

THE CHANGING MEANING OF SUFFRAGE

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INTRODUCTION

Suffrage in the Philippines developed as Philippine constitutional history evolved. It was given recognition in the Malolos Constitution of 1899,¹ which was promulgated by the short-lived Revolutionary Government headed by General Emilio Aguinaldo after the Declaration of Independence from Spain was proclaimed on June 12, 1898.² The recognition of this right was a by-product of the struggle against the Spanish colonial government and an off-shoot of Western liberal ideas on civil government and individual rights. It was reiterated in the provisions of the Organic Law of 1902,³ the Jones Law of 1916,⁴ the 1935 Constitution,⁵ and the 1973 Constitution.⁶ However, the provisions of the Malolos Constitution, the Organic Law, and the Jones Law seemed to have laid greater stress on the establishment of civil government in the Philippines than the right of suffrage though recognized, was not as emphatically expressed. In contrast, the 1935 Constitution and 1973 Constitution emphasized the grant of suffrage to qualified voters by providing separate articles on suffrage, as well as

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¹ The following are the pertinent provisions on suffrage under the 1899 Constitution:

Art. 4. The government of the Republic is popular, representative, alternative, and responsible and is exercised by three distinct powers, which are denominated legislative, executive and judicial....

Art. 33. The legislative power shall be exercised by an Assembly of Representatives of the nation....

Art. 34. The members of the Assembly shall represent the entire nation, and not exclusively those who elect them.

Art. 35. No representative shall be subjected to any imperative mandate of his electors.

Art. 58. The President of the Republic shall be elected by an absolute majority of votes by the Assembly and the representatives specially meeting in a constitutive assembly.

² The Malolos Constitution was promulgated on January 21, 1899.

³ Known as the Philippine Bill of 1902, entitled "An Act to Temporarily Provide for the Administration of the Affairs of Civil Government of the Philippine Islands and for Other Purposes," sections 6 and 7 provide for the taking of census of all inhabitants when general insurrection has ceased; and, two years from the date of census, the calling of general elections for the members of the Philippine Assembly.

⁴ Known as the Philippine Autonomy Act, sec. 8 provided that general legislative power except as otherwise provided, is granted to the Philippine Legislature. Sec. 15 provided for the qualifications of electors in the elections of the senators and representatives to the Philippine Legislature. The qualifications of electors include: sex (male person who is not a citizen or subject of foreign power), age (at least 21 years of age), residency, property, and literacy.

⁵ CONST. (1935), art. V, sec. 1.

⁶ CONST., art. V, sec. 4, and art. VI.

ensuring its effectiveness by creating an independent constitutional body, the Commission on Elections.⁷

Article V of the 1935 Constitution provided that:

Suffrage may be exercised by the male citizens of the Philippines, not otherwise disqualified by law, who are twenty-one years of age or over, and are able to read and write, and who shall have resided in the Philippines for at least one year, and in the municipality wherein they propose to vote for at least six months preceding the election. The National Assembly shall extend the right of suffrage to women if, in a plebiscite which shall be held for that purpose within two years after the adoption of this Constitution, not less than three hundred thousand women possessing the necessary qualifications shall vote affirmatively on the question.

The 1973 Constitution embodies the two provisions on suffrage in Article V and Article VI. Article V Section 4 provides: "It shall be the obligation of every citizen qualified to vote to register and cast his vote." Section I of Article VI provides:

Suffrage shall be exercised by citizens of the Philippines, not otherwise disqualified by law, who are eighteen years of age or over, and who shall have resided in the Philippines for at least one year, and in the municipality wherein they propose to vote for at least six months preceding the election. No literacy, property, or other substantive requirements shall be imposed on the exercise of suffrage. The Batasang Pambansa shall provide a system for the purpose of securing the secrecy and sanctity of the vote.

Compared to the rather diluted grant given in the Malolos Constitution and the Organic Laws, suffrage under the 1935 and 1973 Constitutions has assumed a greater importance with respect to the attributes of citizenship. A closer examination of the provisions reveal substantial distinctions. Disregarding the qualifications of age and literacy, the tenor of the 1935 Constitution is directory, while that of the 1973 Constitution is mandatory. Under the 1935 Constitution, suffrage was a privilege granted only to certain class of people who must meet all the necessary qualifications for voting. Once the privilege is acquired, it becomes a right that cannot be violated or retracted unless the individual himself becomes disqualified from voting. On the other hand, under the 1973 Constitution, the mandatory tone of Article VI is reinforced by Article V, Section 4. Suffrage is a duty. It is no longer a privilege or an enviable right that is freely acquired by citizens, but it has acquired a different dimension—one that implies responsibility and a sense of social burden.

The Changing Concept of Suffrage

In the American case of *Maynard v. Board of District Canvassers*,⁸ Justice Chaplin used the following definition of suffrage: it is a "Vote, voice, or opinion in some matter which is commonly to be determined by

⁷ The Commission on Election was created by an Amendment to the 1935 Constitution in 1940.

⁸ 84 Mich. 228, 47 N.W. 756 and 759, 2 L.R.A. 332 (1890).

a majority of voters as opinion of persons who are empowered to give them; the wish of an individual in regard to any question, measure or choice, expressed by word of mouth, by ballot, or otherwise; that by which the will preference or opinion of a person is expressed." This definition which views suffrage as an expression of opinion or an instrument for the expression of opinion shall be employed in the discussion.

The Constitutional Convention and the Concept of Suffrage Under the Constitutions

It appeared that in 1934, the delegates to the Constitutional Convention were already embroiled in the debate of whether or not suffrage should be made compulsory for qualified electors.⁹ The compulsory voting proposal was defeated as evidenced by the 1935 Constitution. The debate was repeated in the 1971-72 Constitutional Convention but with a totally different result.

These constitutional changes were echoed in the writings of noted constitutional authorities and in Supreme Court decisions.¹⁰ For instance, Dean Vicente Sinco,¹¹ described the nature of suffrage as being "susceptible" to three interpretations:

...One (view) that it is merely a "privilege to be given or withheld by the Law-making power in the absence of constitutional limitations" (*People vs. Corral*, 62 Phil. 945). Another view considers it as a natural right included among the liberties guaranteed to every citizen in a Republican form of government, and may not therefore be taken away from him except by due process of law. A third view maintains that the right of suffrage is one reserved by the people to a definite portion of the population possessing the qualifications prescribed in the Constitution. Consequently, a person who belongs to the class to whom the Constitution grants this right may not be deprived of it by any legislative act except by due process of law (*State vs. Kohler*). It is in this sense that suffrage may be understood in the Philippines.¹²

In 1977, now Chief Justice Enrique Fernando wrote:¹³

As far as the question of suffrage is concerned, there is this thought to consider: ordinarily, whether one goes to the polls or not should be a matter of choice for him. Suffrage may be looked upon as pre-eminently a right, *perhaps the most valuable in the political category*. Its exercise should be left to the wishes of the person concerned. Nevertheless, there is likely to be a failure of the democratic process which is dependent upon the expression of the majority sentiment, if no concern is shown in the failure of a great many citizens casting their votes. That accounts for this parti-

⁹ Taken from the Minutes and Proceedings of the 1971-1972 Constitutional Convention: Report of the Committee on Suffrage and Electoral Reforms.

¹⁰ *Garchitorena v. Imperial Criscini*, 39 Phil. 258 (1918), *Moya v. del Fiero*, 49 Phil. 199 (1927), *Puñgatan v. Abubakar*, G.R. no. 33541, Jan. 20, 1972 43 SCRA 1 (1972).

¹¹ SINCO, PHILIPPINE POLITICAL LAW 380-381 (1962).

¹² *Ibid.*

¹³ FERNANDO, THE PHILIPPINE CONSTITUTION 86 (1977).

cularization. Moreover, it can otherwise be looked upon as an aspect of cardinal duty of defense of state, for it is a Republican state that has to be protected...

The conceptual definition of suffrage has undergone a dramatic change. And this change is reflected in the present election laws which could subject an individual to imprisonment.¹⁴

The Laws Under the Constitution

The Revised Election Code of 1971¹⁵ and the 1978 Election Code¹⁶ are special laws which contain penal sanctions for election offenses and for violation of election laws. But among the offenses penalized by the 1978 Election Code which are not found in the 1971 Election Code are the offenses of failure to register and failure to vote "without justifiable excuse".¹⁷ The penalty for both offenses is imprisonment of not less than one month but not more than six months, with accessory penalties of disqualification to hold public office and deprivation of the right of suffrage for a period of six years.¹⁸ The sentence shall be served in the manner prescribed by Presidential Decree No. 1053. "Prescribing the Manner of Serving the Sentence Imposed upon Persons Who Fail to Cast Their Votes Without Justifiable Cause."

Presidential Decree No. 1053 provides for an alternative method of serving the sentence imposed by the judge for failure to register and failure to vote. The judge may, in his decision, choose between imprisonment of the convicted person in the appropriate jail, and confinement of the person in his residence or other habitation during the sentence. In addition, the convicted person could be "made to participate in construction, gardening, maintenance, or agricultural activities in projects national, provincial or municipal in scope for the duration of sentence." He is also required to report daily to the Chief of Police of his municipality. Failure to do so without cause constitute a new offense for which he could further be penalized.

It is apparent that the 1973 constitutional provisions on suffrage was given real substance through these presidential decrees. But questions have been raised regarding the rather harsh penalty attached to violations, and on the meaning of "justifiable excuse". These two questions in turn raise graver issues on the meaning of right and duty, as well as the real concept of suffrage in a democracy.

¹⁴ Pres. Decree No. 1296 (February 7, 1978), hereinafter referred to as the 1978 Election Code.

¹⁵ Rep. Act No. 6388 (September 2, 1971).

¹⁶ Pres. Decree No. 1296 (1978), sec. 181.

¹⁷ 1978 Election Code, art. XVI, sec. 178 (p) and (ee).

¹⁸ 1978 Election Code, art. XVI, sec. 181.

SUFFRAGE UNDER SIEGE: THE PROBLEMS AND THE ISSUES

Compulsory Voting Law: A Dysnomy

The penalty for failure to register and failure to vote without justifiable excuse is imprisonment. This penal provision can be traced from the constitutional provisions on "the Duties and Obligations of Citizens" (Article V). Under Section 4 of this article, voting is an obligation. But is this an obligation that is enforceable by law?

As Bouvier commented in his definition of "Duty", the "latter is not always enforceable by law".¹⁹ Enforcement by law implies the imposition of certain legal sanctions in any of the following forms: public censure, the payment of fines or damages, or imprisonment. And under the principle of *Nullum crimen sine poena, nullum poena sine lege*, there must be a law which defines certain actions as prohibited, and imposes penalties on these.

Bouvier's comment that a duty is not always enforceable by law is a recognition that there are some fields of activities which are beyond the reach of the State, and which belongs exclusively to man. In the exercise of legislative powers in defining crimes, torts, and wrongs, as well as in the imposition of penalties for these, the law-making body is always faced with three alternatives: to impose fines, censures, or incarceration. It is also presumed that the law-makers act with utmost care and deliberation in the exercise of these tremendous powers.

According to the classical penal theory, punishment can only be as severe as the crime committed.²⁰ This theory is based on survivalist outlook which views the world as a jungle; and that justice is swiftly attained when the Biblical rule of "an eye for an eye and a tooth for a tooth"²¹ is followed. This instant and vengeful justice which modern man frowns upon as "barbaric" was useful, as it applied to criminal acts where both the wrongdoer and the offended are human beings. But where the crimes and wrongs committed by man have become "abstract", and are perpetuated upon by an abstract entity such as the State, instant justice may not be so easily gained since what is involved is the evaluation and measurement of intangibles.

In the context of an abstract wrong committed for not obeying or fulfilling a civic obligation such as voting, is incarceration the appropriate penalty, if it must be imposed at all? Under the 1978 Election Code, failure to vote without justifiable excuse has become a "crime". Is the punishment equal to the crime, if it could properly be labelled as one?

¹⁹ BOUVIER'S LAW DICTIONARY 962 (1918).

²⁰ For a brief historical description of penal theories see Ambion, *Penal Code Revision: Vignettes, Vagaries, and Varieties*, 54 PHIL. L.J. 131 (1979).

²¹ From the Gospel according to MATTHEW 5:38, which traces this rule to the days of Moses.

This is the first issue presented: that the law-making body has imposed a very harsh penalty not commensurate to the violation of a civic obligation.

The phrase "without justifiable excuse" is decisive in determining whether an offense was actually committed or not. And yet the authority to determine what constitutes "justifiable excuse" is not specified by the law. Does it rest on the Commission on Elections under its rule-making power, or does it repose upon the courts to define what justifiable excuse is?

Under the Constitution, the Commission on Elections is empowered to "enforce and administer all laws relative to the conducts of elections,"²² and to "perform such other functions as may be provided by law".²³ It can also "[d]ecide, *save those involving the right to vote*, administrative questions affecting elections, including the determination of the number of and location of polling places, the appointment of election officials, and inspectors, and the registration of voters."²⁴ Under the last provision quoted above, the right to vote has been described as an administrative question, which is not within the power of the Commission to decide upon.

Under the Election Code of 1978, the Commission on Elections may promulgate rules and regulations and prescribe such forms necessary to carry out the provisions of the Code.²⁵ In a Minute Resolution of the Commission dated 8 October 1981, (Item 81-268), the Commission resolved that:

1. All Election Registrar-Lawyers and Provincial Election officers, who have been previously directed before the June 16, 1981 Presidential Elections should continue to conduct preliminary investigation on failure to vote, including those who failed to vote in the June 16, 1981 Presidential Elections and to submit full reports including pertinent papers thereof for evaluation by the Law Department; and

2. For the Law Department to continue processing written explanations of voters and lists of voters who failed to vote either on April 7, 1981 Plebiscite or on June 16, 1981 Presidential Elections, and to submit necessary recommendation thereon.

However, considering the number of persons affected is legion, caution should be exercised against those who submitted explanation and/or voluntarily appear before investigating authorities, said act being a virtual recognition of the authority of this Commission and to majesty of the law. *On the other hand, more concern and strict application of the law should be directed against those who defy and/or challenge the COMELEC.* (emphasis mine).

The last sentence of this Minute Resolution merely points to the method of applying the law, and towards those who "defy and challenge the COMELEC". The question of "justifiable excuse" is untouched.

²² CONST., art. XII, C, sec. 2 (2).

²³ CONST., art. XII, C, sec. 2 (8).

²⁴ CONST., art. XII, C, sec. 2 (3). (emphasis added)

²⁵ 1978 Election Code, sec. 20.

The question still remains: Who determines what constitutes "justifiable excuse"?

There are, therefore, no clear guidelines in the law which could assist the courts in their decisions, or which could give the Commission in their investigation of non-voters. The absence of such guidelines might lead dangerously to lack of uniformity or inconsistency in the application of the law. Facetiously, one could ask: "Is a strong political conviction as valid as the presentation of a medical certificate to qualify as justifiable excuse?" The absence of clear guidelines had been raised in many constitutional law cases, and such lack of guidelines or standards have been the basis of criticisms for undue delegation of legislative powers. Law or provisions of laws have been decreed unconstitutional and void by the Supreme Court for that very reason.

Another problem which could be raised regarding the penal provision is the inconsistency of the law with respect to its nature. The Election Law is a special law which penalizes offenses as *mala prohibita*, and not as *mala in se*. To distinguish between the two concepts:

Criminal intent is necessary in crimes punished by the Code (The Revised Penal Code). Crimes committed by means of *dolo* are generally *mala in se*. They are crimes *per se* because they are condemned by the moral law or the general opinion of civilized society. On other hand, *offenses punished by special laws* are *mala prohibita*. They are not inherently wrong. They are only made wrong by statute. Malice, *mens rea*, or *culpa* is not essential in such offenses. The mere fact of the commission of the prohibited act consummates the offense; for example, possession of unlicensed firearms even if the accused had no criminal intent.²

By the nature of the election law, failure to vote should be penalized without the necessity of inquiring into the reasons, excuses or justifications of the violators. The act of not voting must be viewed (following the *mallum prohibitum* principle) as the offense itself—it is not the reason behind the act which creates the offense. But if the reason for non-voting is scrutinized or delved into, then the offender exposes himself to the presumption of having a "criminal intent", if he is unable to justify his non-voting or refusal to vote. And yet as earlier quoted, criminal intent is unnecessary in laws that are by nature *mala prohibita*.

These problems give rise to the graver issue resting upon the meaning of suffrage which shall be discussed with the previous election results as background.

What Election Results Reveal

Presidential Decree No. 1296 was promulgated on February 7, 1978. On April 7 of the same year, national elections for the *Interim Batasang*

²⁶ 1 AQUINO, REVISED PENAL CODE 47 (1976).

Pambansa was called. On January 20, 1980, local elections and a plebiscite were simultaneously conducted. On April 7, 1981, a plebiscite on the Constitutional Amendments were held. And on June 16, 1981, the first presidential election since the imposition of Martial Law on September 21, 1972 was held. The Election Code of 1978 was the existing legislation enforced in these elections.

The results of the April 7, 1981 plebiscite on the Constitutional Amendments carry a very strong political significance not only in terms of the substance of the proposed amendments but also in the subsequent witch-hunt for the non-voters who were already publicly branded as "boycotters".²⁷ In this plebiscite, official results show that out of 24,881,021 registered voters, 19,250,019 electors cast their votes, while 5,631,002 did not. (See Annex B). Statistically, these figures mean that 77.37 percent of the votes were cast and 22.63 percent of the votes were not cast.²⁸ The Opposition claims that as much as 70 percent of the populace did not vote.²⁹

If the above official figures are compared with the past national election turn-outs (including a plebiscite) from 1946 to 1965, it could be shown that in those elections an average of 23.80 percent of registered voters did not cast their votes. On the other hand, there was an average voting turn-out of 79.86 percent in the last three elections (excluding the Presidential Elections), or an average of 20.14 percent non-voting. Annex A shows the election results from 1946 to 1970, while Annex B shows the election results during the Martial Law regime and immediately after it.³⁰ For the purposes of this paper and to obviate further questions that may be asked concerning the validity of any election while under Martial Law, comparison of election results would consider only the following periods: 1946-1970 and 1978-1981.

Taken at face value, statistics shows that from 1946 to 1981, subtracting the years 1972-1977, an average of one-fifth of the total number of registered voters did not vote. There is no difference in the average percentage of non-voting which remained at twenty percent. But a major difference lies in the consequences for the non-voters. As earlier established, this difference is in the application of penal sanctions and the accessory penalties imposed by the 1978 Election Code.

On the strength of the Code, the Commission on Elections threatened to prosecute the "boycotters".³¹ Preliminary investigations were conducted by the Commission regarding some 300 individuals who did not vote, based

²⁷ The Bulletin Today, May 10, 1981, p. 1, col. 6-8.

²⁸ Source: Statistics and Election Records Division, Commission on Elections.

²⁹ From a leaflet published by the People's Opposition to the Plebiscite-Election, dated April 26, 1981. It alleged very low voting turn-outs in the provinces of Nueva Ecija (40 percent), Davao City (50 percent), Lanao del Norte (25 percent), and Pampanga (30 percent).

³⁰ Source: Statistics and Election Records Division, Commission on Elections.

³¹ The Bulletin Today, May 9, 1981, p. 1, col. 6-8.

on the registration centers' lists of non-voters in Metro Manila.³² The cases are pending with municipal courts based on these investigations.³³

Suffrage: A Right or A Duty

The issue of non-voting or failure to vote has attracted a lot of attention and acquired a deeper significance because its consequence means imprisonment or the alternative measures provided in Presidential Decree No. 1053, which both constitute a deprivation of an individual's fundamental right to liberty. The arguments against compulsory voting and the arguments in favor of compulsory voting are a mixture of political, philosophical, and intellectual arguments.

The oppositionists to compulsory suffrage anchor their position on the following arguments:

Argument No. 1. Suffrage cannot simultaneously be a right and a duty. If suffrage is a right, then it cannot be penalized. If suffrage is a duty, penal sanction is hardly the appropriate punishment for the violation of such duty. If the other duties and obligations of the citizens under Article IV of the Constitution are hardly penalized, why penalize the violation of compulsory voting law as if the violator was an ordinary criminal?

Argument No. 2. The right to vote carries with it an inverse right not to vote. Rights are upheld, not punished. Non-voting, being a right, cannot be punished.

Argument No. 3. A right may be waived, if the waiver is done intelligently. If voting is a right, then this right could be waived; and the decision rests upon the individual. His decision in turn depends upon his values: moral, political and ethical. If he believes that in conscience he should not vote, he is entitled to waive his right without fear of reprisals.

The proponents of compulsory voting justify the penal sanctions on these bases:

Justification No. 1. Suffrage is a duty, and not a mere privilege. Duty implies the existence of a prior right which, must be safeguarded or preserved for the right to be continuously enjoyed. For instance, a citizen has the right to live peaceably in his community. For this right to continue, he must not violate any laws of his community. Or even more positively, he could help enforce the laws. Suffrage could therefore be both a right and a duty.

Justification No. 2. A right must be exercised in order to produce results. The end result of suffrage is universal participation of the qualified

³² The Bulletin Today, May 9, 1981, p. 1, col. 4-5.

³³ Source: Law Department, Commission on Elections. As of November 1981, 243 non-voters are facing charges for failure to vote in the plebiscite. The Bulletin Today, Nov. 29, 1981, p. 1, col. 7-8.

citizenry in the elections to ascertain the will of the majority. Voting could be compelled in order to obtain these desired results.

Justification No. 3. Self-preservation by the State is a principle recognized in law. And in the furtherance of this objective, citizens may be compelled to render military service. Self-preservation implies maintenance of the State and the status quo, and such is possible if the people are responsive to the needs of the State. Self-maintenance being as important as self-preservation, should, like the latter, also be the obligation of the citizens.

Public opinion is a way of maintaining the State, since the State theoretically adopts itself to the voice of public opinion. If public opinion is not forthcoming, then, on the theory of self-maintenance, the State could compel suffrage upon its citizens.

Justification No. 4. Compulsory voting forces the individual to awareness of the real issues involved in the election. Such awareness leads to knowledge, which leads to an intelligent choice of leadership, or representation, and ensures better government.

Resolution of the Conflict

Other minor arguments could be readily incorporated in the preceding section. And the list would be lengthened considerably, but it will not resolve the basic conflict that exists. On the basis of the above arguments, two dimensions or two levels of analysis will be used to justify the positions of voting as a right and voting as a duty. These two levels of analysis are the philosophical level and the theoretical-political level.

1. A Philosophical Level of Analysis

The three most commonly occurring words in the arguments are "Right", "Duty", and "Suffrage". Black defines "right" as the power, privilege, faculty or demand inherent in one person. Generally, it means "the power of free action". There are three kinds of rights: 1) *natural right*, which grows out of the nature of man and which depends upon his personality as distinguished from that which is created by law and depends upon civilized society; 2) *civil right* which belong to every citizens of the State or country, or in a wider sense, to all the inhabitants not connected with the organization of government; and 3) *political right*, which is the power to participate directly or indirectly in the establishment or administration of government.³⁴ Suffrage as a right falls under the last category.

Bouvier defines "duty" as a "human action which is exactly conformable to the laws which require us to obey them"; it is that which is a right due from one to another; a moral obligation or responsibility.³⁵

³⁴1 BLACK'S LAW DICTIONARY 1486-87 (1968).

³⁵BOUVIER'S LAW DICTIONARY 962 (1919).

As mentioned earlier in the discussion,³⁶ suffrage is defined as a vote, voice or opinion of a person in some matter which is commonly to be determined by majority of votes as opinion of persons who are empowered to give them; it is the wish of an individual in regard to any question, measure or choice, expressed by word of mouth, by ballot, or otherwise.

There is apparently no disagreement on the definition of duty and suffrage as applied in the arguments of the oppositionists and the advocates of compulsory voting. But a serious cleavage occurs when the philosophical nature of rights is discussed. Using the broad definition of right as "the power of free action" one encounter two levels of rights: the "right of exercise", and the "right of specification."³⁷ The "right of exercise" provides the individual with the choice between activity and non-activity, i.e., to do or not to do. The decision confronting such individual involves whether or not to perform an act.

The "right of specification" on the other hand, is the power of an individual to choose his actual course of action once he decides to act. If, however, he decides not to act, he cannot exercise his right of specification.

By applying these distinctions to the question of suffrage, the right of exercise would mean that an individual could choose between voting or not voting; while the right of specification would mean that the individual has already decided to vote but still has to decide on who (or what) to vote for. Those who argue that suffrage is both a duty and a right assume that there is only the right of specification (who or what to vote for). The right of exercise reduces itself to a duty to act, and the right of specification which should be corollary to the right of exercise becomes, by such assumption, the fundamental right we call suffrage.

Those who argue that suffrage is a right premise their conviction on the "right of exercise". The individual's first decision is whether he will vote at all. If he decides to vote, he will then have to choose among the candidates, and thus make use of his right of specification. But if the individual decides not to vote, then he loses his right of specification since this right is secondary to the right of exercise.

Upon this vital philosophical distinction rests the argument of those who boycotted the plebiscite and the presidential elections. The right of exercise is a decision that considers all aspects of the election. It includes the question of whether the legal procedures are properly observed, but primarily it considers the political environment in which an election is being held. And such decision is premised on the fundamental freedoms of conscience and speech.

³⁶ *Supra* at 137-138.

³⁷ These two terms (right of exercise and right of specification) were used by Prof. Jose Espinosa, UP College of Law Faculty member, in a discussion with the writer.

2. A Political and Theoretical Level of Analysis

That the sentiments and aspiration of the Filipino people in framing the 1935 and the 1973 Constitutions are shared and undifferentiated is apparent in the Preambles of the two constitutions. Both Preambles speak of the desire to establish a government that would embody the Filipino ideals in a Democracy where justice, liberty, equality and peace prevail. In both Constitutions, a representative government is established. The functions and powers of government are so defined that ideally, no abuse of power or usurpation of powers may result. Since representation in the government is the only practicable method of ensuring the articulation of the interests and opinions of ordinary individuals, these individuals must secure this representation through elections. The right of suffrage could serve as the most effective political instrument for the masses. And this right, when properly invoked, shows direct collective participation by the sovereign body in the decision-making process, e.g., in the choice of leadership. This right is the realization of the provision that "Sovereignty resides in the people and all government authority emanates from them."

The Philippine experience in republicanism leans heavily upon the principles of Democracy as the ideal. The essence of democracy lies in the recognition of the individual who possesses certain inherent, inalienable, and natural rights which no government and no authority could unlawfully or arbitrarily deprive him of. The safeguards of the Bill of Rights, the encompassing due process clause and equal protection clause define limits and boundaries beyond which the State or the government must not or cannot encroach upon.

The political right of the individual is palpably demonstrated through his right of suffrage. The collective will, enforced through and by the rule of the majority, is the voice of the people. It is public opinion which needs to be expressed and listened to. The Supreme Court had enunciated this idea in several cases. In *Garchitorena v. Imperial and Criscini*,³⁸ the court said:

In democracies, the people, combined, represent the sovereign power of the State. This sovereign authority is exercised through the ballot of the qualified voters, in duly appointed [sic] elections held from time to time, by means of which they choose their officials for a definite and fixed periods, and to whom they entrust, for the time being, as their representatives, the exercise of the powers of government.

In the case of *Pungutan v. Abubakar*,³⁹ the Supreme Court said:

The right to vote has reference to a constitutional guaranty of the utmost significance. It is a right without which the principle of sovereignty residing in the people becomes nugatory. In the traditional terminology, it is a political right enabling every citizen to participate in the process

³⁸ 39 Phil. 258, at 263. (1918).

³⁹ G.R. No. 33541, Jan. 20, 1972 43 SCRA at 11 (1972).

of government to assure that it derives its powers from the consent of the governed. What was so eloquently expressed by Justice Laurel comes to mind: "Republicanism in so far as it implies the adoption of the representative type of government necessarily points to the enfranchised citizens as a part of popular sovereignty as the ultimate source of established authority". (Moya v. del Fiero, 69 Phil. 199)

Earlier,⁴⁰ the explanation of Dean Sinco was used to show the nature of suffrage. The last view according to Dean Sinco, was the acceptable way of looking at suffrage, i.e.,

...that the right of suffrage is one reserved by the people to a definite portion of the population possessing the qualifications prescribed in the Constitutions. Consequently, a person who belongs to the class to whom the Constitution grants this right may not be deprived of it by any legislative act except by due process of law (*State v. Kohler*). It is in this sense that suffrage may be understood in the Philippines...

The theory that is articulated here rests on the exercise of political sovereignty by the citizens, which exercise is a guaranteed Constitutional right that they cannot be arbitrarily deprived of. But can an individual or must an individual be compelled to exercise his right of suffrage? In the 1971 Constitutional Convention, the Honorable Samuel Occeña, delegate from Davao del Norte, quoted Former Chief Justice Concepcion who suggested a reorientation of traditional ideas on suffrage:

It is high time, I think, that stress be made also upon the responsibilities of the citizenry. The time, I think, is right to impress upon them that every right or power is merely a means to an end, and that such means can produce excellent results only if put to good purpose. That every grant or recognition of such power, right, or means must be understood to be conditional upon the exercise for that purpose...

I would suggest therefore a bold and more assertive reorientation of the people, emphatic in its stress upon the responsibilities attached to every right, and its implication in the determination of the moral and civil development of the citizenry.⁴¹

With the promulgation of the 1978 Constitution, the above suggestion was effectuated. And as Chief Justice Fernando earlier quoted,⁴² says:

Suffrage may be looked upon as pre-eminently a right, *perhaps the most valuable in the political category*. Its exercise should therefore be left to the wishes of the person concerned. Nevertheless, there is likely to be a failure in the democratic process, which is dependent upon the expression of the majority sentiment if no concern is shown in the failure of a great many citizens casting their votes ... it can be looked upon as an aspect of cardinal duty of defense of state, ...

The inescapable conclusion that may be drawn from the above-cited authorities is simply this: that the concept of the right of suffrage is evolutionary; that it is a changing concept which is subject to redefinitions

⁴⁰ See note 12.

⁴¹ Records and Proceedings of the 1971-72 Constitutional Convention, sponsorship speech of Delegate Occeña.

⁴² See note 13.

when circumstances seems to warrant such change. But the right of suffrage is founded under the concepts of democracy and democratic process. Can it be compromised such that although the right exists, it may be compelled by the State?

THE MEANING OF SUFFRAGE IN A DEMOCRACY

Democracy can be viewed as a process, the "democratic process", which prescribes guidelines, procedural and substantive, while the balancing of rights and interests of the individuals and the State are constantly enacted or re-enacted.

Our own Philippine history attests to the struggles against the unjust cruel, and unreasonable colonial domination. The oppressive taxes, the *polos y servicios*, the public and social humiliation of being whipped, the discrimination against the *indios* during the era of Spanish domination, all of which were echoed by the *Ilustrados* in their brave but unsuccessful attempt for representation in the Spanish Cortes.⁴³ Those evils and injustices led to the Revolution of 1898 against Spain, and the promulgation of the Malolos Constitution which stressed the ideals of democracy under a Republican form of government, where the Executive, indirectly, and the Legislature, directly, are elected by the people.

We constantly refer to the similarity between the Philippine Constitution and the American Constitution, and explain or dismiss it as the product of American influence or American *diktat*. But our colonial history under the Spanish domination is comparable to American history. The Americans in 1776 declared their independence against Britain because of its oppressive, unjust, and unresponsive monarchical rule. We declared our independence against Spain in 1898 for the same reasons. It is to be admitted that the theories of our Malolos Constitution were acquired largely from Western political thoughts. But we borrowed these thoughts with the consciousness of hard struggles and painful experiences. But, in less than a century, and after three Constitutions, the meaning of the right of suffrage has altered.

This writer submits that the right of suffrage in a democracy cannot be compromised. Participation in the decision-making process is a political right which every nationalistic and civic-minded person must safeguard. His right to a just, honest, and responsible government, his right to participate in a political proceeding such as an election should be regarded as a right, the exercise of which depends upon his will and not upon his submission to another's will.

It is contended that democracy is served if all the qualified citizens vote because their votes will be counted. But suppose a qualified voter

⁴³ AGONCILLO & GUERRERO, HISTORY OF THE FILIPINO PEOPLE, Chaps. 6-11 (1977).

abstains or deliberately marks his ballot? Does his vote get counted? There is a ballot but it is an empty one, because there is no vote. Is voting then reduced to the visible exercise of the voting motion but without the substantial expression of choice? There is strictly no reassurance that the motion of voting could and would produce the popular will.

In the study of the election offenses and the strict rules on election conduct and other electoral matters found in the Election Code, there is no doubt that the Legislature intended to secure free and orderly participation of the voters to the end that their opinions will be heard and counted. The universal participation of citizens were sought to be secured by removing sex, property, and literacy requirements, as well as the lowering of the age requirements. And the election laws added innumerable conditions in order to secure free, honest, and fair elections. And these laws were presumed to have an implicit goal of universal participation. But universal participation for democratic ends must not be secured by the undemocratic process of compulsion. Compulsory voting to achieve participatory democracy defeats the very essence of democracy. And when compulsion exists, we concede to a Machiavellian democracy!

Compulsory Voting and Freedom of Conscience

But a Machiavellian democracy is a contradiction in terms, and that is what the Opposition seeks to prevent in citing the freedom of conscience as a ground for non-voting. As discussed earlier, the underpinning of this reasoning is based on the right revolving around certain value judgments of an individual regarding his environment.

The unforgettable Philippine experience under martial law from 1972 to 1981 is the background of the clamor for the right of conscience and expression in the plebiscite-elections of 1981. Previous to the martial law experience, this ground was not particularly cited by the Constitutional Convention delegates as a justification for non-voting. The delegates cited the rising apathy or disenchantment of the voting populace because of exposure to election malpractices such as vote-buying, or voter intimidation, and at times, the upsurge of violence during elections.

Within the nine-year period of continued martial law existence, fears have escalated, and these were not easily abated by the lifting of martial law on January 17, 1981. Neither did the call for a plebiscite on the Constitutional Amendments allay the fear that martial law was merely being legitimized through the Constitution; nor did the call for Presidential elections convince the opposition that normalcy of the political process shall take place. The bitter experience of the ratification of the 1973 Constitution as announced by the Proclamation No. 1102⁴⁴ based on the findings

⁴⁴ Proc. No. 1102, "Announcing the Ratification by the Filipino People of the Constitution Proposed by the 1971 Constitutional Convention", dated January 17, 1973.

from the newly-created Citizens' Assemblies,⁴⁵ and which proclamation of ratification was contested in the case of *Javellana v. Executive Secretary*,⁴⁶ was a lesson that called for future cautiousness and wariness. Chief Justice Concepcion, in describing the conduct of the ratification in accordance with the existing elections laws, said in his opinion:

Few laws may be found with such a meticulous set of provisions aimed at insuring free, orderly, and honest elections, as envisaged in section 2 of Article X of the Constitution. . . . Yet none of the foregoing Constitutional and statutory provisions was followed by the so-called Barangay or Citizens Assemblies. . . . And no reasons have been given nor were sought to be given therefore. In many if not most instances, the elections were held *a viva voce*, thus depriving the electorate of the right to vote secretly—one of the most fundamental and critical feature of our election laws from time immemorial—particularly at a time when the same was of *utmost* importance owing to the existence of Martial Law. . . .⁴⁹

At the time of the ratification of the Constitution, martial law had been in existence for less than four months. And at the time of the 1981 plebiscite on the Constitutional Amendments, the lifting of martial law had been effective for less than three months. The psychological conditioning of nine years of martial law are not easily erased or reversed by the lifting of martial law. And if the results of the elections during martial law are considered, the comparatively high percentage of voting turn-outs may even be indicative of the voting population's psychological fear. Thus, freedom of conscience was the defense availed by the oppositionists for boycotting the plebiscite and the elections.

Under a democracy, freedom of expression and freedom of thought are safeguarded through the Constitution. Freedom of conscience, which is implicit in the guaranty of intellectual liberty finds meaning only upon its expression. Viewed within the situation depicted above, freedom of conscience is expressed when the "right of exercise" is granted to an individual. He should be free to ascertain whether the political conditions proceeding immediately after the lifting of martial law may produce elections untainted by fraud or fear. In the performance of such exercise, freedom of conscience is the inviolable and invulnerable bulwark through which the individual's decision is safely undertaken.

SUFFRAGE LAWS: A MIDSUMMER NIGHT'S DREAM IN A SHAKESPEAREAN DRAMA

The tragic drama of suffrage as a right and suffrage as a duty within a democracy is lightened somewhat by the existence of an election law

⁴⁵ Created by Pres. Decree No. 86 (January 1, 1973), as amended by Pres. Decree No. 86-A (January 5, 1973) and Pres. Decree No. 86-B (January 7, 1973), which specified that the immediate function of the initial referendum includes the ratification of the Constitution (which was subsequently held on January 15, 1973).

⁴⁶ G.R. No. 36142, March 31, 1973, 50 SCRA 30 (1973).

⁴⁷ *Javellana v. Executive Secretary*, *supra* at 110-111.

which, as shown by earlier discussion, is open to criticisms from many fronts. In the context of the discussion of the rights of specification and exercise, *the law appears to punish not the failure to vote, but the failure to appear in the polling booths to vote!*

On the surface, the words "without justifiable excuse" qualify the word "failure to vote". But upon the examination of the reasons commonly given to and accepted by, the Commission on Elections as justifiable excuse (such as illness or ill-health, inaccessibility of the polling places or lack of transportation, person is abroad, or, absence of names in the roster of registered voters) there is an ineluctable inference that one is actually being penalized for his non-appearance in the polls—and not for his failure to vote. Strictly speaking, failure to vote (a right of specification) means failure to indicate or specify choice from the list of candidates.

The penal sanction attached to failure to vote without justifiable excuse is ominous enough without adding these accessory penalties: disqualification to hold public office, and denial of the exercise of the right to vote, for six years. The temporary disqualification being an accessory penalty, the term "public office" should be interpreted in accordance with the basic principle that a penal provision is strictly construed against the state and in favor of the individual. Thus, the disqualification will not apply to public employment or employment in a position with the government which does not constitute public office.

A public office is the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.⁴⁸ A position is a public office when it is created by the constitution or law, with duties cast on the incumbent which involve some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent. It is distinguished from public employment which is created by contract and not necessarily by law. Public employment does not involve an exercise of some portion of the sovereign power.⁴⁹

The accessory penalty of disqualification to hold public office for six years is certainly a heavy penalty especially to public officers who will thus be deprived of their offices if they are convicted for failure to vote. The rationale for this accessory penalty for failure to vote is purely punitive and is contrary to the rationale for the same disqualification under the Revised Penal Code.⁵⁰

⁴⁸ MECHEM, PUBLIC OFFICES AND OFFICERS, Sec. 1. Cited in GONZALES, ADMINISTRATIVE LAW, LAW ON PUBLIC OFFICERS AND ELECTION LAW 170 (1972).

⁴⁹ GONZALES, *supra* at 171.

⁵⁰ Act No. 3815 (1930). An example of the accessory penalty of disqualification to vote and to hold public office is article 30 which provides:

Under the Penal Code the manifest purpose of the accessory penalty involving restrictions upon the right of suffrage or to hold office is to preserve the purity of elections. The presumption is that one rendered infamous by conviction of felony, or other base offenses indicative of moral turpitude, is unfit to exercise the privilege of suffrage or to hold office. The exclusion must for this reason be adjudged a mere disqualification, imposed for public protection and not for punishment.⁵¹

The concept of accessory penalty of disqualification to hold office as a measure of public protection is likewise present in the 1978 Election Code. Section 75 thereof provides:

a) any person who has been sentenced by final judgment to suffer imprisonment for not less than one year, such disability not having been removed by plenary pardon; Provided however, that any person disqualified to vote under this paragraph shall automatically re-acquire the right to vote upon expiration of five years after service of sentence.

It will be noted here that while the imprisonment referred to in this quoted section is at least one year, the corresponding accessory disqualification is only for five years. But under Section 181, the imprisonment attached to a conviction for non-voting is only for six months but its accessory penalty of disqualification to vote and to hold public office lasts for six years.

Thus further incongruities on the electoral provisions are uncovered, and these have the appearance of a situation somewhat akin to Shakespeare's "A Midsummer Night's Dream".

CONCLUSION

The right of suffrage is a tradition, an institution which is a legacy acquired from history itself. And if compulsion is used to attain the noble desire of popular and universal participation to express collective opinion, a mockery of democracy would result.

Art. 30. Effects of the penalties of perpetual or temporary absolute disqualification.—The penalties of perpetual or temporary absolute disqualification for public office shall produce the following effects:

1. The deprivation of the public offices and employment which the offender may have held, even if conferred by popular election.

2. The deprivation of the right to vote in any election for any popular elective office or to be elected to such office.

3. The disqualification for the offices or public employment and for the exercise of any of the rights mentioned.

In case of temporary disqualification, such disqualification as is comprised in paragraphs 2 and 3 of this article shall last during the term of the sentence.

4. The loss of all right to retirement pay or other pension for any office formerly held.

⁵¹ *People v. Corral*, 62 Phil. 945 (1936), cited in 1 REYES, *THE REVISED PENAL CODE* 595 (1977 ed.).

Perhaps the solution to the controversy lies not in forcing the people to vote. Perhaps the solution lies in improving the quality of our elections and the electoral processes. Citizens who are convinced that their votes will be counted, that their votes could make a difference in the counting of ballots, need not be compelled to vote. The electors who see that there exists a real choice from among the list of candidates who could and would represent their interests would not hesitate to express their preference. Clean, honest, and orderly elections could be the answer to the need for popular and universal participation.

These sentiments are echoes from the past. But could we not concretize them?

ANNEX A
DATA OF THE REGISTERED VOTERS, ACTUAL VOTING TURN-OUTS AND PERCENTAGE OF VOTING
IN THE ELECTIONS/PLEBISCITES BETWEEN 1946-1970

Election Yr.	Number of Registered Voters	Number of Actual Voters	Percentage of Voting	Number of Non-Voters	Percentage of Non-Voting
1. April 23, 1946 (Nat'l Elections)	2,898,604	2,596,880	89.59%	2,596,880	10.41%
2. March 11, 1947 (Plebiscite on Const'l Amendments)	3,096,413	1,971,155	63.66%	1,125,258	36.34%
3. Nov. 8, 1949 (Nat'l Elections)	5,231,224	3,700,778	70.74%	1,530,446	29.26%
4. Nov. 10, 1953 (Nat'l Elections)	5,603,231	4,326,706	77.22%	1,276,525	22.78%
5. Nov. 11, 1957 (Nat'l Elections)	6,763,897	5,108,112	75.52%	1,655,785	24.48%
6. Nov. 14, 1961 (Nat'l Elections)	8,483,568	6,738,805	79.43%	1,744,763	20.57%
7. Nov. 9, 1965 (Nat'l Elections)	9,962,345	7,610,057	76.39%	2,352,294	23.61%
8. Nov. 18, 1967 (Plebiscite on Const'l Amendments)	9,764,604	7,957,019	81.66%	1,781,585	18.34%
9. Nov. 11, 1969 (Nat'l Elections)	10,300,898	8,202,793	79.63%	2,098,105	20.37%
10. Nov. 10, 1970 (Nat'l Elections for Con-con Delegates)	9,811,431	6,582,905	68.11%	3,128,526	31.89%
SOURCE: Statistics and Election Records Division, Commission on Elections			Average = 76.195%	Average = 23.805%	

ANNEX B
DATA OF THE REGISTERED VOTERS, ACTUAL VOTING TURN-OUTS AND PERCENTAGE OF VOTING
IN THE ELECTIONS/REFERENDUMS/PLEBISCITES BETWEEN 1973-1981.

Election Year	Number of Registered Voters	Number of Actual Voters	Percentage of Voting	Percentage of Non-Voting
1. Jan. 15, 1973 *				
2. July 27-28, 1973	22,883,632 (— 2,739,706)**	19,908,760 (— 2,388,488)	87%	13%
	20,143,926	17,520,272		
3. July 27-28, 1975 (Referendum)	24,390,269 (— 2,793,013)	23,109,780 (— 2,640,661)		
	21,597,256	20,469,119	94.75%	5.25%
4. Oct. 16-17, 1976 Referendum/Plebiscite	26,167,635 (— 3,041,213)	23,740,107 (— 2,665,607)		
	23,126,422	21,075,500	90.72%	9.29%
5. Dec. 17, 1977 (Referendum)	23,272,088 (— 2,033,476)	22,003,192 (— 1,809,746)	94.55%	5.45%
	21,238,612	20,193,446		
6. April 7, 1978 (Election IBP Members)	21,464,213	18,356,849	85.52%	14.48%
7. Jan. 20, 1980 (Local Elections Plebiscites)	24,881,021	19,081,270	76.69%	23.31%
8. April 7, 1981 (Plebiscite on Const'l Amendments)	24,881,021 (data as of 1981)	19,250,019	77.37%	22.63%
SOURCE: Statistics and Elections Records Div., Commission on Election.				

* The Commission on Elections did not supervise the ratification of the 1973 Constitution. No Official COMELEC data are therefore available.

** Figures in parenthesis represents votes of individuals aged 15 to below 18 allowed to participate in the elections. But computation of actual votes and percentages included voters aged 18 and above.

Average % of
Voting = 86.66%
Average % of
Non-Voting = 13.34%

1978-81 Average Non-Voting = 20.13%
1978-81 Voting turn out Ave. = 79.86%