# ELECTIONS AND SUFFRAGE: FROM RITUAL REGICIDE TO HUMAN RIGHTS?

by

LEONARDO A. QUISUMBING *

A close look at the core principles of election law, as well as the basic right of suffrage, is crucial to the efficient transition and reconstruction of government implicit in the new Constitution and its amendments.[1]

In treating of electoral problems and reforms, however, a time-frame of a decade (1973-83) may not suffice to correlate societal and economic developments within the prevailing political system. Given the premise that Philippine society is *developing,* it must be viewed over time as growing pluralistic culturally while, this past decade, becoming authoritarian politically. Yet "electoral reforms" need not be a rebuke of the recent past, though they obviously serve more as expression of faith in the near future. For if debates on partisan matters are now encouraged, honest-to-goodness elections might not be far behind.

*Perception and reality of elections*

What, firstly, do people mean by elections? Is the perception of elections congruent with their reality?

In common parlance, an election is the act of casting and receiving the ballots, counting them and marking the return.[2] An election is the means by which the people choose their officials for a definite and fixed period and to whom they entrust for the time being, as their representatives, the exercise of the powers of government.[3]

An election is the embodiment of the popular will, the expression of the sovereign power of the people. Thus the purpose of election laws is to safeguard that will. The purity of elections is one of the most important and fundamental requisites of popular government. To banish the spectre of revenge from the minds of the timid or the defenseless, to render pre-

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* Holder of the Comelec Professorial Chair at the U.P. College of Law.

Under P.D. 1296, sec. 185(k), Comelec may "carry out a continuing campaign to educate the public and inform the electorate about election laws and the necessity of clean, orderly and honest electoral processes."

[1] Art. XVII provided for transition from presidential to parliamentary system. The 1981 amendments shift the fulcrum of power from a prime minister to a mighty president.

[2] Hontiveros v. Altavas, 24 Phil. 636 (1913).

[3] Garchitorena v. Crescini, 39 Phil. 258 (1918).

carious the bartering of votes, and lastly to secure a fair and honest count of the ballots cast, is the aim of election laws.[4]

These pronouncements embodied in decided cases, however, represent only conventional wisdom, description and doctrine. They do not tell, what animates the right of suffrage? What infuses an election with oracular force: *vox populi, vox dei?*

It does become imperative to look afresh at the history and culture of our people and government to find if anything there might be more instructive.

### *Pre-history and early history*

In tribal times, it is said the chief was not always chosen by birth or strength alone. The members of a tribe could choose voluntarily their chief; and where an old chief has failed his office or committed wrong or simply aged useless, the members of the tribe could replace him and choose another leader.[5] Among the Muslims, it is said that a council or *ruma bechara* chooses the sultan. An old sultan may appoint his successor but his decision is not absolute. There are settled criteria for choice of a sultan. Aside from age, or blood and wealth (*bangsawan* and *atawan*), the choice must further satisfy two more virtues: fidelity to Islamic faith (*ilmawan*) and exemplary character or personality (*rupasan*).[6]

A sultan who disgraces his office may lose his title, risk the ire of his *umah* or community, forfeit the support of his leaders, or provoke a violent rebellion that may cost his life. It is further said, in Islamic tradition, that in times of crises, the community may choose its leader voluntarily, irrespective of social status. A serf or slave may be voted the chief, because of his ability, by consensus of the community.[7] It may be concluded that in his elevation as chief, he not only regained freedom but gained noble status as well. He becomes thereby a member of royalty and may rise to head the sultanate if Providence further smiles on him.

### *Historical evidence*

From actual incidents of which there is historical evidence, it is reported that the American armed forces that fought the Revolutionary Army of Aguinaldo began as early as May 1899 to form municipal governments in "pacified areas." So even before the passage of the municipal code (Act No. 82, based on Gen. Orders No. 40),[8] there was some form

[4] Gardiner v. Romulo, 26 Phil. 521 (1914).
[5] See JOCANO, PHIL. PREHISTORY (1975), ch. 8, "Community Organization." Cf. MERRIAM, POLITICAL POWER (1934), ch. 3, "Law among the Outlaws."
[6] Interview with J. Kiram, BOULEVARDIER, Jan. 1983 issue.
[7] E.g. the choice of the present Sultan of Zamboanga-Basilan.
[8] AGONCILLO AND GUERRERO, HISTORY OF THE FILIPINO PEOPLE 326 (1973).

of elections in *poblaciones* captured by the Americans. Thus, one may well imagine what took place in Baliuag, Bulacan, in the summer of 1899.[9]

In the glare of the morning sun, closely watched by Yankee soldiers, perhaps to the sound of bugles and the beat of drums, came the male descendants of proud Balagtas, nee Baltazar. These beaten Bulakeños were assembled in the town plaza, to listen to the rules of a new game called popular elections. But they had no time for speeches, no paper for ballots, no boxes for votes. Nevertheless the conquerors must prove the meaning of victory. The assembled men of Baliuag were told to choose a municipal mayor or *presidente* from among three aspirants, by the simple expedient of putting each aspirant in a corner of the plaza and asking those who would vote for him to come to his corner. The aspirant with the biggest flock was the winner.

Knowing the temper of that revolutionary time from written chronicles and the deadly humor of Filipinos, one might wish to find out if the winner laughed, cried, or both. Unfortunately, there is no further material on this episode. But it can be surmised the winner was in a neat pickle—like the Mayor in the novel, *The Secret of Santa Vittoria;* or worse, the headman in *Apocalypse Now.*

Seriously, the Yankee commanders must have forgotten that Aguinaldo, a Tagalog himself, had a whole set of functionaries from Prime Minister down the line in the Tagalog provinces, at least. Perhaps the moral of this episode is that President McKinley's instructions to educate Filipinos in the ways of democracy should not have been taken seriously by his military advisers. They forgot that an election like that of Baliuag, forced at gunpoint, could amount to a violation of the laws of war. From the Filipino viewpoint, it was akin to committing treason.

Leaving history for a while, skipping instances of probable violations of the fundamental law,[10] one must probe deeper into the unwritten saga of elections in human culture.

### *Cultural and classical roots*

If the myth of science is that science has no mysterious myths, it may be said that the dogma of democracy is that it has no dogma save one. That is, the people have no sovereign but themselves. In democratic theory, the people deposed their old king but did not destroy his crown. They picked it up and crowned themselves. *Le souverain est mort; vive le souverain!*

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[9] PACIS, PHIL. GOV'T. AND POLITICS 35 (1967).

[10] Extension of Pres. Quezon's term by American Congress; Plebiscite of 1947 to approve Parity Ordinance.

Sometimes, however, stubborn facts interfere with theory. The people may reign but cannot govern. The crown fits only one head, sometimes two or three; but seldom a hundred, much less a million. The madding crowd cannot speak above the din. The motley mass cannot win wars nor maintain peace. The masses could cut the chains of their oppression, but only one or a few could dispense justice for all.

That's why one is forced anew to examine the paradox of democracy, if not its irony. One has to look at the concepts of popular sovereignty, republican government, and democratic leadership in the light of emerging principles on the right of suffrage, elections, and electoral reforms. Without being a seer, one cannot find out what the future holds by way of "clean, orderly and honest elections" even for 1984, unless one looks back and probes the roots of yesterday.

From a survey of social and cultural *arcana* related to elections, one may advance the thesis that, an election cannot be considered a raw contest for power or spoils of power, much less a mere periodic but polite changing of guards and their officers. For the surface, physical and tangible impact of casting a vote might be far outweighed by its symbolic, psychic and tantric values. Voting and elections have a legitimating force that is, to use a favorite word of the Supreme Court, "transcendental."

Why? To answer this question, one might have to dig into classic anthropological studies. Thence, it could be fairly asserted that an election is a cultural growth of a most ancient and sacred ritual: the rite of regicide and of reification.[11]

Whether traced to the tale of the golden bough of Nemi among the druids of Europe or the spear-contest of the Polynesian tribes in the Pacific, these rites spring from folk wisdom that correlate the fecundity of the soil, the bounty of the sea, the fertility of women and the prosperity of men in society as well as their peace with the Almighty. Woe to the people that forget or desecrate these rites, even if today they are called voting and election. The mandate of heaven is still a valid, vivid concept that invests secular politics with wonder, awe, and legitimacy.[12]

A leader may seize power by naked force, *brutum fulmen.* Or an official may manipulate the provisions of law, even the fundamental law that is a constitution, to hold power. But neither naked force nor positive law could invest him with the aura that was King Arthur's in Camelot.

[11] See FRAZER, THE NEW GOLDEN BOUGH (1959).
Regicide, however, began in all earnest; a priest-king could succeed to office only until he was in turn slain by a stronger, craftier contender.

[12] Prof. Rossiter quotes Henry Ford Jones, that "American democracy has revived the oldest political institution of the race, the elective kingship." AMERICAN PRESIDENCY, Mentor rev. ed. 1951. Elective kingship antedated Greece and Rome. In West Asia, Osiris, Tammuz, Adonis, Attis preceded Jesus in the "class of divine kings whose duty it was to die each year for their people and the world." Frazer cites a Bagobo practice related to sacrifice of a "hanged god." *Supra,* p. 317.

For that, he needs Merlin, poet, song, legend and the vast compass of the human spirit. Unless one takes this inspired view on elections, one might be reduced, after reading decisions of the Supreme Court, to exclaim like Freud: *Credo, quia absurdum!*[13]

*Sovereignty and emerging human rights*

Yet even as the cultural roots of suffrage are lost in limbo, one finds ineluctably surfacing today the right to vote as a human right. This view of suffrage harks back to a natural law conception of a "higher-law" from which constitutions trace their origin. Of interest, the emergence of this view coincides with attacks on the principle of sovereignty, the bedrock of suffrage in a state system.

Students of public law, reared and weaned on the idea that the constitution is the fundamental law of the state to which all other laws must conform, may find these developments in political thought both disturbing and exciting. The primacy of the constitution, however, is also a tenet of municipal law that is buttressed by the acceptance of state sovereignty and equality in the international arena, traditionally understood.

Today, absolutist ideas on sovereignty prescinding from Bodin find few congenial adherents. Some text writers, in fact, proclaim that sovereignty itself as a concept is dead and ought to be buried.[14] Behaviorists and functionalists find Bodin's formulation too stiff and dogmatic for modern use. What has happened, instead, is that the ideas of state sovereignty and state immunity, both came under intense attack from several, unexpected quarters, if not simply ignored by them.[15]

*TNCs and World Bank Interests*

Thus, profit-seeking practices of multinational enterprises,[16] also called TNCs, reduced into shambles constitutional safeguards on national frontiers and national territories. They proved pious declarations on nationalism, particularly economic nationalism, as farcical. But ironically, the TNCs have provoked intense counter-assertion of the principle of permanent sovereignty over natural resources by the developing states. Their fear is that uncontrolled exploitation of irreplaceable resources like minerals and gas or oil by the TNCs would leave their countries barren or busted. Seen in the context of the capitalist order, the principle of permanent sovereignty over natural resources asserted by host debtor-states is a last-ditch attempt to retrieve, not safeguard, a lost patrimony.[17]

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[13] I believe it, because it is absurd!

[14] FROHOCK, THE NATURE OF POLITICAL INQUIRY 91 (1967).

[15] See HAAS, BEYOND THE NATION STATE (1964); MITRANY, A WORKING PEACE SYSTEM (1966).

[16] VERNON, SOVEREIGNTY AT BAY (1971).

[17] See HOSSAIN, LEGAL ASPECTS OF NIEO (1980).

But the TNCs are probably just one type of predatory economic organisms attacking the sovereignty principle. There are serious writers here and abroad who fear and warn that the World Bank and the International Monetary Fund and related agencies of quasi-public, multilateral character, could also prove difficult threats to national sovereignty not just of the Philippines but many other borrower-countries. Aptly, their situation has been called by Cheryl Payer as a debt-trap.[18] Walden Bello calls our economy a development debacle.[19] Prof. Jose essays our predicament as mortgaging the future. "In short, what we have now is," he says, "the phenomenon of a group of strangers dictating upon the native elite a philosophy and program of national development fashioned according to the goals of the monopolies, but without taking actual responsibility for their devious results that dangerously affect the lives of millions."[20] If so, a *new* neocolonialism renders Philippine sovereignty less real each day as the peso value drops and the dollar exchange rate rises. This probably explains, with due respect, why on the same page of the same newspaper, the Philippine Minister of Agriculture and the World Bank had separate but identical calls to increase the rural banks' rate of interest to 15%. Since these foreign-controlled financing institutions have very substantial stakes in the stability and utility of the Philippines, they may be tempted to influence elections here openly or covertly.

### *Foreign Intervention*

Yet, if this happened, this will not be the first instance of foreign intervention in Philippine polls. Sad to recall, the 1953 election was admittedly manipulated by a foreign intelligence agency whose network in the Far East may still be widespread and intensive. Based on written confessions in book form[21] of participants in the 1953 operations, what could be termed the most orderly and most honest election in Philippine history is claimed, ironically, the handiwork of foreign spies who eventually bungled Vietnam and the Bay of Pigs. Such a prestigious organization as the NAMFREL[22] turned out, in retrospect, to be nothing but a clever front in a show window, in a larger war of counter-insurgency. And the election of a President so well-beloved by the masses becomes, in contemporary history, if these operatives are believed, nothing but a cold-blooded prologue to large-scale interventions in South East Asia. No wonder the tragedy of South Vietnam scarred America more than Korea or Pearl Harbor did. Surely, Filipinos too suffered in the aftermath, not the least

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[18] PAYER, THE DEBT-TRAP (1974); See ch. 3 on R.P., pp. 52-74.
[19] BELLO, DEV. DEBACLE: THE WORLD BANK IN THE PHIL. (1982).
[20] JOSE, MORTGAGING THE FUTURE 202 (1982).
[21] See e.g. SMITH, PORTRAIT OF A COLD WARRIOR [1976].
[22] "National Movement for Free Elections" organized by, according to Smith, one Gabriel Kaplan and others including Col. Jaime Ferrer. Idem. pp. 87 and 257-58. The latter became eventually Chairman of the Commission on Elections before martial law was declared.

in the admitted subversion of the electoral processes by a foreign intelligence agency. Perhaps it is not too early to see what problems a similar situation could cause future elections.

*Regional Integration & Cooperation*

A second development in regional cooperation today also encroaches, even if more benignly, on the sovereignty principle. Like-minded states sometimes find that absolute sovereign claims stand in the way of regional integration. It became necessary for certain Western European states, for example, to surmount national interests to hasten the development of a common market. Today they have succeeded in forming a community, actually three communities, with supra-national institutions such as a court, a council, a commission, and even a parliament of Europe.[23] To a certain extent, it is admitted that the compulsion to European integration was a defensive reaction to the excesses of Nazism and Facism in World War II. It is the hope of the new Europeanists that the extreme ideas of sovereign states like Nazi Germany and Fascist Italy will at long last be buried in the new spirit of European integration.

But the formation of the EEC has meant opening up borders in the interest of free movement of peoples, of commodities, of services, and of ideas. The treaties that set up the Euratom, the Coal & Steel Community, and the Common Market have functioned as the organic law or the Constitution of the Community. While the five countries of ASEAN are not quite in the same league or track as the ten countries of the EEC, it might not be amiss to reflect that the Manila Declaration and other declarations or agreements among ASEAN countries are fast becoming organic instruments deemed to possess a constitutional force. Thus, it might happen that regionalism could affect changes in the idea of national sovereignty. For instance, in certain countries of the European community, national legislation and court decisions must reckon with European law. This is particularly true in anti-trust or competition law.[24]

More germane to the subject, EEC countries now allow foreign workers and employees to vote in and be elected to representative bodies in the firm where they work,[25] dispensing with the requirement of citizenship. Here are the seeds of an idea that might render obsolete the citizenship principle behind suffrage. Or are they harbingers of a new, inchaote principle of regional as opposed to national citizenship, e.g., European or even Asean citizenship in the not-too-distant future?

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[23] KEESING'S REPORT, *The European Communities* (1975).

[24] See Proceedings, Asean EEC Seminar, Jan. 1983, to be published by Ministry of Foreign Affairs, Foreign Service Institute.

[25] KEESING'S REPORT, *Supra* at 55.

### *Human Rights Covenants*

The third, and perhaps most significant, development of all in the international scene that affects the fundamental ideas of suffrage and elections, springs from the human rights movement. Since 1976, the International Covenant on Civil and Political Rights has come into force. Together with the Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Numan Rights, they form what is known as the International Bill of Rights.[26] Suffice it to say that the Philippines is a signatory to these basic documents, including the optional protocol to the Civil and Political Rights Covenant. The Philippines, moreover, already ratified the Economic, Social and Cultural Rights covenant. Perhaps, with the lifting of martial rule, the time has come for us to also ratify the Covenant on Civil and Political Rights.

Thus, in the world scene, one continues to witness dynamic changes in the concept of law and of rights. With regard to suffrage, there is basis now to say that perhaps a reversal has taken place in the doctrine that suffrage is a mere privilege, a right to be given or withheld by the exercise of the law-making power of the sovereign state. To say the least, the human rights covenants would make an anachronism of the view, in *People v. Corral,* 62 Phil. 947 (1936), which stated: "In the Philippines, suffrage is not a natural right but a privilege which may be enlarged or restricted, granted or withheld by the state. It is a function of government."

The human rights provisions on suffrage squelch the old line of U.S. state decisions, quoted by Philippine authors, such as *Gardina v. Jefferson County,* 48 S. 788 (1909), to the effect that suffrage is "not a natural right of the citizen but a franchise dependent upon law, by which it must be conferred to permit its exercise." Instead, the covenant's provisions now affirm the liberal line of precedents exemplified by *In re Holman,* 104 A. 212 (1918): "The common law did not create the right to vote. The right pre-existed the common law." It is commonly referred to as a sacred right of the highest character... placing the right of suffrage upon the high plane of removal from the field of mere legislative impairment." [State v. Phelps, 144 Wis. 1 (1910].

### *Ponencia on Human Rights*

Just the same, students are not unaware of the seeming setback to the application of human rights in the Philippines by the courts, e.g., in *Ichong v. Hernandez,* 101 Phil. 1155 (1957). Unfortunately it is based on the positivist view of Kelsen, stating that the Declaration of Human Rights contains nothing more than a recommendation or a common standard of achievement for all peoples and all nations. The better view on human rights, it is submitted, is the *ponencia* of Justice Tuason in two

[26] WILLIAMS, INTERNATIONAL BILL OF HUMAN RIGHTS (1981).

habeas corpus cases, namely *Mejoff v. Director of Prisons,* 90 Phil. 70 (1951); and *Borovsky v. Commissioner of Immigration,* 90 Phil. 107 (1951).

In both cases, the Court decisions expressly cited the adherence of the Philippine Constitution to the generally accepted principles of international law as part of Philippine law. The Court pointed out that the Philippines is a member of the United Nations which passed the resolution entitled the Universal Declaration of Human Rights, approved on Dec. 10, 1948, citing therein Art. 8: "Every one has the right to an effective remedy by the competent national tribunals for acts violating the fundamental human rights granted him by the Constitution or by law." This justified the release of petitioners Mejoff and Borovsky from imprisonment.

*Enforcement Problems*

Way back in 1947-48, as a Yale graduate fellow, Chief Justice Fernando already wrote a monograph on the International Bill of Rights.[27] Said he in conclusion of his study: "Nor does the difficulty end with the verbal formulation of the rights of man. The question of implementation remains. Here again one power or group of powers may accede to the covenant without taking steps to make living realities out of those rights so guaranteed. Enforcement on an international level may run afoul of the doctrine of sovereignty. Nonetheless, the United Nations should go ahead and formulate an international bill of rights.[28]

Now, not only has the United Nations formulated an international bill of rights. With the covenants already entered into force, the bill is a reality in fact and in law.

Entry into force, however, is of course distinct from being enforced, particularly by national courts and agencies. It is unfortunate that human rights have become the new football of international politics and the cold war. An American, in the proceedings of American Society of International Law, has said: "It must be recognized that international human rights is politics; any other view is foolish. The U.S. has learned within its own boundaries the significance and intensity of human rights politics. The traditional theoretical or academic approach is not possible anymore."[29] A high Soviet law association official, on the other hand, has produced a White Book on human rights, charging that they have been used as covers for espionage and subversion against the Soviet Union, and detailing particular cases and offenses.[30] For a while, the Philippines appeared among the top targets of human rights activists. Perhaps the Philippine government

[27] PCF Publications, 1948.
[28] *Id.* at 42.
[29] HAUSER, U. N. LAW ON RACIA' DISCRIMINATION, cited in LILLICH and NEWMAN, INTERNATIONAL HUMAN RIGHTS (1979).
[30] SMIRNOV *et al;* THE WHITE BOOK (1979).

still is. But that, in no way should affect the intrinsic merit of the human rights covenants.

Yet perhaps the most difficult objection to a covenant or convention being enforced by national courts and agencies is the argument that such a covenant or convention would override national laws, even a Constitutional provision, and thus become the supreme law of the land without the action of national legislature or the concurrence of the sovereign people.[31] But this objection has been rebutted by McDougal and Arens, with an analogy to the U.S. federal system and federal-state relations; citing C. J. Taft, in *U.S. v. Lanza,* 260 U.S. 377 (1922): "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory...It follows that an act denounced as crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." McDougal would add that in this almost unwavering position, the Supreme Court has upheld concurrent jurisdiction on matters as diverse as election controls, cattle inspection, and gambling transactions.[32]

In the Philippines, perhaps, there could be challenges to the enforcement of the right to vote and participate in government as a human right under the covenants and the universal declaration. But the spirit if not the letter of Art. II, Sec. 3 of the Constitution of the Philippines, on our adoption of generally accepted principles of international law, might prove a bulwark against such challenges. Once the covenants on human rights become recognized as generally accepted principles of international law, based on actual count of signatories and ratifiers, then critics may have little ground to claim they do not form part of the law of the land. They could become *jus cogens.*

At this time, it may be far-fetched to say that perhaps we too recognize two sovereignties, a national and an international sovereign. For the U.N. does not claim sovereignty on a global scale. From the philosophical standpoint, however, that hardly matters. What is necessary is a global consensus on human rights for the sustained growth and survival of the human community. Positive law is not the end-all of human rights. Law in fact, is secondary to the idea of human dignity and equality which are pole stars of the rule of law.

### *Covenant Provisions*

In contrast to the provisions in our Constitution, specifically Art. V, Sec. 4, which makes it an obligation to register and vote; and of Art. VI, which provides for the exercise of suffrage and the qualifications therefor,

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[31] See PHILLIPS, THE GENOCIDE CONVENTION, cited in LILLICH & NEWMAN, *op. cit, Supra,* note 29 at 159-163.

[32] McDOUGAL & ARENS, THE GENOCIDE CONVENTION AND THE CONSTITUTION, cited in *Id.,* at 163-166.

we now cite Article 25 of the Covenant on Civil and Political Rights, to properly appreciate their scope and impact.

"Every citizen shall have the right and opportunity without any of the distinctions mentioned in Art. 2 (meaning race, color, sex, language, religion, opinion, property, birth, etc.) and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country."

These provisions, insofar as the Covenant is the enforcement/enforceable treaty, is traceable to Article 21 of the Universal Declaration of Human Rights, which proclaims that:

"1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

"2. Everyone has the right of equal access to public service in his country.

"3. The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

To reiterate, the Covenant on Civil and Political Rights entered into force in 1976. Together with the Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights, they now compose the International Bill of Human Rights. Their force are not based alone on their sponsorship by the United Nations as a family of nations today, but on the long lineage of political and social thinkers whose ideas developed the democratic heritage. States now have to reckon with their applicability. For even individuals, under the protocol, could file complaints against any state for violation of their human rights — surely a quantum leap in legal procedures.[33]

### *Tests of Constitutional Provisions*

There is a tendency in judicial argument to consider an appeal to the authority of the Constitution as the summit of inquiry. The thrust of

[33] See Art. 1 of the Optional Protocol:
"A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications for individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."

human rights ideas, however, is to elevate inquiry to a higher plane or standard of justice and legality.[34] This is true particularly where governmental practice shows that positive provisions of law trench upon recognized fundamental freedoms. The covenants provide us with acceptable criteria to validate anew, on a higher plane, the postulates of our civil and political laws, more particularly our electoral laws.

The idea of testing the validity and legitimacy of Constitutional provisions is a logical extension of our premises. This is neither novel nor radical in juristic theory. If a statute can be challenged as void, invalid, inoperative or inapplicable, within the context of a national legal order, necessarily by force of analogous logic, a challenge to a constitutional provision is feasible in the context of a global or supra-national order. The practical problems only were finding the convenient forum and agreeing on the set of juristic principles to test those provisions of a constitution at issue. Human rights covenants and courts or committees set to enforce those covenants solve both problems. We are, therefore, at the threshold of an interesting, nay exciting, future in the law.

But even without judicial recourse, meaning a supra-national court, political thinkers already addressed themselves to the problems of legitimacy and justness of constitutional regimes. How to assess the "justice of the constitution", for example, is answered by Harvard professor John Rawls: thus, (1) the constitution must be a just procedure satisfying the requirements of equal liberty; and (2) the constitution must be framed so that it is the most feasible arrangement for a just and effective system of legislation.[35]

*Specific Electoral Law Criteria*

In the face of specific legislative problems, in the political sphere,[36] one may draw from Prof. Rawls an intellectually rigorous yet justly fair set of criteria. May I summarize:

The precept one elector, one vote is honored. Elections are fair, free, and regularly held. Sporadic, unpredictable tests of public sentiment by plebiscite or similar means at times that suit the convenience of government officials do not suffice for a representative regime (a republic). Certain liberties, particularly freedom of speech and assembly, and the liberty to form political associations are recognized. Political parties are not mere interest groups, petitioning government on their behalf (and advantage); to win office, they must advance some conception of the public good. The legislature has more than advisory capacity, nor is it simply a forum of

[34] But in Art. 2, "the complaining individual must first exhaust all available domestic remedies" except where per Art. 5, "unreasonably prolonged."

[35] RAWLS, A THEORY OF JUSTICE, 221 (1971).

[36] E.g., the proposed Election Code of 1983.

delegates from various sectors of society consulted by the executive. All sane adults, of course with given exceptions, have a right to take part in political affairs. All citizens have equal access, in the formal sense, to public office. The authority to determine basic social policies resides in a representative body chosen periodically by and accountable ultimately to the electorate.[37]

Perhaps it is far from surprising that the criteria set by Prof. Rawls in his neocontractarian classic hewed closely to the basic tenets embodied in the human rights triad. To be sure, some prescriptions of Rawls are criticized as conservative. His views do not exhaust the possibilities of social justice for poor but proud countries. His views, however, avoid any charge of radicalism. They are useful, for comparative purposes, as exposition of a philosophical foundation not just for international covenants but even more so for national constitutions. Policy-makers struggling from martial-law vestiges toward political normalcy may find them stimulating if not instructive. The Comelec surely has to consider human rights of suffrage and political participation, and their impact on our society, today and tomorrow.

### *Decade of Election Cases*

Turning now to the Supreme Court decisions from January 1973, a period of ten years, one will be struck by the number of cases involving electoral processes and disputes, as well as the Comelec itself, its powers, and its official actions.[38] They testify to the vigorous assertion by the people of their sovereign rights. While normal elections (that should have been held in November 1973 under the old Constitution and two years thereafter periodically), were suspended at the onset of martial law government, nevertheless, electoral processes continued in such forms as referenda and plebiscite and later local elections (barangay, municipal, and provincial councils) as well as the *interim* Batasang Pambansa elections. These exercises elicited as much heated controversies as Proclamation 1081 itself. Cases arising from these political exercises hugged the attention not only of the press but of the highest Tribunal. One will, therefore, find these cases of a decade a gold mine of polemics from which he may shift valuable nuggets of decision as well as non-decision. A number of them, e.g., the *plebiscite* and *ratification* cases, have passed into legal history as epochal struggles worthy of the bar and the bench.

Yet these landmarks validate the truism that hard cases make bad law. Often the Court speaks in divided voices, far from unanimous, and hardly with a clear majority. Opinions proliferate as do the quotations from Prof. Rossiter, Corwin, Cooley, etc. For legal forecasting, these verbose

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[37] RAWLS, *op. cit., supra,* note 35 at 222-224.
[38] See cases from Jan. 1973 to Aug. 1982.

cases may ill serve the venerated principle of stare decisis. Yet, it cannot be gainsaid how courageously the Court wrestled with questions many deemed political but which others found quite justiciable. The end result of these forensic epics, which grew out of our national travails, is the enrichment of jurisprudence on the doctrine of judicial review at a time when presidential, if not parliamentary, supremacy is the order of the day. This is surely an achievement for the Supreme Court.

Happily too, for the Comelec, its track record is better than mixed. The powers and decisions of the Comelec have been upheld, adumbrated and legitimated; e.g., in Aquino, Aratuc, Sanidad, Occeña, Laban, Peralta, Dumlao and Olfato decisions.[39] Of course, as is inevitable, there are minority opinions that chide, if not castigate, some actions of the Comelec, e.g., in Santos, Ticson, and Omar,[40] for certain lapses in procedure or interpretation of law. But a fair review of some 70 cases since 1973 justifies a conclusion that the Comelec performed its crucial tasks during so difficult a period in our history with marked fidelity to the Constitution, the law, and the public trust.

However, there is a line of cases—namely those of Mayor Santos of Taytay, Mayor Ticzon of San Pablo, and Major Geronimo of Baras,[41] among others, that might give a long pause for sober reflections. These are cases dealing in what is now known as "turncoatism." The dissents of Justice Teehankee surely make for hot reading in divided opinions. It is fairly known that the result of turncoatism disputes was uneven, a matter that could put the law in disrepute. Yet in these cases, it is obvious enough that the Comelec was valiantly enforcing Sec. 10, Art. XII-C of the Constitution as well as BP 52 and PD 661.

### *Constitutional and Statutory Reforms*

These cases demonstrate a fundamental problem of electoral reform via the Constitution. The authors of Sec. 10 truly intended an innovative approach to the ludicrous problem of "political butterflies." Little did these draftsmen suspect they will stir, instead, a hornet's nest. Like the would-be sage who made voting a duty, rather prematurely, they did not foresee their progenies would come home to roost on their heads, with a vengeance.

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[39] No. L-40004, January 13, 1975, Aquino v. Comelec, 62 SCRA 275 (1975); Nos. L-49705-09, February 8, 1979, Aratuc v. Comelec, 88 SCRA 251 (1979); No. L-44640, October 12, 1976, Sanidad v. Comelec, 73 SCRA 333 (1976); No. L-47883, March 25, 1978, Laban v. Comelec, 82 SCRA 196 (1978); No. L-47771, March 11, 1978, Peralta v. Comelec, 82 SCRA 30 (1978); No. L-52245, January 22, 1980, Dumlao v. Comelec, 95 SCRA 392 (1980); No. L-52749, March 31, 1981, Olfato v. Comelec, 103 SCRA 741 (1981).

[40] No. L-52390, March 31, 1981, Santos v. Comelec, 103 SCRA 628 (1981); No. L-5245, March 31, 1980, Ticson v. Comelec, 103 SCRA 671 (1980); No. L-53962, February 3, 1981, Omar v. Comelec, 102 SCRA 611 (1981).

[41] Geronimo v. Comelec, No. L-52413, September 26, 1981, 107 SCRA 614 (1981), but note, Supreme Court sustained Comelec decisions here.

Perhaps the 1981 amendments, one applicable to Sec. 10 ("unless otherwise provided by law"), can mitigate the harsh positivism of the original prohibitions. The problem is now being squarely faced by the IBP. Perhaps there is a way to uphold the section's benign intent yet also efface its malevolent sting.

Over-all the problems of accrediting political parties, redistricting, and cleaning up electoral malpractices point to a pressing need to prepare for the return of a genuine legislature, a full-bodied, regular (rather than *interim*) Batasang Pambansa. Without a wish to speak out of turn, perhaps one can suggest two principles for the reconstruction of the electoral edifice with pre-requisites like political parties and authentic voters' list. These two principles are intended only to be equitable guides rather than positive strait-jackets: (1) the principle of equal opportunity applied to politics; and (2) the principle against abuse of right and of dominant position among parties.

It is possible that the KBL-NP tandem will dominate the political life of the Filipino nation even after 1984. Nothing is strange about that. But it should not mean the un-edifying prospects of uneven, unexciting struggle at the polls demonstrated in 1981. If the state has to recognize two accredited parties, those parties ought to even up resources even before 1984. To quote Rawls again, with reference to parties: "The principle of loyal opposition is (or ought to be) recognized, the clash of political beliefs, and of the interests and attitudes that are likely to influence them, are accepted as a normal condition of human life... Without the conception of loyal opposition, and an attachment to constitutional rules which express and protect it, the politics of democracy cannot be properly conducted or long endure."[42] While one may personally hope for tripartisan contests, this looks vain as of now.

One cannot deny that the youth, the intellectuals, the press, labor, even business and other sectors of society look for revival of a robust democracy—perhaps minus dissidents or private armies that are still terrorizing localities. In this renascence, the Comelec plays a central role.

### *Comelec and Certiorari Power*

Is the Comelec a court—and should it possess certiorari powers like the Supreme Court and now the intermediate appellate court?

Without doubt, the new Constitution has enlarged the powers and functions of the Comelec. First, it is the organ "to enforce and administer all laws relative to the conduct of elections." Second, but no less important, it is "the sole judge of all contests relating to the elections, returns, and qualifications of all Members of the Batasang Pambansa, and elective

[42] RAWLS, *op. cit., supra,* note 35 at 223.

provincial and city officials," aside from pre-proclamation controversies at all levels. (Const. XII-C, Sec. 2 and P.D. 1296, Sec. 175; Sec. 192). Comelec decisions, orders and rulings are final and executory; they can be brought to the Supreme Court only on certiorari. Regional trial court decisions and orders in election contests involving municipal and municipal district officers are subject to Comelec appellate jurisdiction. Moreover, since the abolition of Congress, the powers, personnel and properties, of the defunct Senate and House Electoral Tribunals, whose functions were judicial, got transferred to the Comelec.

Thus, there is plausible reason to argue that the Comelec is a court. Further, it should have certiorari jurisdiction insofar as appeals from the Regional Trial Court orders and decisions are concerned. But in *Pimentel v. Comelec,* the Supreme Court held there is no express legislative grant of certiorari jurisdiction to the Comelec. Justice Aquino, concurring, added: "the Comelec has no such certiorari jurisdiction because no law expressly confers such jurisdiction upon it and because it is not a regular court of justice."[43]

Nevertheless, the fact is that it is the *sole judge* of certain electoral cases. It sits en banc or in three (now two active) divisions, so that there are actually four sets of clerks of court with subordinate staff. Since the Court decision centers on the lack of legislative authority for it to exercise certiorari jurisdiction, that can be remedied by *new legislation* such as the proposed Election Code of 1983. (Sec. 216, Exclusive authority on petitions for certiorari, prohibition and mandamus).

### *Conclusion*

Could it be true that elections, so dear to legalists, are but primarily symbolic exercises to help tie the masses to an established order? Aren't elections the people's real instrument of control over public policy and over public officials? Are elections as much a myth of democracy as the golden bough in the legend of Nemi? Yes, perhaps, but legends and symbols die harder than facts. The rites of regicide and reification live on well enough in the ceremonies of the ballot box. These rituals may yet be enshrined everywhere among the basic human rights.

[43] Nos. 53581-83, December 19, 1980, Pimentel v. Comelec, 101 SCRA 769, 779 (1980), Cf. NP v. Vera, 85 Phil. 126 (1949).