had no functions other than ceremonial such as addressing the National Assembly at the opening of its regular session; proclaiming the election of the Prime Minister; dissolving the National Assembly and calling for a general election; accepting resignation of the Cabinet; attesting to the appointment or cessation from office of Cabinet members and certain other offices as the law may provide; and, appointing all officers and employees in this office,[81] became in one fell stroke the real "head of state and chief executive" [82] possessing a vast dominion of powers including those which the 1935 President exercised and which was not conferred upon any other official, unless provided otherwise by the Batasang Pambansa.[83] Unlike the Prime Minister in the abortive set-up, the President was to be "elected by direct vote of the people for a term of six years.[84] This had crucial implications in the system of power allocation in the Constitution because it not simply changed the personality of the chief executive (from the Prime Minister to the President); it also severed the fusion of powers between the executive and legislature, the principal novelty of the 1973 Constitution and the most outstanding characteristic of a parliamentary form of government. The Chief Executive was secured a status independent of the legislature. Such erased the last features of parliamentary government in the Philippines for it is an undisputed proposition that the hallmark of parliamentarism is not the existence of a unicameral legislature or of a Prime Minister but the peculiar interrelationship between the chief executive and the lawmakers resulting from a fusion of their powers.

That is why, the pronouncement of the Supreme Court in the very recent case of *Free Telephone Workers v. Minister of Labor* [85] could not really be a genuine surprise. Chief Justice Fernando, *ponente,* wrote:

> The adoption of certain aspects of a parliamentary system in the amended Constitution does not alter its essentially Presidential character. Article VII on the presidency starts with this provision: "The President shall be the head of State and Chief Executive of the Republic of the Philippines." Its last section is an even more emphatic affirmation that it is a presidential system that obtains in our government.

The President, under the amendments, echoing the 1935 Constitution, once again was given control of the ministries.[86] He was made the com-

[80] CONST. (1973), art. VII, sec. 1.
[81] CONST. (1973), art. VII, sec. 6.
[82] CONST., art. VII, sec. 1.
[83] CONST., art. VII, sec. 16.
[84] CONST., art. VII, sec. 3.
[85] G.R. No. 58184, October 30, 1981.
[86] CONST., art. VII, sec. 8; CONST. (1935), art. VII, sec. 10(1).

mander-in-chief of all the armed forces of the Philippines, and whenever it become necessary, he could call out such armed forces to prevent or suppress lawless violence, invasion, insurrection or rebellion. In case of the same event, or the imminent danger thereof, when public safety required it, he could also suspend the privilege of the writ of *habeas corpus,* or place the country or any part hereof under martial law.[87] He also was granted the power to appoint the various heads of bureaus and offices, officers of the armed forces and all others whose appointments were vested in the President or not otherwise provided for.[88] (It should be noted that the President's power of appointment now is not subject to the consent of a Commission on Appointments.) He was also given the power to grant reprieves, commutations and pardon, except in cases of impeachments, remit fines and forfeitures, and grant amnesty with the concurrence of the Batasang Pambansa.[89]

In addition to this enumeration, the Constitution, as amended, *unlike the 1935 Constitution,* expressly granted the President the power to contract and guarantee foreign and domestic loans on behalf of the Republic[90] and to formulate the guidelines of national policy.[91]

Furthermore, the President is made "immune from suit" during his tenure and thereafter.[92] For official acts done by him or by his subordinates pursuant to his specific orders during his tenure, no suit shall lie.

To cap everything, all powers vested in the President under the 1935 Constitution and the laws of the land not provided for by the amended constitution or conferred upon any other official were deemed vested in the President, unless the Batasang Pambansa provided otherwise.[93]

What has happened to the Prime Minister and the Cabinet? They have been relegated to relatively very minor participations in running the government. Chief Justice Fernando gives a most illuminating analysis of the relationship between the President and the Prime Minister:

> ...the Constitution is explicit that while he (the Prime Minister) shall be the head of the Cabinet, it is the President who nominates him from among the members of the Batasang Pambansa, thereafter being "elected by a majority of all the members thereof." He is primarily, therefore, a Presidential choice. He need not even come from its elected members. He is responsible, along with the Cabinet, to the Batasang Pambansa for the program of government but as "approved by the President." His term of office as Prime Minister "shall commence from the date of his election by the Batasang Pambansa and shall end on the date that the nomination of his successor is submitted by the President." ... Even the

87 CONST., art. VII, sec. 9; CONST. (1935), art. VII, sec. 10(21).
88 CONST., art. VII, sec. 10; CONST. (1935), art. VII, sec. 10(3).
89 CONST., art. VII, sec. 11; CONST. (1935). art. VII, sec. 10(6).
90 CONST., art. VII, sec. 12.
91 CONST., art. VII, sec. 13.
92 CONST., art. VII, sec. 15.
93 CONST., art. VII, sec. 16.

> duration of his term then depends on the Presidential pleasure, not on legislative approval or lack of it....To the Prime Minister can thus be delegated the performance of the administrative functions of the President, who can then devote more time and energy in the fulfillment of his exacting role as the national leader (citations omitted).[94]

The Cabinet has likewise lost its "assisting" role in the exercise of executive functions. In its place was created an Executive Committee to be designated by[95] and whose existence also depends upon the President.[95]

In order, however, to fully appreciate the dramatic resurrection of the President to power, it is necessary to resort to certain historical facts. It is an inevitable observation that the particular changes as introduced by the amendments in the allocation of constitutional power have not actually affected or in reality have maintained the *status quo* for one man, except to increase what great powers he already possessed. The series of amendments affecting the change of the locus of power from the 1935 President to the Prime Minister and lastly to the 1973 President is easier to comprehend in reality because, at all times, only one man possessed such powers.

Ferdinand E. Marcos could not have been President beyond 1973 when his second term would expire. The 1935 Constitution mandated that "no person shall serve as President for more than eight consecutive years."[97] But in September of 1972, he declared martial law.[98] By the middle of January, 1973, or shortly before Congress could convene, President Marcos, by Proclamation No. 1102, declared the results of a national referendum whereby the Filipino People was claimed to have ratified the 1973 Constitution.[99] Article XVII, otherwise known as the Transitory Provisions of this Constitution provided, *inter alia:*

> Sec. 3. (1) The incumbent President by the Philippines ... shall continue to exercise his powers and prerogatives under the 1935 Constitution and the powers vested in the President and the Prime Minister under this Constitution until he calls upon the *interim* National Assembly to elect the *interim* President and the *interim* Prime Minister, who shall then exercise their respective powers vested by this Constitution.[100]

The phrase "incumbent President" was disputed in one case;[101] the Supreme Court held that it referred to President Marcos. At this point in time, it became readily apparent that President Marcos could continue in office until he shall have initially convened the *interim* National Assembly and as martial law administrator, necessarily possessed powers essential to

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94 Free Telephone Workers v. Minister of Labor, *supra* note 85 at 5.
95 CONST., art. IX, sec. 3.
96 CONST., art. IX, sec. 4.
97 CONST., (1935), art. VII, sec. 5.
98 *See* Aquino v. Ponce Enrile, G.R. No. 35546, Sept. 17, 1974, 59 SCRA 183 (1974).
99 *See* Javellana v. Executive Secretary, *supra,* note 69.
100 CONST. (1973), art. XVII, sec. 3(5).
101 Aquino v. COMELEC, G.R. No. 40004, Jan. 26, 1975, 62 SCRA 275 (1975).

meet the emergency and such other powers and prerogatives under the 1935 which legalized President Marcos' stay in power beyond 1973, was amended.[102] Among others, Amendment No. 3 provided:

In 1976, the Constitution, specifically its Article XVII, the provision which legalized Pres. Marcos' stay in power beyond 1973, was amended.[102] Among others, Amendment No. 3 provided:

> ... The incumbent President of the Philippines shall be the Prime Minister and he shall continue to exercise all his powers even after the *interim* Batasang Pambansa is organized and ready to discharge its functions, and likewise he shall continue to exercise his powers and prerogatives under the 1935 Constitution and the powers vested in the President and Prime Minister under this Constitution.

By this amendment, President Marcos, incumbent President under the 1935 Constitution, became Prime Minister, not by election, but by constitutional mandate. The position of President/Prime Minister was thus created. It vested the powers of the 1935 President, the powers of the 1973 President and the powers of the 1973 Prime Minister in one person. In addition, however, to the enumeration, Amendment Nos. 5 and 6 were introduced burying, once and for all, any doubt as to the validity of the exercise of legislative powers by the incumbent President.[103]

Amendment No. 5 provided:

> The incumbent President shall continue to exercise legislative powers until martial law shall have been lifted.

Amendment No. 6 was clear, thus:

> 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 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.

In 1981, the Batasang Pambansa, sitting as a Constituent Assembly, introduced the 1981 amendments previously discussed. These were amendments to Article VII, VIII and IX, among others, the effect of which was to secure to the New President on a more permanent basis, virtually the same powers then held by the President/Prime Minister.

It is unbelievable but it is true. The national excursion to the realm of parliamentarism, martial law and back has resulted in the concentration

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[102] Ratified by the People in the Referendum Plebiscite held on October 16-17, 1976, and proclaimed in full force and effect as of October 27, 1976 by the President under Proclamation No. 1595. The power of the President to introduce amendments to the Constitution was questioned in Sanidad v. COMELEC, G.R. No. 44640, Oct. 12, 1976. 73 SCRA 333 (1976).

[103] The exercise of legislative powers of the President was assailed in Aquino v. COMELEC, *supra* note 101.

of a constellation of powers in one man heretofore impossible even in the imagination.

The significance of the 1981 Amendments does not end, however, in having institutionalized a President possessing almost the same powers as the previous President/Prime Minister. By themselves, the amendments further contributed to the cause of power accumulation.

Firstly, the subservient status of the Prime Minister to the President placed the latter in a superior position with respect to the Batasang Pambansa. While the Prime Minister was stripped of his essential functions as chief executive, he has retained an eminent status inside the halls of the legislature. Presumably, within the four corners of the Batasang Pambansa, as no changes were effected in the working relationships between him and the Batasan, the voice of the Prime Minister will still reverberate the farthest. He remains to wield the greatest influence. But, as was pointed out earlier, he is only a Presidential choice and his term of office depends upon Presidential discretion. He can be effectively controlled by the President. Through him, the President can manipulate the legislature, even dissolve it.[103a]

How can the Batasang Pambansa check the President?

It is unfortunate that the Amendments have actually failed to fortify the Constitution with the necessary checks and balances. The Batasang Pambansa is powerless against the President. The unamended 1973 Constitution provided for a question hour during which the Prime Minister or any Minister may be required to appear and answer questions and interpellations by Members of the National Assembly.[104] This provision provided for the forum where the Prime Minister and the Members of his Cabinet could be required to explain their actions to the representatives of the people. This is retained in the Constitution as it was not touched by the Amendments — but obviously, it has lost its significance when the Prime Minister was relegated to the background. Why take pains in spelling out provisions that will check the conduct of the Prime Minister when it is the President who possesses the immense power to make or break the Filipino people?

The same fate befell the provision on withdrawal of confidence from the Prime Minister by the National Assembly.[105] The term of the Prime Minister, as mentioned earlier, now depends on presidential discretion. However, the Constitution still contains the rather elaborate procedure for the withdrawal of confidence from the Prime Minister by the Batasang Pambansa. It is rather vexing why a constitution should spend so much effort outlining institutions to afford built-in checks against possible abuse of power if the object of such checks are officials who do not really "call the shots." The separation of the President from the legislature, as evidenced

[103a] CONST., art. VIII, sec. 13(2).
[104] CONST. (1973), art. VIII, sec. 12.
[105] CONST. (1973), art. VIII, sec. 13(1).

by his being elected directly by the people and by the nature of his duties as enumerated in the fundamental law, necessitates that checks and balances be instituted between him and the legislature; not between the Prime Minister and the legislature.

Secondly, the 1981 Amendments to the Constitution has made the President immune from suit during his tenure. No suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure.[106] Serious questions arise as to the effects, both beneficial and adverse, of this provision on the supposed accountability of public officers. It should be remembered that public officers are mandated to "serve with the highest degree of responsibility, integrity, loyalty and efficiency, and shall remain accountable to the people." [107] If some public officers are assured that "no suit whatsoever shall lie" against them, it is very difficult to see how accountability to the people can ever be concretized. Then it may be asked: how does this immunity provision affect the power of judicial review by the courts? Will the immunity of the President and his subordinates who acted pursuant to his "specific orders" foreclose inquiry into matters which are of interest to the people? Does not this provision have the undesirable effect of indirectly putting a stamp of validity on acts of the President and his subordinates by simply holding them beyond the reach of the courts?

The reason cited for the introduction of this provision was that it would avert harrassment of public officers.[108] It was explained that this provision was intended to encourage public officials to perform their duties efficiently and free from fear of vexations and threats of litigations. While, admittedly, this is a very laudable measure to protect public officials who have genuinely worked for the people, it also reflects an unconscionable lack of faith in our justice system. A man, guilty or not, under our system, is entitled to his "day in court." A man, guilty or not, under our system, is presumed innocent until proven otherwise. But, on the other hand, what has this provision done? Without determining the guilt of the public official, this immunity has already decreed that no suit whatsoever shall lie against him. This blind immunity protects *everybody* who acted pursuant to specific orders of the President although it is undeniable that some, in the performance of such orders, may have been abusive or oppressive, and, although constitutional rights may have been violated in the process. It is a settled principle in law that the President, during his tenure, may not be made a party in court suits because, otherwise, he becomes an ordinary litigant having to answer summonses from courts all over the country to the detriment of the state when he should be spending his time performing his more important functions. But this reasoning cannot stand when he steps down

106 CONST., art. VII, sec. 15.
107 CONST., art. XIII, sec. 1.
108 On the eve of the lifting of Martial Law, a decree, P.D. No. 1791, was issued to grant the military a substantially similar immunity.

from office. And it is to the interest of the State that a public official should be accountable to the people for any misconduct during his tenure, there is no reason why the mere fact of his termination from service should bar suit against him.

Thirdly, the 1981 Constitutional Amendments have opened wide the door to the possibility of a President holding office for life. Unlike the 1935 Constitution, no provision is found in the amended Article VII which prohibits the President from bidding for a perpetual re-election or which prescribes a maximum number of years during which an individual may serve. The wisdom of such prohibition is undisputed. A lifetime will be a very short term for a good President during which he can work to alleviate the poor conditions of the people. However, a day will be an eternity under the oppression of a tyrant. If justice were to be served, the structure of government must be able to assist the good President in his noble endeavors, but, at the same time, it must be able to resist the stranglehold of a self-serving dictator. If it is true, as one writer said, that one of the reasons for constitutionalism is the fear of despitism,[109] the failure to provide for a maximum number of years when an individual may serve as President, a very, very potent office under the particular set-up is a gross omission the consequences of which no Filipino could be ready to face.

Two Legislative Bodies Under the New Republic

Then, there is Amendment No. 6 of the 1976 Amendments. It was earlier stated that this provision, together with Amendment No. 5 buried once and for all any doubt as to the power of President Marcos, then President under the 1935 Constitution, to issue decrees with the effect of law, a prerogative which he started exercising since the declaration of martial law in September of 1972. Under the conditions then prevailing, these amendments constitutionally confirmed the ruling of the Court in *Aquino v. COMELEC*,[109a] declaring certain Presidential Decrees as valid, thereby upholding the legislative powers of the President. By the amendments, it was then undisputed that President Marcos exercised law-making functions at least until martial law shall have been lifted.[110] Furthermore, it was clear that, when a grave emergency existed to which the interim Batasang Pambansa or the regular National Assembly could not respond, the President could still issue decrees, orders, etc.[111] In January of 1981, martial law was lifted. Amendment No. 5, therefore, joined the shadows of history. President Marcos, in his report to the Batasang Pambansa, regarded January 17, 1981, the day when martial law was lifted, as the beginning of a

109 Quisumbing, *Human Rigths in the 1973 Constitution: Implementation and Enforcement*, in QUISUMBING, (ED.) THE NEW CONSTITUTION AND HUMAN RIGHTS, *op. cit. supra* note 45 at 155.

109a *Supra* note 101.

110 *See* Amendment No. 5.

111 *See* Amendment No. 6.

"new age" [112] because, with Amendment No. 5 becoming *functus officio,* the great responsibility of law-making fell more heavily into the hands of the Batasang Pambansa.

As to the exercise of the power granted by Amendment No. 6, President Marcos said:

> This allows the Prime Minister or the incumbent President to meet any grave emergency or a threat of imminence thereof to rectify any inadequacy without having to resort to the extreme of proclaming martial law or suspending the privilege of the writ of *habeas corpus.*
>
> It, therefore, is a safety valve and at the same time allows the phasing or gradation of the use of emergency power.
>
> When the situation arises which, may be grave like an economic emergency and yet does not affect the security of the state, Amendment No. 6 can be utilized. Without Amendment No. 6, it is possible that a grave economic emergency or a threat of imminence thereof may be utilized in order to justify the proclamation of martial law, specially when marked by violence, subversion and insurrection. I reiterate that Amendment No. 6 is a safety valve which allows the graduated classification of contingencies and crises in such a manner that the President and Prime Minister can restrain or extend the vigor of the exercise of such power in accordance with the requirements.
>
> It also motivates the Batasan to adequately provide for every situation.
>
> In all instances, however, I have announced that as the head of government and the party leader of the parliament, it is my hope not to exercise this power unless absolutely necessary to do so and only after consultation with the members of the party in power in the Batasang Pambansa which shall be the repository of the legislative power of the Republic of the Philippines.[113]

A close look, however, at Amendment No. 6 reveals nothing more than the fact that, whenever in the judgment of the President/Prime Minister (Marcos), there exists a grave emergency or a threat or imminence thereof, or whenever the interim Batasang Pambansa . . . is unable to act adequately on any matter that in his judgment requires immediate action, he may in order to meet the exigency, issue the necessary decrees, etc., which shall form part of the law of the land. In other words, the President still possesses law-making powers even after martial law was lifted, inspite of Amendment No. 5 becoming *functus officio.* And irrespective of any rhetorics about the Batasang Pambansa sharing the "greater" burden of law-making, it was clear that there is another law-making body existing whose judgment no court in the land could dare to question. It seems that Amendments Nos. 5 and 6, were two mutually exclusive grants of power, one being sufficient even without the other so much so that when martial law was lifted, Amendment No. 6 has persisted and continued to operate to its fullest extent.

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[112] Address of the President, Opening Session of the Batasang Pambansa, 19 January, 1981.

[113] *Ibid.*

By virtue of the ratification of the Amendments of 1981, national elections were held last June, 1981 for the position of President. There was a total of thirteen aspirants,[114] one of them being Ferdinand E. Marcos, the last President under the 1935 Constitution and President/Prime Minister under the 1976 Amendments to the 1973 Constitution. He won the Presidency with a plurality of 18,309,360.[115] In June 30, 1981, he was sworn into office as President, the first under the "New Republic."[116]

The idealism of the New Republic has been well explained by President Marcos. In his report to the Batasang Pambansa, he said:

> We must now recognize without reservation that our passage into political normality connotes no simple return to old democratic processes and institutions, but the real founding of a New Republic in our country — new in structure and in character.
>
> But it is not merely in a formal sense that our Republic merits demarcation from its predecessors. The temper of the times we live in, the situation of the nation today, the nature of our purposes and circumstances signify also reform and change of a more substantive character.
>
> We have lived through a period of crisis and renewal in our land, the likes of which we have not known or attempted before. Just as it is fact that we have brought to life a new system of government in our country, so it is also fact that the people and the nation which will raise it to maturity are new — liberated, as many of us are wont to say, from the shackles of the past and the letters of structures and trends in our national history.[117]

But the one silent implication of the New Republic that is of great importance to the Filipino people lies deeper. It is the fact that after June 30, 1981, Article VII of the amended 1973 Constitution was made operative *in lieu of the Transitory Provisions.* While before, the Chief Executive was governed by Article XVII and the 1976 Amendments; now, it was Article VII and it meant a partial departure from a transition government to the normal, regular government.[118] If only for the fact that the New Republic ushered in the regular President under the regular government, June 30, 1981 should be well-remembered in Philippine history.

Earlier, it was noted that the 1981 Amendments, particularly Article VII institutionalized a President with virtually the same powers and prerogatives as the President/Prime Minister under the transition government. Furthermore, it was shown that Article VII has elevated the

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114 *Statement of the Votes Cast for Each Candidate for President in the Election Held on June 16, 1981,* Batasang Pambansa.

115 *Ibid.*

116 *See* Times Journal, p.1; Bulletin Today, p. 1; Daily Express, p. 1; all dated June 30, 1981.

117 Ferdinand E. Marcos, *State of the Nation Address: The New Republic,* July 27, 1981.

118 Section 5(1) of the amended Article VIII mandated that regular election of the Members of the Batasang Pambansa be held on the second Monday of May, 1984.

President to a position of ascendancy over the Batasang Pambansa and even the Supreme Court.[119] At this point, however, it is likewise submitted that, in spite of the above, Article VII is also significant for its failure to reenact Amendment No. 6 and, therefore, the omission to grant the President the power to issue decrees under any conditions, unless so empowered by the Batasang Pambansa. Therefore, it goes without saying that President Marcos, when he was sworn into office as President of the New Republic, ceased to be President/Prime Minister and relinquished forever his decree-making power.

Very cogent reasons dictate this conclusion. Firstly, it is absurd to even grant as an assumption that when President Marcos was elected and sworn as President under the New Republic, he still remained President/Prime Minister under the transitory provisions and the 1976 Amendments. The amended Article VII contemplated the operation of government under normal conditions; while Article XVII and Amendment No. 6 were measures intended to operate under a dual atmosphere: a national emergency and the transition from the 1935 Constitution to the New Constitution. Normality negated any notion of emergency and an emergency was by nature an abnormal situation. Therefore, either President Marcos was President under the amended Article VII or he was President/Prime Minister under Article XVII and Amendment No. 6. But President Marcos was in fact sworn into office as President under Article VII last June 30, 1981. Therefore, he cannot be the former President/Prime Minister under Amendment No. 6; he does not, therefore, possess the power granted by Amendment No. 6 and the position of President/Prime Minister, having been vacated, Amendment No. 6 has become *functus officio*.

President Marcos, himself, speaking before the Batasang Pambansa admitted:

> On April 20, this year, when I addressed the Batasan *one final time as President/Prime Minister,* following the national plebiscite on April 7, I formally relinquished to this body *all powers of legislation vested in the President/Prime Minister by the Transitory Provisions of the Constitution* (underscoring supplied).[120]

Secondly, it is equally unwarranted to suppose that the power granted by Amendment No. 6 to the President/Prime Minister is likewise granted to the President because Article VII which governs the Presidency does not in any manner make any reference to Amendment No. 6. It was shown before that Article VII enumerated the vast powers of the President. And, in addition, Section 16, Article VII vests in the President all powers vested in the President of the Philippines under the 1935 Consti-

[119] See discussion on page 17 *et seq.*

[120] Ferdinand E. Marcos, *State of the Nation Address: The New Republic,* July 27, 1981.

tution and the laws of the land which are not provided for or conferred upon any other official (unless the Batasang Pambansa provided otherwise). But Amendment No. 6 is not part of the 1973 Constitution as one of the amendments thereto. Furthermore, if there was intention to grant the President the same power, certain other sections of the Constitution were amended in such a way that the term "Prime Minister" was made to read as "President," but Amendment No. 6 was not touched. The fallacy in the proposition that the President now possesses the power under Amendment No. 6 is readily apparent if it is assumed that *another* person, not President Marcos, was elected President. Surely it is incorrect to say that the power granted by Amendment No. 6 to President Marcos, as President/Prime Minister should, without any legal or constitutional basis, be transferred to the elected President merely because, in the coming "new age", it is the President who is at the helm of government.[121] The wrong thinking that the President under Article VII possesses the power of issuing decrees under Amendment No. 6 stems from a confusion as to where constitutional power is lodged: the person or the position. This should now be obvious.

Thirdly, the proposition that the President now can still issue decrees collides directly with the amendment vesting in the *interim* Batasang Pambansa now existing the *same* powers as the *interim* National Assembly,[122] which has been renamed Batasang Pambansa.[123] This means that the present Batasang Pambansa shall exercise the legislative power, not the President. If this amendment, taken together with the fact that a regular President has already assumed office, were taken to mean that the country is definitely grinding towards normalization, negating the existence of grave emergencies that necessitate grants of extraordinary power, then, possession of the power under Amendment No. 6 by the President is an anachronism and cannot deserve serious consideration.

From the foregoing, it follows that the President does *not* possess any legislative power and, therefore, cannot issue decrees that shall "form part of the law of the land." The only one instance when the President may hope to wield (again) law-making powers is when he is so authorized by the Batasang Pambansa to exercise such powers necessary and proper to carry out a declared national policy during times of war or other national emergency. Even then, this delegation by the Batasan shall be for a "limited period and subject to such restrictions as it (the Batasan) may prescribe."[124]

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[121] CONST., art. IX, sec. 4; art. XII-B, sec. 1, par. 1; art. XII-C, sec. 1, par. 2, sec. 2, par. 4, sec. 4; art. XIV, sec. 1 & 15.

[122] The 1976 Amendment No. 2 was amended to read: 2. The *interim* Batasang Pambansa shall have the same powers and its Members shall have the same functions, responsibilities, rights, privileges, and disqualifications as the *interim* National Assembly and the regular National Assembly and the Members thereof.

[123] CONST., art. VIII, sec. 1.

[124] CONST., art. VIII, sec. 15.

The factual events, however, are all astray. On September 19 and October 2, 1981, apparently exercising the power under Amendment No. 6, President Marcos issued two decrees, Presidential Decree Nos. 1840 and 1841, respectively. On November 11, 1981, before the Batasang Pambansa, Assemblyman Francisco Tatad attacked these presidential issuances as a "contempt and a very serious one at that" committed against the Batasan which deserved at the very least the Batasan's "collective indignation."

Assemblyman Tatad argued that the Constitution had been violated. He said that the Batasang Pambansa is not only a legislative body of the nation. It is *the* legislative body of the nation. Beside it, after it, there is no other. Legislative power is vested in the Batasang Pambansa, not Malacañang. And there is nothing in the Constitution that empowers the President to legislate.

On Amendment No. 6, he said:

> Amendment No. 6, Mr. Speaker, when it was yet enforced gave the President/Prime Minister the power to legislate concurrently with the Batasan. But that power, that power is no more. It is gone. Finished. Ended. And it ended when President/Prime Minister Marcos who had the right to exercise such power under the 1976 Amendments passed in to the shadows of history and President Marcos took his oath of office as President of the so-called Fourth Republic on June 30, 1981 under the Constitutional Amendments of 1981. If any proof be needed that Amendment No. 6 is no longer in operation, one needs only to look at the provision and see that, in the 1981 Amendments, we have a provision which alters the usage of the regular National Assembly as it appears in Articles XII, XIII, XIV, XV and XVI to the term "Batasang Pambansa," but which does not at all, touch on Amendment No. 6.[125]

But the government believes that President Marcos still possesses his decree-making power. The following news item appeared in the papers recently:

> President Marcos last night gave the Batasang Pambansa one week to pass the Dangerous Drugs bill....
> Departing from his prepared text, the President said that drug addiction requires emergency action....
> *He also recalled telling the Kilusang Bagong Lipunan caucus last week his intention to issue a decree* on a tougher anti-drug law, should the assemblymen fail to meet his deadline.[126] (underscoring supplied)

Impeachment As the Ultimate Check

The Constitution demands no less than the highest degree of responsibility, integrity, loyalty and efficiency from each and every public

[125] Transcript of Proceedings, Batasang Pambansa, November 11, 1981. Note: Last January 16, 1982, Pres. Decree No. 1842 was issued amending certain provisions of Pres. Decree No. 1841.

[126] Times Journal, January 20, 1982, p. 1; See also Bulletin Today, January 21, 1982, p. 1.

officer and employee.[127] To concretize this mandate, the Constitution provides for the removal from office of the President, Members of the Supreme Court, and Members of the Constitutional Commissions on impeachment for and conviction of culpable violation of the Constitution, treason, bribery, other high crimes, or graft and corruption.[128] Likewise, a special court called the *Sandiganbayan* [129] and a special office called the *Tanodbayan* [130] have been created to hear criminal and civil cases involving graft and corruption and such other offenses committed by public officers and employees; and to receive and investigate complaints relative to public office, make appropriate recommendations and, in case of failure of justice, to file and prosecute the corresponding cases, respectively.

The law on impeachment as provided in the Constitution merits great attention in this paper because, having seen, *supra,* how strongly the President has become and how weakly the other departments of government have degenerated, it becomes critically a matter of national survival that, there be impeachment provisions which can operate to serve as the ultimate check on the exercise of expansive powers by the President.

It is submitted, however, that Section 3, Article XII of the Constitution is a defective law and it cannot be made to operate without necessarily an injustice being perpetrated and without the fundamental notions of justice being violated. So long as this is not corrected, the Constitution exists as if it is without any provision on impeachment and the people are afforded no checks that will rein in public officials to accountability.

A study of the nature of impeachment and reference to foreign models of impeachment procedure will clearly illustrate this point.

Impeachment is a criminal accusation brought by a legislative or executive branch of a government.[131] Originally, it was a legislative function only; but the concept broadened since World War II, so that impeachment may be by executive body as in Nationalist China[132] or by a body exercising both executive and legislative functions, as in Cuba.[133]

Legally, the term "impeachment" applies only to the indictment. In popular usage, however, it embraces also the trial of the accused, conducted by the *higher* branch of legislature, as in US and England; by

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127 CONST., art. XIII, sec. 1.
128 CONST., art. XIII, sec. 2.
129 CONST., art. XIII, sec. 5.
130 CONST., art. XIII, sec. 6.
131 14 ENCYCLOPEDIA AMERICANA 816 (1970).
132 The Control Yuan, a group that supervises public functionaries, holds the sole power to impeach. REPUBLIC OF CHINA CONST., art. 90.
133 A council of Ministers may indict the President of the Republic or its own members for crimes against the state. 14 ENCYCLOPEDIA AMERICANA 816 (1970).

a Court, as in Belgium, France and Italy, or by a combination of both as in some states of the United States.[134]

Impeachment existed in ancient Greece, in a process called the *eisangelia.* The modern institution did not originate until the later part of the 14th Century, in England from where it spread throughout the world.[135]

Today, varying impeachment clauses appear in the constitutions of almost all countries of the world, except notably that of the Soviet Union.[136]

Impeachment in the United States

Six clauses in the United States Federal Constitution embody the impeachment law: Article I, Sections 2 and 3, Article II, Section 2. The House of Representatives indicts, the Senate tries and the Chief Justice of the United States presides over the inquiry in case of impeachment of the President. A two-thirds vote of the Senators present is required to convict. Punishment is limited to removal from office, but the acts of the accused are still subject to criminal proceedings in the Courts. The impeachable acts are "Treason, Bribery, or other High Crimes or Misdemeanors."

Article II, Section 4 of the Federal Constitution provides that "the President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Since the adoption of the Constitution, congressional investigations of possible impeachment for misconduct had been ordered in over sixty-five cases, of which fifty-three involved federal judges.[137] As a result of twelve of these investigations, nine concerning federal judges, articles of impeachment were voted by the House of Representatives. Seven of the twelve respondents were acquitted, one resigned just before the commencement of his trial by the Senate and four—all of whom were federal judges were convicted by the Senate.[138]

The writers of the U.S. Constitution adopted the British procedure with *modification* primarily to discourage the practice then common in England of using impeachment as an instrument of political warfare.[319] The most conspicuous attempt in the United States to circumvent this intent took place in 1868, when the radical Republicans in control of

134 *Ibid.*
135 *Ibid.*
136 *Ibid.*
137 Fenton, *The Scope of the Impeachment Power,* 65 N.W.U.L. REV. 719, citing I. BORKIN, THE CORRUPT JUDGE 219-258 (1962).
138 *Ibid.*
139 14 ENCYCLOPEDIA AMERICANA 816 (1970).
140 *Ibid.*

the House of Representatives impeached President Andrew Johnson in an obvious attack on the federal system of checks and balances.[140]

The most recent incident in the U.S. that could have led to an impeachment was the case of President Richard M. Nixon in 1974.[141] But as in most of the investigations in the past, the possibility of impeachment was foreclosed by the resignation from office of the subject of inquiry.[142]

The Senate has a special set of rules, 25 in number which define its proceedings when sitting as a court for impeachment trials.[143] The sole power of impeachment is vested in the House of Representatives, and even if the Senate in an impeachment trial should find the person not guilty, that does not alter the fact that said person had been impeached by the House.

Once the House of Representatives has voted to impeach an officer of the Government, the Senate is informed of such fact by a message from the House of Representatives, announcing to the Senate that a committee has been appointed by that body to go to the bar of the Senate, "and, in the name of House of Representatives and all of the people of the United States, to impeach . . ." the said person and "to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him" for the Senate's consideration of whether the said person is guilty or not guilt.[144]

At a later date, the Senate is informed that managers on the part of the House of Representatives have been named "to conduct the impeachment against" the said official and that said managers are directed to carry to the Senate the articles agreed upon by the House.[145]

It requires a two-thirds vote by the Senate in the adoption of at least one of the articles of impeachment submitted to the Senate by the House of Representatives to find a person guilty of "treason, bribery or other high crimes and misdemeanors."

The Constitution also provides that the "Senate shall have the sole power to try all impeachments, when sitting for that purpose, they shall be on oath or affirmation."[146]

Impeachment in England

In England, an impeachment is a judicial proceeding against a lord or a commoner who is accused of a high crime or political misdemeanour. In

141 SCHLESINGER AND BRUNS, CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974 1523 (1975).
142 Fenton, *op. cit. supra* note 138 at 719.
143 The description of the procedure of impeachment was taken substantially from RIDDICK, SENATE PROCEDURE 495 (1974).
144 *Ibid.*
145 *Ibid.*
146 *Ibid.*

this proceeding, the Commons are the accusers, and the Lords are judges both of fact and law.[147]

The first recorded case of impeachment occurred in 1376, when Lords Latimer and Neville and four commoners — i.e., Lyons, Ellys, Peachey and Bury — were charged with the removal of the staple from Calais, lending the King money at usurious interest, and buying Crown debts for small sums and then paying themselves in full out of the Treasury. In 1386 Michael de la Pole, the Chancellor, was impeached and dismissed for official misconduct. William de la Pole was impeached in the reign of Henry VI. After this, there was no impeachment till the reign of James I, bills of attainder having taken their place. In 1621 Lord Bacon and Sir Giles Monpesson were impeached, and down to the Revolution there were forty cases of impeachment. From the accession of William III to the death of George I there were fifteen cases. There was one case during the reign of George II.[148]

The last two cases of impeachment were those of Warren Hastings, Governor-General of India (1787) and Lord Merville, formerly treasurer to the Admiralty (1805). Both were acquitted.[149]

There is a view that impeachment may now be obsolete. During times of political excitement, the subject may arise but "circumstances are not easily imaginable in which resort to it might be necessary so far as ministers are concerned. This is mainly due to the development of the convention relating to collective ministerial responsibility to parliament."[150]

The right to institute an impeachment belongs exclusively to the House of Commons, and when a motion has been agreed to by that House, the mover is instructed to go to the House of Lords and impeach the offender of high crimes and misdemeanours and acquaint the Lords that the House of Commons "will, in due time, exhibit particular articles against him, and make good the same."[151]

The House of Commons appoints a committee to draw up the articles of impeachment for the approval of the House. The Commons then send the articles to the Lords while reserving the right to send further articles if the Commons think them necessary, and the Lords make an order for a copy of the articles to be granted to the accused person, to each of which he is directed to put in his answer within a specified time. On receipt of the answers, the Lords communicate them to the Commons, who put in replications if such are thought necessary.

The day for the hearing is fixed by the House of Lords. If the accused is a peer, a Lord High Steward is appointed to preside, while if a commoner

147 PHILLIPS, CONSTITUTIONAL LAW 68-69 (1952).
148 *Ibid.*
149 *Ibid.*
150 *Ibid.*
151 The description of the procedure of impeachment in England was substantially taken from 10 HALSBURY'S LAWS OF ENGLAND 336 (1975).

is on his trial, either the Lord Chancellor or the Lord Speaker of the House of Lords presides. The Commons attend the trial as a committee of the whole House, and their case is put forward by certain of their members whom the House appoints as its managers to prepare the evidence and conduct the prosecution on its behalf. The accused person may summon witnesses and may be heard by counsel.

All members of the House of Lords are equally judges of law and of fact, and, though a High Steward may be appointed to preside, he has merely to regulate the procedure, and is a judge of law to no greater extent than any other peer. He has a vote in the same manner as other peers. The High Steward has the title of "His Grace." In determining whether the charges have been proved, each article of the impeachment is taken separately, the Lord High Steward, or the Lord Chancellor, as the case may be, asking each peer in turn (beginning with the junior baron) whether the defendant is guilty or not guilty. In reply, each peer stands in his place and laying his right hand upon his breast, answers in the words "guilty or not guilty and then announcing the result."

If the accused is declared to be guilty, he may plead matters in arrest of judgment, and in no case is judgment delivered by the Lords until it has been demanded by the Speaker on behalf of the Commons.

Impeachment in the Philippines

In the Philippines, no president or any other high official of government has ever been removed from office on impeachment and for conviction of an impeachable offense as provided for in the Constitution. History, however, relates of certain near-incidents where resolutions were proposed in the House of Representatives to impeach the President [152] and a justice of the Supreme Court.[153] In the latter case, Justice Perfecto died before he could be removed from office.

The Senate of the now defunct Congress did not have any rules of procedure on impeachment pursuant to the provisions of the 1935 Constitution. De Leon,[154] following the American model, proposed one such procedure. Its most salient points included the passing by the House of Representatives of an Article of Impeachment after due investigation; the appointment by the House of a Committee of Managers who will make good the

[152] There was a move to impeach President Elpidio Quirino. See H. Res. 160, 1st Cong., 4th Sess. (1949); Special Comm. on Impeachment, H. Rpt. 1214, 1st Con., 4th Sess. (1949); 4 CONG. RECORDS No. 64 1537 *et. seq.* (April 28, 1949). There was also a move to impeach President Diosdado Macapagal. See H. Res. 169, 5th Cong., 3rd Sess. (1964); Comm. on Judiciary, H. Rpt. 5482, 5th Cong., 3rd Sess. (1964). There was also a move to impeach President Ferdinand Marcos. See H. Res. 127, 6th Cong., 4th Sess. (1969); 4 CONG RECORDS No. 71 1 *et. seq.* (May 20, 1969).

[153] "Wants Perfecto Impeached". Evening Chronicle, January 22, 1941, p. 1. (headline). The impeachment case against Justice Antonio Barredo is very fresh in our mind.

[154] F. De Leon, *Impeachment Under Our Constitution*, CONSTITUTIONAL REVISION PROJECT, UP Law Center (1970).

charges embodied in the Articles of Impeachment: the constitution of the Senate as a high court of impeachment; and, lastly, the trial, where the House, through its Committee of Managers, acts as the accuser, and the Senate, as judge.

Under the 1973 Constitution, as amended, the impeachment law is contained in Article XIII. Section 2 provides that:

> The President, the Members of the Supreme Court, and the Members of the Constitutional Commissions shall be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, other high crimes, or graft and corruption.

Section 3 says:

> The National Assembly [155] shall have the exclusive power to initiate, try and decide all cases of impeachment. Upon the filing of a verified complaint, the National Assembly may initiate impeachment by a vote of at least one-fifth of all its Members. No official shall be convicted without the concurrence of at least two-thirds of all Members thereof. When the National Assembly sits in impeachment cases, its Members shall be on oath or affirmation.

Section 3 presents a most anomalous situation. It wittingly or unwittingly collides with the fundamental precept that in proceedings where a person stand on trial for his conduct, the judge cannot, *at the same time,* be the accuser. The basic flaw in our impeachment provision is that the "exclusive power to initiate, try and decide" all cases of impeachment has been vested in only one body, the Batasang Pambansa. This means that the Batasan indicts; the Batasan convicts.

The nature of the impeachment proceeding is adversary, just like our criminal system. The reason why a fiscal cannot be made to act as the judge later in the trial is because after he has determined according to law that there is a *prima facie* case against the accused, he can no longer possess that impartiality that the accused must be accorded. The fiscal, after having taken the cause of the complainant, will not be able to believe later on that the accused is innocent unless proven otherwise, as the Constitution guarantees. This is the necessary partisanship of the lawyer but herein lies the success of the administration of true justice.[156] The fiscal paints one profile of truth, the counsel for accused paints the other. For justice to be done, there has to be a judge other than the fiscal or defense counsel, who can look at truth "full in the face."[157]

The Batasang Pambansa has the "exclusive" power to initiate impeachment proceedings." A vote of at least one fifth (1/5) of all the Members of the Batasan in favor of the resolution of impeachment presented by the

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155 Now the Batasang Pambansa.
156 QUISUMBING, TRIAL TECHNIQUE: A FORMULA FOR TRIAL 8 (1951).
157 *Ibid.*, citing CALAMANDREI, EULOGY OF JUDGES. 37-38.

Committee on Justice, Human Rights and Good Government shall be necessary for the impeachment trial to proceed.[158] The Batasan has likewise the exclusive power to try and decide all cases of impeachment. "In the final voting to determine whether the impeachment shall be sustained or not, the *yeas* and *nays* and abstentions shall be taken on each article of impeachment separately. If the impeachment be not sustained by the vote of two-thirds of all the Members of the Batasang upon any of the articles presented, a judgment of acquittal shall be entered . . . . "[159] It is immaterial that a vote of only one-fifth of all the Batasan Members is required to pass an Article of impeachment and to commence trial. It is likewise immaterial that conviction requires a two-thirds vote of all the Members. It is shocking enough to the moral and judicial senses that the *same* body which has initiated the trial after having ultimately determined the legal sufficiency of the impeachment charge will also determine the guilt of the respondent as so charged. The requirement of initial voting where at least one-fifth of all the Members approve an Article of Impeachment renders the impeachment trial meaningless and merely a matter of form because, in both cases when the Batasan votes (i.e., to pass an Article of Impeachment and to convict upon the Article of impeachment) there is only one issue: the probable guilt of the respondent. Can the Batasang Pambansa look at truth full in its face?

This flaw is not present in the U.S. Constitution where the House of Representatives indicts; and the Senate tries. It was also absent in our 1935 Constitution. It is not found in the English procedure, the accepted model of parliamentarism. The French procedure from which we have supposedly modelled our system also does not suffer from this mistake. In France, the two assemblies of Parliament indict; the High Court of Justice tries.[160]

Intended as a measure to hold high public officials accountable to the people, Article XIII, Section 3 instead succeeds to perpetrate a "constitutional injustice." As a political weapon, it has become even more dangerous.

The justness of the Constitution or any of its provisions is a question that is properly addressed to its wisdom rather than its constitutionality. Therefore, it is an inquiry which the Supreme Court will not undertake. What is then the recourse of the public official?

CONCLUSION

This is our Constitution.

It is a monumental document that enthrones the rights of the Filipino at the top of our hierarchy of constitutional values. It is the most expres-

158 Rule III, Sec. 8, Rules of Procedure in Impeachment Proceedings. Approved by the Batasang Pambansa, December 7, 1981.
159 Rules on Impeachment, *supra* Rule VII, Sec. 28.
160 FRANCE CONST., art. 68.

sive evidence of the antecedent nature of human rights with respect to his society.

It confirms that human rights cannot be compromised or be the subject of social bargaining. It condemns any veiled attempt to suppress human rights through dictatorship or communism. The quintessence of our Constitution is human rights.

But the same Constitution falls short in ensuring a government that shall effectively safeguard these human rights. The Constitution falls short in creating a strong Batasang Pambansa that can effectively be the chief protector of the fundamental human rights of the people by infusing life into our human rights provisions through meaningful legislations. It falls short to provide for a Batasang Pambansa that can emerge as the harmonizing force between individual and social justice. On the other hand, it has succeeded in institutionalizing a President who possesses a dominion of powers which is unprecedented in our history. It disregards a fundamental principle in politics that, all great decisions of government must be shared decisions.[161] It fails to see the purpose served when a strong executive works within the framework of a constitution with an equally strong system of democratic controls, not only in unwritten restraints but also in formal checks and balances formally written in the Constitution.[162] It misses the point that, ultimately, it is not only personal character and play of politics that will hold to avail the executive to accountability.[163] While so much is made out of the fact that the Constitution as fundamental law is the spring source of constitutional power, very little is said of the fact that, in order that it may serve the ends of the Rule of Law it must set the limitations for such power.

This is our Constitution and therein takes form our justice system.

Are we any closer to justice?

161 ESPIRITU, *op. cit. supra* note 70 at 141.
162 *Id.*, at 142.
163 *Ibid.*