THE RULE OF LAW AND THE DECREE-MAKING POWER OF THE PRESIDENT SOME REFLECTIONS ON THE CRISIS OF CONSTITUTIONAL AUTHORITARIANISM IN THE PHILIPPINES

PETER B. PAYOYO*

I. THE PROBLEM REFORMULATED

Executive legislation is not a new phenomenon in modern constitutional law and practice.[1] However, the Philippine experience of presidential law-making since September 1972 invites attention to the peculiarities of its practice and the philosophy that underlies its justification. After the official lifting of martial law,[2] the law-making powers of the president legally continued to exist by virtue of Amendment No. 6 in the Constitution. This constitutional provision authorizes legislation by the president[3] even after the Regular Batasan Pambansa has been elected[4] and convened.[5] What is idealized by this amendment is the dynamics of presidential power in the country and the relation of its actual practice to the regime[6] maintained in the state. To introduce an initial postulate, Amendment No. 6 is the core expression of the process of governmental power in the Philippines.

Although much of the uncertainties and misgivings about executive legislation, "Philippine style," have been exposed in the literature,[7] the debate

* *Chairman,* Editorial Board, Philippine Law Journal

1 *See* C. ROSSITER, CONSTITUTIONAL DICTATORSHIP (1948) which treats on the subject of executive legislation during defined situations of emergency.

2 Proc. No. 2045, Jan. 17, 1981.

3 *See* the reasoning of the Supreme Court decision regarding the nature and necessity for Amendment no. 6 in Legaspi v. Minister of Finance, G.R. No. L-58289, July 24, 1982, 115 SCRA 418. Amendment no 6 reads:

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

4 May 14, 1984. CONST., Art. VIII, sec. 5(1).

5 July 23, 1984. CONST., Art. VIII, sec. 6.

6 For an overview of the regime type referred herein, *see* ANNUAL SURVEY, Vol. XVIII, No. 4, April 1978 on Emergency Regimes in Asia, especially, J. Das Gupta, *A Season of Caesars: Emergency Regimes and Development Politics in Asia;* A, Lijphart, *Emergency Powers and Emergency Regimes: A Commentary;* L. Noble, *Emergency Politics in the Philippines.*

7 *See for e.g.,* Fernandez, *From Javellana to Sanidad: An Odyssey in Constitutional Experimentation,* 1976 AMENDMENTS TO THE CONSTITUTION 38 (1976); Paguio,

over presidential powers embodied in this amendment, has obviously sharpened since the later part of 1983, admittedly during the period of an economic crisis. Since the advent of this economic debacle of the 80's, what has increasingly become evident is the cynicism toward the regime and its ability to provide the basic material necessities of a people. The competence of government to sustain a viable economic system has unquestionably emerged as a crucial focus of controversy.

It should suffice at this point to state that politics in the country is inimately related with the constitutional process that is formally carried out. The regime that is sustained is precisely characterized by this relationship between Philippine politics and Philippine constitutional law. It is logical, therefore, that even the constitution, considered as a principle of government, has not been exempt from the rage of the political and economic controversy. Behind Amendment No. 6 is a whole philosophy of government that can immediately be held responsible, directly or indirectly, for the unprecedented economic breakdown experienced by the nation.

The connection between presidential powers, or more broadly the constitutional set-up, and the economic plight is not an accidental or arbitrary agenda in the continuing debate over Amendment No. 6. The practice of executive legislation has extensively affected the economic organization of the state, in terms of its control and direction. This is seen by the scope of presidential issuances which cover economic areas such as investments, labor policy, taxation, agrarian reform, and industrial and business regulation. The purpose of this paper is not however to make a study of the economic content of laws issuing from the executive. It is sufficient to assert, and this is of momentous methodological significance, that the economic predicament, whether temporary or protracted, had evolved the material and socio-psychological conditions that necessitate a fundamental reexamination of Philippine constitutional law, or more concretely, Amendment No. 6 and the legal principles that make its practice putatively consistent and intelligible. The object of this essay is to interpret and explore the inevitability of this reality.

Seven Years of Martial Law, Its Impact on Social and Legal Institutions, 54 PHIL. L. J. 345 (1979); Cortes, *Executive Legislation: The Philippine Experience,* 55 PHIL. L. J. 1 (1980); Tan, *The Decree Power and the 1981 Amendments, A Reinterpretation,* 56 PHIL. L. J. 491 (1981); Pangalanan, *The 1981 Amendments: The Presidency in the Wake of Constitutional Mutation,* 56 PHIL. L. J. 225 (1981); Caballes, *A Reassessment of the Presidency in the Light of the 1981 Amendments,* 56 PHIL. L. J. 252 (1981); Avena, *Public Order Act and the Morning After: Constitutional Issues,* 56 PHIL. L. J. 525 (1981); Muyot, *Amendment No. 6 and the Rule of Law,* 59 PHIL. L. J. 139 (1984).

II. A NOTE ON METHODOLOGY

The total problem about Philippine executive legislation could be reduced to one of justification. Amidst the social turmoil aggravated by the economic shock, the validity and necessity of Amendment No. 6 have seriously been questioned. The present political problem of the regime is the crucial one that may be described as its inability to justify its philosophy and practices, its *raison d' etre,* within a framework that can restore widespread confidence in its continued existence. Finding the solution for political stability is afterall a basic search for consensus about the fundamentals of state political life.[8] How can Amendment No. 6 be justified so that it can continue to find relevance in the political situation of the Philippines? Within what framework will this justification be established?

Since Amendment No. 6 is also a contemporary constitutional law problem, it may be safe to proceed with its justification, if this is ultimately possible, on the basis of its consistency with constitutionalist principles.[9] Establishing the integrity of Philippine executive legislation through the tenets of constitutionalism is a decisive step in the direction of justifying Amendment No. 6. Does presidential law-making, as this is practiced in the Philippines, affirm the continuity of a constitutionalist tradition, or does it negate the essence of constitutionalism?

Because what is sought to be justified in the final analysis is the institution of a powerful presidency — or Amendment No. 6 in more specific terms — its basis in constitutionalism, if there is any, must be proved according to the historical development of the idea of constitutionalism. In short, the practice of Philippine executive legislation must fit into the conceptual requirements of constitutionalism as this developed in history, if consistency and continuity between the two, i.e., executive legislation and constitutionalism, can be established. This historical approach is most promising if what is aimed to be clarified is the proof that Amendment No. 6 is buttressed by constitutionalist doctrines.

---

[8] It will be assumed at this point that the solution to the politico-legal problem involving Amendment No. 6 lies in consensus. For a shared view, *see* ZURCHER, CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II 6 (1951):

> In short, the great liability of the new constitutions is the lack of moral unity in the societies that have promulgated them. It is the absence of anything approximating Rousseau's concept of a "general will." It is the failure to achieve agreement among parties and interest groups on any fundamental common aim and the failure to acknowledge that there are values upon which parties might agree, at least partly, not to disagree for fear of bringing the state itself into jeopardy. To reiterate, it is the failure to secure consensus.

[9] "Constitutionalist" or "Constitutionalism" must be distinguished from "constitutional." The former conveys a specific historically developed doctrine or theory of constitutional law, while the latter could be made equivalent to the phrase "in accordance with the provisions of the constitution," used to describe an act or law, as this is judicially determined in particular cases.

To trace the development of the principle of constitutionalism more broadly and over a greater span of history, the concept of "Rule of Law" will be used to generalize the historically metamorphosed doctrines that make up the whole of this principle. I will however be constrained to summarize historical developments and extensive bodies of ideas in the barest and most general outline if this approach is to be made possible. Thus, tracing the history of the concept will be equivalent to tracing the development of constitutionalism, although the concept of "Rule of Law" is not quite the same as the concept of "Constitutionalism." For all purposes, however, the present understanding of Constitutionalism is closely related with the idea of Rule of Law.

Answering the question of whether the phenomenon of a legislating executive in the Philippines is compatible with the principles of Rule of Law will likewise accomplish the following objectives: (1) briefly elaborate on a method for understanding concepts; (2) apply this method in understanding Rule of Law and, consequently, Constitutionalism; and (3) relate this understanding of legal concepts to the idea of executive legislation.

III. THE RULE OF LAW

The shibboleth of Rule of Law can be used according to the purposes which are sought to be served and the ends which are desired to be attained by its propounders. Inspite of the rigorous, professional, and technical meanings accorded[10] to this phrase, Rule of Law still retains very ambiguous and flexible connotations.[11] The romanticism that is current about Rule of Law must not however prevent its analysis as essentially a social concept. Insofar as its relevance is concerned, it articulates a shared expression about the reality that it describes, no matter how this reality may be conceived or represented. The confusion about its exact meaning must be treated as a practical problem in itself. Like any other significant concept accorded competing definitions and conflicting meanings, the state of its comprehension is indicative of the actual reality, and the conflicts therein, that the concept seek to describe. As its history will reveal, the faith that people can have on a principle, expressed through a concept, is a uniting force if the exact consequences of that principle are mutually appreciated and clearly understood among themselves.

---

[10] Some authoritative materials that define Rule of Law are: DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (6th ed. 1902); MITCHELL, CONSTITUTIONAL LAW (1964); DICKENSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE *U.S.* (1927); INTERNATIONAL COMMISSION OF JURIST, BASIC FACTS (1962).

[11] The disagreement among legal scholars themselves about the essence of the concept is seen from a comparison of the interpretations presented, among others in the materials in the foregoing note. The conflict of meanings attached to the concept naturally elicits the dismay and confusion typified by Sir Ivor Jenning's comment that "Rule of Law is apt to express the political views of the theorists and not to be an analysis of the practice of government."

Throughout the history of the concept, Rule of Law has signified less a personal conviction than a social outlook. The Rule of Law is a social concept because it asserts the values of a type of government, or polity, and generalizes the beliefs that this mode of government implies. As a framework that provides for the ideal workings of a society, Rule of Law not only describes theoretic insight in the processes of a legal system but also informs a definitive practice of politics. This would mean that it is not only possible but inevitable that the idea of Rule of Law can serve as an instrument to justify or assail an existing arrangement of society and government.

A. *Rule of Law as a World Historical Tradition*

The movement of the concept of Rule of Law follows the movement of world society that eventually led to the formation of modern day nation-states. From its brief history outlined below, it will be seen that (1) the content[12] of the concept of Rule of Law is determined by the social milieu that it seeks to explain, justify, or condemn, and (2) that for every new historical phase in the evolution of the concept, there is a situation of "crisis" in the term of transition that is undergone by the concept, and this is indicative of an actual crisis in the social environment.

The idea of Rule of Law has its ancient origins in Greek society. Since this period, it already underlied the notion of a just society cohered by some principle or principles of human order. Aristotle referred to the Polis with a tripartite distribution of powers which was governed by law.[13] It operated on the basis of a balanced distribution of social "classes," there being no "checking" activities among the three elements (viz., the deliberative, legislative, and adjudicative elements) of government, the deliberative element being supreme.[14] Rule of Law then was the outstanding principle of an aristocratic society ideally governed by the Philosophical class.[15] The Greeks, during their own philosophical era, justified this aris-

[12] By "content" of the concept is meant the social meaning, or socially relevant conception, with the corresponding social philisophy that subtantiates its semantic attributes.

[13] For a brief overview of Greek Polity, *see* I CURTIS: GREAT POLITICAL THEORIES 59-94 (1961).

[14] *See* Burin, *Theory of the Rule of Law and the Structure of Constitutionalist State*, 15 AM. U. L. REV. 313, 318-319 (1956). Burin's explanation about the development of the Rule of Law clearly shows the changing content of the concept from Greek to Medieval society to the present constitutionalist state. However, his representation of the development of the concept, i.e., his conceptual model, follows the structuralist-functionalist approach in the determination of the content of the Rule of Law concept, *e.g.*, note the "checking" functional criterion applied to Greek society. What Burin does, in other words, is to apply present theoretical standards (adopted from systems theory) to past historical societies. For a similar treatment of the concept, *see* DICKENSON, *supra*, note 10.

[15] Aristotle writes, "He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast and passion perverts the minds of rulers even when they are the best of men." Plato's *Republic* likewise explains justice in society when reason, through the philosopher-king, rules.

tocracy, and the slave institutions then existent, with this concept of Rule of Law, or "rule of reason." This notion explains the economically based division of labor in Greek classical society. The distribution of power between the aristocratic class and the subordinate constituents defined and justified the dominance of the "deliberative element" in the law-governed society.

The rise and expansion of Roman military power later led to a modification of the dominant ideas about government and the role of law in society. The Rule of Law idea was elaborated in the context of military might. It was during the period of Roman expansion that the need was felt to formulate rules for the growing polity.[16] The checks and balances idea of institutional power was hence developed. "Thus, there originated in Polybius the constitution of checking and balancing organs (not functions as yet)."[17] The Rule of Law came to mean an imperial principle of consolidating and balancing the powers of Roman Consuls.[18]

The spread of Christianity and the consequent decline of the Roman Empire ushered in the coming of medieval society whose dominant feature was the power of the Catholic Church. The European monarchies that were formed later governed with the pope's sufferance. The secular Roman notion of Rule of Law wes evidently abandoned and a theological orientation was introduced to the idea of Rule of Law.

> Bracton, writing in the 13th century adopted the theory generally held in the middle ages that the world was governed by law, human or divine; and held that "the king ought not to be subject to man, but subject to God and the law, because the law makes him king." This view is also expressed in the Yearbooks of the 14th and 15th centuries. The superior law governed kings as well as subjects and set limits to their prerogatives.[19]

Saint Thomas Aquinas exemplified the prevailing thinking about the law and its divine source and basis. The scholastic tradition of the Rule of Law can be traced to the ideas of this period.

With the breakdown of feudalism came the collapse of medieval institutions of power, specifically the Catholic Church. The development of a new theology—protestantism, the conceptualization of state theory in political doctrine, and the rise of a new cosmology based on science and metaphysical reality gave birth to Liberalism as the foundational spirit of social and individual thinking.[20] In the 16th century, the spread of modern

---

[16] NICOLAS, AN INTRODUCTION TO ROMAN LAW 3-4 (1962); W. KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 35-130 (2d ed. 1975).

[17] Burin, *supra* note 14 at 320. Note the bias in evaluating Roman Rule of Law with functional analysis.

[18] *Ibid.*, at 320.

[19] PHILLIPS, THE CONSTITUTIONAL LAW OF GREAT BRITAIN AND THE COMMONWEALTH 27 (1952).

[20] This historical interpretation is taken from LASKI, THE RISE OF EUROPEAN LIBERALISM (1936). This book explains the historical causes and the nature of liberalism, particularly its critical relation with economic movements.

secularism in the study of law and politics, seen in the ideas of Bodin and Machiavelli, considerably reduced the power of the medieval church to define the means and ends of life. The law was now entirely personified in the monarchy. Thus, the divine-right-to-rule doctrine was devised. Rule of Law, conveyed in the theory of state sovereignty, it must be noted, had served the purposes of an expanded production process implied in mercantilist world economy.

Subsequently, the economic transformation from mercantilism to *laissez faire* attended equally revolutionary changes not only in economic production but also in politics and political thought. The new state society, operating on a new economic philosophy imposed by the flourishing outlook of liberalism, forced a conception of Rule of Law in radically new directions. Changes in the institutional locus of power is gleaned from this account:

> Fortescue in the middle of the 15th century, based his argument that there could be no taxation without the consent of parliament; in the regime of the early Stuarts, the doctrine propounded by Coke was the superiority of the common law over the king and executive. But the common lawyers (including Coke in his late life) were in alliance with parliament, and this theory had to be combined with the recent doctrine of the sovereignty of parliament. What was supreme therefore was the law for the time being; that is to say, the common law subject to such changes as king or parliament might make from time to time.[21]

The legacy of the Social Contract in the ideas of Hobbes, Locke and Rousseau, and much later refined by Montesquieu, had received concrete application in the political institutions of the period. It was therefore the dominant belief that men enter into association, form the "Commonwealth," or found a "Leviathan" out of their own free and rational wills. Thus, law, as the product of reason and constituted in society, must exist only for the furtherance of the liberty of the individual in a civil society — a liberty that was later on expounded in the writings of John Stuart Mill. The relationship of individual freedom to the interest of the Commonwealth is defined by law, and this law arises out of the Commonwealth itself as constituted by individuals who, through reason, have chosen to be free. During the French and American Revolutions, the idea of a Constitution was a natural emanation from this outlook. Government, then, is merely the instrumentality for the formulation of law.[22] The

---

[21] PHILLIPS, *supra* note 19 at 28.

[22] Locke, in his *Second Treatise of Civil Government* points out:

> Men . . . enter into society . . . the better to preserve himself, his liberty, his property. . . . And so whoever has the legislative or supreme power of any government is bound to govern by established and standing laws, promulgated and known to the people, and not by extemporary devises; by indifferent and upright judges who are to decide controversies by the laws; and by the executive power who shall employ the force of the community at home only in the execution of such laws.

I CURTIS, GREAT POLITICAL THEORIES 347 (1961).

Constitution became the supreme political value of all conveivable societies. Montesquieu advanced the separation of powers in government to the end that liberty, not tyranny, may be the proper object of government.[23] This idea brought far-reaching advances in the theory of constitutionalism.

The Age of Enlightenment, the bloom period of the spirit of science and liberalism, reversed the former notion of Rule of Law with all its connotation of monarchial or church supremacy. This era inaugurated the collapse of the monarchy as an institution of immense influence. Republicanism claimed its rightful place in political theory. The French Revolution had affirmed the crowning of glory of republicanism — the belief that the social contract is the fundamental basis of all political authority in the state. The initial understanding of constitutionalism therefore coincided with republicanism. The content of the new Rule of Law is suggested in this recollection.

> Hundreds of men, had, under the system [of the *ancien régime*] suffered loss of liberty not for distinct and proven purposes and breaches of the law but because they had rendered themselves obnoxious to those who were powerful enough to procure a *lettre de cachet* consigning their enemies to imprisonment which might be lifelong. The Bastille stood not for the rule of law, but for the rule of privilege.... In proportion however, as we can appreciate the blessings of the "rule of law" we can sympathize with the destruction of the rule of might.[24]

The hold of liberalism has thus been pervasive from the period of the Renaissance to the French Revolution.[25] The forces that gave rise to liberalism were exactly the forces that molded the idea of constitutionalism, or republicanism, and the conception of Rule of Law that was attendant to this idea. In the American continent, already affected by the revolutionary tide in Europe in the 18th century, the adoption of a written constitution instituted the separation of powers principle as the fundamental basis for the Rule of Law.[26] John Adams had conceived of linking the two concepts of Rule of Law and separation of powers[27] but the germinal

---

[23] A famous excerpt from Montesquieu reads:

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

MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (T. Nugent Trans., 1949).

[24] MARRIOT, ENGLISH POLITICAL INSTITUTIONS 35 (1910).

[25] LASKI, *supra*, note 20.

[26] The Bill of Rights of the Massachusetts Constitution of 1780 reads:

> In the government of this Commonwealth the legislative department shall never exercise the executive and the judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive, or either of them, to the end that it may be a government of laws and not of men.

Quoted in Burin, *supra* note 14 at 318.

[27] Burin, *supra* note 14, at 318.

idea of the inseparability between these two principles of government had long been recognized by Locke and Monstequieu. It was during the mature period of world liberalism that the Rule of Law, as a social philosophy, was transformed into a social conviction about the virtues of a constitution that acknowledged separation of powers — a tenet of government that instructs the values of upholding individual liberty and condemning arbitrary power.

Like the previous periods of transition, the emergence of new ideas in the content of the Rule of Law signaled the decline of counterpart ideas that were formerly associated with the concept. The transition, for instance, from the Roman to the Medieval period marked the rise of Christianity and the decline of Roman secularism as the guiding social outlook. The corresponding changes in the notions of the law, government and politics directed a reorientation of the content of the Rule of Law concept which, in turn, accompanied the actual transformation of society. In a parallel manner, the emergence of the nation-state went along-side the collapse of medieval society and the dominating religious world outlook that this society shaped. Weber and Tawney have elaborated on the reconstruction of a society brought about by a secuarization of the religious beliefs along liberalist lines. During this same era, the Rule of Law delivered an *ex cathedra* message of an independent monarchial rule; the abandonment of the belief in the power of the church to dictate the conduct and the affairs of political men was indubitably completed. Again a similar pattern is observed: the eventual transition indicated an actual struggle of people and philosophies at the concrete stage of society. The birth of individualism, an integral doctrine of liberalism, concurred with the collapse of hereditary social privilege instrinsic in monarchial institutions and beliefs. Prior to this downfall, the votaries of monarchial power had to engage in violent struggle against the forces of the ascending liberalist movement.[28] When a peaceful accommodation between these two world outlooks could not be made, the struggle crystallized in the Revolution of 1789, after which the victory of individualist liberalism and the collapse of monarchial supremacy were *fait accompli.*

The described periods of transition definitely mark periods of social crisis. These are periods when the confrontation and struggle of ideas confirm the actual struggle and conflict among people. The social state of uncertainty about general organizing ideas, notions, beliefs or convictions underlying a concept is referred to as a "crisis" of a concept. It may be said then that the "crisis" of a significant social concept, like Rule of Law, is coincidental with a crisis in the reality that the concept seeks to describe. If this is true, understanding the actual, objecive social crises must proceed on a thorough

[28] Bracton states "the king has a superior, to wit the law, and if he be without a briddle, a briddle ought to be put on him, namely, the law." From DICKENSON, *supra* note 10 at 32, citing MAITLAND, BRACTON'S NOTEBOOK, i, 29-34.

understanding of the "crises" undergone by the cencepts that describe or idealize particular social realities.

B. *Framework of a Crisis: the Interlude*

From the historical perusal above, the structure of a social crisis can be discerned. The forces at work that instigate social change direct the formulation and elaboration of the new philosophies in place of older ones. The crisis is defined not so much as the emanation of a novel, more appropriate world outlook, as the decline and struggle for survival of an "old" philosophy. Thus, through inevitable social change, an old reality is transformed to a new one. The requirements of the new reality in terms of material preconditions and social relations, necessitate the formulation of a new world view.[29] Correspondingly, the old world outlook either compromises with the new one or struggles for its continued dominance. The ensuing clash of world views, with the specific collision of alternative and competing socially relevant concepts, leads to concrete social antagonisms. A crisis situation is hence created. The crisis, in this sense, pertains not only to the conflict of philosophies or world views but also, inextricably, to the disintegration of political structures and social institutions that are rested on some belief system.

C. *Rule of Law in the 20th Century*

The Rule of Law, as a concept that has undergone various qualitative transformations throughout history, is now composed within a framework of constitutionalism — a political world view that emerged from European liberalism since the Reformation.[30] As a world view that expresses a legal philosophy, its tenets were consolidated with the spread of the "juridical world outlook,"[31] the belief that law is the ultimate factor for social change and state transformation. As such, the formulation and application of law must conform to evolved rational standards, institutional and legal, that would preclude unlimited and arbitrary power. Sinch individual liberty is the antithesis of tyrannical rule, these standards have to be defined by the principles of government founded upon the liberal concept of Rule of Law. The identity of Rule of Law to Constitutionalism is finally verified.

Since the turn of the 19th century, the train of development of the Rule of Law concept pointed to a direction of a more intensive safeguarding of its values for liberty, i.e., of strengthening the control over absolute and arbitrary power either by one man or group of men. The prominent

---

[29] *Cf.* KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1972), on his theory of "paradigmatic change."

[30] LASKI, *supra* note 20 at 15.

[31] For a discussion of "juridical world outlook" *see* TUMANOV, CONTEMPORARY BOURGEOIS LEGAL THOUGHT (1974). The "juridical world outlook" is associated with the German *Rechtsstaat*, which, according to Burin, *supra* note 14 at 313, is the continental analogue of Anglo-American Rule of Law.

modern theory of Rule of Law within a framework of 19th century constitutionalism, was formulated by Dicey.[32] He notes three elements in the concept:

> (1) That no man is punishable or can lawfully be made to suffer in body and goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land;
> (2) That not only is no one man above the law but that—what is a different thing—here, every man whatever be his rank or condition is subject to the ordinary law of the realm and amendable to the jurisdiction of ordinary tribunals; and
> (3) That with us the law of the constitution, the law of a constitutional code are not the sources but the consequences of the rights of the individuals as defined and enforced by the courts.[33]

The growth an expansion of government and state administration in the 20th century introduced minor innovations to the conception of Rule of Law. The complexity of, and differentiation of functions in, government rendered the original fomrulation of Dicey inadequate. Dicey's Rule of Law was thus criticized on this account.[34]

In the United States and other democracies, the Rule of Law was all the more conceived to broaden the supremacy of the rights or liberties of individuals, especially political and civil rights. The later guarantees for socio- and economic rights, through the active intervention and participation of government in the state, confirmed the trend towards the positive welfare state. The economic affairs of men were therefore even subject to the intervention by government. *Laissez faire,* as a once-imposing economic credo, was of necessity relegated to the social background and an economic welfare theory that allowed a more active state economic role was substituted in its stead.[35] In the U.S., Keynesian economics provided the theoretical underpinnings of the government's economic role. After the Great Depression since 1929, a government that governed least would never have been a government that governed best. The New Deal proved the reconstructed practice of government in the economic life of a state.

The liberal tradition behind the Rule of Law survived and persisted even after the Second World War when new states were recognized in the international community and the colonial empires gradually disintegrated.

---

[32] DICEY, *supra* note 10.

[33] *Id.*, at 183, 189, 191.

[34] *See* MARRIOT, *supra* note 24; DICKENSON, *supra* note 10; PHILLIPS, *supra* note 19 at 27-28; *See also* MICHELL, *supra* note 10 at 41.

[35] In SCHWARTZ, THE SUPREME COURT CONSTITUTIONAL REVOLUTION IN RETROSPECT 20-24 (1957), the author refers to the constitutional revolution in the U.S. after the Supreme Court upheld the constitutionality of the National Labor Relations Act in the case of *National Labor Relations Board v. Jones and Laughlin Steel Corporation,* 301 U.S. 1 (1937). The court's duty of actively checking the other branches of government, the author maintains, was tempered into a practice of "judicial self-restraint" after the passage of the New Deal.

After the war, the emphasis on the sacredness of individual rights and liberties was transformed to an international movement for human rights.[36]

Human rights, understood as a condition that is actively generated by government for individuals considered as human beings, became identified with the Rule of Law. The principal concern against tyrannical rule was still retained, however, in the concept. What is then a clearly developed conception is that a government not only has the valid duty to promote the econmic welfare of its citizens but also a positive obligation to protect the constitutional rights of individuals against their repression by governments or regimes themselves; hence, the notion of human rights. This theme appears to be the motivation of the International Commission of Jurists in espousing the correlative principles of Rule of Law and Human Rights.[37]

Today, the concept of Rule of Law represents the principle that governments have the duty to protect and promote the international movement on human rights.[38] In the western sense, human rights have been divided into socio-economic and civic-political rights. Human rights, conceived in these terms, conceptualizes, and in fact prescribes, a practice of government and a view on state politics. Understood from a legal and political standpoint, this would mean that the promotion of human rights becomes the end by which a modern government is presumably constituted. This conclusion is of noteworthy importance because it preserves the ideal of liberty within a framework of orthodox constitutionalism, which has still

---

[36] In 1948, the U.N. General Assembly passed the Universal Declaration of Human Rights. Subsequently, an International Commission of Jurists sponsored the active advancement of Human Rights. *See* Act of Athens (1955); Declaration of Delhi (1959); Law of Lagos (1961); Resolution of Rio (1962). This international movement explains the relationship of the Rule of Law to internationally recognized human rights. A definition of Rule of Law is given in INTERNATIONAL COMMISSION OF JURISTS, BASIC FACTS 3 (1962):

> The principles, institutions and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic background, have shown to be important to protect the individual from arbitrary government and enable him to enjoy the dignity of man.

[37] A close analysis of the framework of the International Commission of Jurists in the movement for human rights will yield this finding as their prime principle.

[38] The concept has however recently been given an extended meaning that emphasizes the applicability of the Rule of Law in the relations of states in international politics. For *e.g.*, in J. STONE, QUEST FOR SURVIVAL THE RULE OF LAW AND FOREIGN POLICY (1961), the author asserts that "the problem is not the value of this concept [i.e., Rule of Law] for guaranteeing human beings against the contageous excesses of their own governments towards them in their respective societies, but its value as a practical recipe for the present crisis between states" (p. 3). Recognizing the need to restore the Rule of Law, as he understands it, the author further states that "the weakness of the Rule of Law is an effect, rather than the cause of the crisis conditions of world politics" (p. 15). What is very significant about this novel understanding is its revelation that the content of the concept has already transcended its exclusive implications for state constitutionalism and extended to the context of a present world society. As will be discussed later, this metamorphosis of the concept of Rule of Law has an important suggestion to the analysis of Rule of Law as a principle for state organization in the Philippines.

survived as a central principle of state. It somehow became imperative, therefore, as a historical development, that human rights were a logical outgrowth of the tradition and practice of constitutionalism.

If the realization of Human Rights is the ultimate aim of modern contemporary governments, as this is currently believed to be so, and government has a defined active role in their advancement, then the constitutionalist mode of government must be the means, or the theoretical and practical technique, to attain this end. It was shown that constitutionalism rests on the tenet of separation of powers developed from the thesis of Montesquieu: that separation of powers is the only safeguard to liberty against arbitrary and tyrannical power. The logical conception of Rule of Law then must recognize the inherent and integral relationship between the advancement of human rights and the separation of powers principle.[39] This can only be the most accurate understanding of Rule of Law when the concept is framed from the perspective of its descent from liberalism. The practice of separation of powers in government is the means to ensure the promotion and safeguard of human rights by the same government.

From the viewpoint that the concept of Rule of Law must be understood historically, the derived conclusion is that today's concept of Rule of Law coincides with, and is identical to, constitutionalism. Constitutionalism, in turn, has acquired its most recent and logical meaning as a principle of government that purposively aims to attain and fulfill Human Rights through the mechanism of separation of powers in government. In western constitutions, human rights and constitutionally guaranteed individual rights are one and the same. The essence of present-day Rule of Law, of Constitutionalism, is its advocacy of individual human rights by state adherence to internationally evolved standards of human dignity[40] and decency. Once it is acknowledged that separation of powers is the

---

[39] The separation of powers principle was developed together with the juridically related principle of "checks and balances" — the 20th century functionalist translation of the separation of powers principle in contemporary constitutionalist states. The purposes of these principles are the same. As discerned, for *e.g.* in Myers v. U.S., 272 U.S. 52, 292-293, 47 S.Ct. 27, 71 L. Ed. 160 (1926):

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy.

See also, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153 (1952). A similar purpose is assumed in this statement by the International Commission of Jurists:

> To ensure that the extent, purpose and procedure appropriate to delegated legislation are observed, it is essential that it should be subject to ultimate review by a judicial body independent of the executive.

MARSH, THE RULE OF LAW IN A FREE SOCIETY 6 (1959), quoting from Clase II of the Report of Committee II of the International Commission of Jurists.

[40] It is recognized by some writers that human rights is only one approach—the Western Approach—of achieving a more ultimate aim of human dignity. *See* Donnelly, *Human Rights and Human Dignity An Analytic Critique of Non-Western Conceptions of Human Rights,* 76 AM. POLITICAL SCIENCE REV. 303 (1982).

logical and liberalist approach to human rights, and this correlation defines today's constitutionalism, the contrast among competing definitions of Rule of Law offers much more opportunity for analytic appreciation rather than common sensical dismay about the semantics of Rule of Law.

IV. RULE OF LAW IN THE PHILIPPINES

A. *History of Philpipine Constitutionalism*

The constitutionalist culture in Philippine political life was incipiently manifested in the revolutionary movement that culminated in 1896. The ideas of the illustrado class during the period illustrate that liberal ideas have seeped through the consciousness of the revolutionary leadership.[41]

When the Americans took over the Islands in 1898, the American heritage of constitutionalism has been formally[42] but gradually assimilated in Philippine legal thought and practice.[43] Philippine jurisprudence before Independence in 1946 made salient the rigorous defense and adherence to the principles of constitutionalism as the fundamental creed of government and state. The separation of powers principle was, for instance, explained and applied in *Government v. Springer*,[44] and *Villavicencio v. Lucban*[45] originally declared the primacy of individual liberty over discretion by public officers. There was, as yet, no explicit recognition that human rights is the end by which the separation of powers is merely the means used for its attainment, because the concept of constitutionalism at that time was not yet developed as such (contemporary "human rights" being a post World War II concept). Nevertheless, the concept and practice of Philippine constitutionalism followed the historical development of constitutionalism in the U.S. Constitutional jurisprudence would prove that the growth of Philippine constitutionalism followed in tandem the growth of constitutionalism in the west, particularly in the U.S. The reason for this is that since the whole theory of constitutionalism as applied in Philippine society was, by and large, developed during the colonial era, the concept of Constitutionalism in the west had taken deep roots in Philippine colonial society. Philippine legal history definitely attests to a strongly entrenched tradition of constitutionalism patterned after the juridical theory and application of constitutionalism in the United States.

---

41 *See* MAJUL, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION (1967).

42 The insular case of U.S. v. Bull. 15 Phil. 7 (1910), defined the organization of government in the Philippine Islands in relation to the U.S. Constitution.

43 A history and description of the development of Philippine constitutionalism before the martial law regime is given in MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: DOCUMENTS ON THE PHILIPPINE CONSTITUTIONAL SYSTEM (1978).

44 50 Phil. 271 (1927).

45 39 Phil. 780 (1919). The characteristic conviction for individual liberty is expressed thus:

Since the whole theory of constitutionalism, as applied and dispensed—i.e.,, in the practical and educational sense—in the Philippines is expressed in the history of constitutional jurisprudence, a review of some landmark constitutional law cases will show the close interconnection between the Philippine constitutionalism and constitutionalism in the U.S. The subject of judicial review is most illustrative of this interrelation. Since judicial review is a necessary postulate of the principle of separation of powers and an integral practice of constitutionalist government, Philippine jurisprudence has to pronounce the necessity of judicial review. This has been done so that judicial review in the American sense is no different from Philippine judicial review. in the American sense is no different from Philippine judicial review. Following the magistrally ennunciated thesis in *Marbury v. Madison,*[46] the nature, significance, and necessity of judicial review in a constitutionalist system of government was expounded in *Angara v. Electoral Commission.*[47]

The sacredness of the separation of powers principle had likewise received constant elaboration in the history of Philippine constitutional law. The use of delegated legislative powers by the executive, for instance, even for emergency purposes, have been invalidated by the Supreme Court on two occasions:[48] in the cases of *Araneta v. Dinglasan*[49] and *Rodriguez v. Gella.*[50] It was sternly warned by the Court that the legislative power can never be shared concurrently by the presidency and

---

> The annals of juridical history fail to reveal a case quite as remarkable as the one which this application for habeas corpus submits for decision. While hardly to be expected to be met in this modern epoch of triumphant democracy, yet after all, the cause presents no great difficulty if there is kept in the forefront of our minds the basic principle of popular government, and if we give expression to the paramount purpose for which the courts as an independent power of such a government, were constituted. The primary question is: Shall the judiciary permit a government of men instead of a government of laws to be set up in the Philippine Islands?

[46] 5 U.S. (1 Cranch) 137 (1803).

[47] 63 Phil. 139 (1936).

[48] Before the War broke out, the National Assembly adopted C.A. No. 671 on Dec. 16, 1941 which declared a state of emergency and gave the president extraordinary powers necessary to deal with the exigency. After the war, the legislative power allowed by this act was invoked by Pres. Roxas. In 1947, President Quirino, on the basis of the same Act, issued a number of executive orders. Again, the emergency Powers Act was invoked in 1949 when congress failed to pass the general Appropriations Act. It was at this instance that the President's Acts were challenged in the case of *Araneta v. Dinglasan,* 84 Phil. 368 (1949). The Court held that Act No. 671 became inoperative when Congress convened in regular session on May 25, 1946, and that therefore the executive orders of the president were "issued without authority of law". Notwithstanding this decision, President Quirino issued two executive orders in 1952 appropriating funds for various executive departments. These issuances were once again challenged in court in the case of *Rodriguez v. Gella,* 92 Phil. 603 (1953). Respondent argued that the challenged executive orders were issued because Congress failed to enact measures for public works and social welfare. The Court upheld Congress' power to withdraw all delegated emergency powers to the president and further declared, following its pronouncement in *Araneta v. Dinglasan,* that the Emergency Powers Act ceased to be operative when Congress met in regular session.

[49] 84 Phil. 368 (1949).

[50] 92 Phil. 603 (1953).

the congress. Evidently, the admonitions of Locke, Montesquiteu, or Adams have not lost their significance in Philippine Constitutional law theory.

With regard to individual rights guaranteed by the constitution, it is important to note that Philippine constitutional jurisprudence followed a trend that favored the application of positive State power *vis-a-vis* individual rights. This has been done after judicial determination of valid police power purposes behind the laws involved.[51] The trend, however, is not accidental but follows from developments in U.S. constitutional history. During the period of its incidence, the growth of Philippine constitutionalism has been affected by the rise of New Deal welfare legislation. Individual rights have not been denied their classical importance, but the role of government in actively promoting these rights has been emphasized. The New Deal in the U.S. had definitely influenced the movement of constitutionalism in the Philippines. Overall, Philippines constitutionalism has been confirmed and shaped by the world development of Rule of Law, specifically, the characteristic doctrinal features of constitutionalism in the United States.

B. *The Regime of Martial Rule in the Philippines*

1. THE CRISIS OF PHILIPPINE CONSTITUTIONALISM

To state that Constitutionalism in the Philippines has undergone a crisis is to say in effect that it had competed with a conflicting alternative principle of government. After the declaration of martial law,[52] a different philosophy of government has indeed been infused into the constitutional structure of the country. I have postulated earlier that constitutionalism is a philosophy ideally embodying the pursuit of human rights through the institution of separation of powers, and that the relationship between these two components of constitutionalism is not merely a theoretical formulae of cause and effect but an integral logical relationship evolved in western (and partly, Philippine) legal history. It is not difficult to see that the regime of martial rule[53] negated this essence of constitutionalism.

a. Justification for Political Change: Constitutional Authoritarianism

The historical continuity and doctrinal integrity of constitutionalist principles have been subverted by the philosophy of the "September 21 Movement": Constitutional Authoritarianism. It must be made clear that martial law, as a legal emergency measure in doctrinal constitutionalism, was merely the instrument, and the only available means, to facilitate the

[51] This is proved by the consistent validation of police power measures by the Supreme Court since 1940 when government became a "prime mover" in state affairs, clearly after the "Constitutional Revolution" in the U.S. The threshhold case of this trend is Calalang v. Williams, 70 Phil. 726 (1940).

[52] Proc. No. 1081, Sept. 21, 1972.

[53] By "Martial Law Regime" will be meant not the period of martial rule, 1972-1981, but the regime initiated by the "September 21 Movement". "September 21 Movement" is used and explained in MARCOS, NOTES ON THE NEW SOCIETY OF THE PHILIPPINES, 39-52 (1973).

imposition or acceptance of constitutional authoritarianism.[54] This may be illustrated by demonstrating, in an almost personified manner, the initial struggle between these two world outlooks. Constitutionalism recognized the need of concentrating extraordinary powers in the executive during situations of emergency, therefore, warranting authoritarianism or dictatorship. However, it also asknowledged the theoretical possibility that doing so dilutes its preventive safeguards against any future tyranny once absolute power is reposed in the executive. This conceptual uncertainty or weakness renders constitutionalism naturally impotent when confronted by any philosophy of government that breeds on authoritarianism once this philosophy takes hold of the reigns of state power during the emergency. Constitutional authoritarianism was a rival philosophy to constitutionalism whose inherent feature is the disavowal of the separation of powers principle. It was also a logical predator of constitutionalism once the latter exposes its weakness and allows constitutional authoritarianism to control the power instruments of state. Constitutionalism, during the extreme conditions in 1972 authorized constitutional authoritarianism to initially possess state power through martial law. It was, therefore, only through martial law that constitutional authoritariansm was able to secure the power machinery of state. Martial law became the license, so to speak, of constitutional authoritarianism, from the beleaguerred constitutionalism, to wreck the foundations of constitutionalism and simultaneously strengthen its influence in Philippine polity. Martial law was used to achieve the initial purposes of constitutional authoritarianism.

Constitutionalism was also translated to a political world view for social change—"The Democratic Revolution from the Center,"[55] which confronted the totality of constitutionalism, especially the role of the executive in government and in society. Constitutional authoritarianism was

---

[54] Like any other social Philosophy that envisions a more just society, Constitutional Authoritarianism derives its political method from the social milieu in which it is born. This method is gleaned in MARCOS, AN IDEOLOGY FOR THE FILIPINOS 23 (1980):

> To avoid this evil swindle of our people, the crisis government rooted itself in the constitution . . . . Thus, based on law and on the fulfillment of popular goals, Martial law became a unique force for realizing the revolutionary aspirations of the Filipinos.

Also in MARCOS, PROGRESS AND MARTIAL LAW 48 (1981):

> But our ultimate objective, beyond repelling the threat to the government, was to remove the causes of popular grievance which had accumulated through the decade of neglect and oppression and given rise to discontent. Our fervent wish then as expressed in Proclamation No. 1081, and all subsequent decrees and pronouncements, the validity of which was affirmed by the Supreme Court, was to establish democracy, restore individual rights and promote the welfare of the people.

Again in *Ibid*, 107:

> The Philippine experiment we initiated cannot be abandoned; we must prosecute it to its logical end. Martial law was merely meant to annihilate the crisis we faced in 1972 and to plant the seeds of reform.

[55] *See* MARCOS, THE DEMOCRATIC REVOLUTION IN THE PHILIPPINES (1977); *see* also the so-named blueprint of the New Society: MARCOS, TODAY'S REVOLUTION DEMOCRARCY (1971).

not a related legal philosophy in constitutional law but a total social theory that became a total alternative to constitutionalism. The monumental struggle between the two social outlooks is reflected in *Javellana v. Executive Secretary*.[56] After this case has been decided, the legal basis for executive legislation, under a new philosophy was consolidated and the principle of separation of powers was of consequence eventually superseded. The presidential powers of legislation had been reaffirmed in *Aquino v. COMELEC*.[57] All the more was the separation of powers principle legally consigned to oblivion when the Supreme Court, in *Sanidad v. COMELEC*,[58] sustained the president's constituent powers—an institutional power whose exercise has been exclusively reserved to the people, acting through legislature or a constitutional convention, in constitutionalist legal fiction. *Legaspi v. Minister of Finance*[59] finally affirmed that constitutional authoritarianism was the dominant political philosophy that was meant to substitute constitutionalism as the political world view even after martial law has been terminated.

For the purposes of comparing constitutional authoritarianism and constitutionalism, the concern must be given to the practices or techniques that give logic to, and consistency in, their concepts. Their merits as philosophies lie not so much in the similar aims that they seek to fulfill, *e.g.*, human dignity, equal opportunity, economic plenty, and democracy, as in their actual methods of setting out the social conditions for the attainment of these aims, as dictated by the reason of their inner logic. Constitutionalism presupposes the institution of separation of powers[60] while constitutional authoritarianism disregards this and insitutes executive legislation as the pivotal and controlling technique of government. Constitu-

---

[56] G.R. No. L-36142, March 31, 1973, 50 SCRA 30. The division of the Court in each of the five issues formulated reflects the weakening hold of constitutionalist philosophy even in the Supreme Court itself. The dismissal of the case, in effect, confirms the validity of presidential power as the fundamental force for social change—a basic tenet of constitutional authoritarianism.

[57] G.R. No. L-40004, Jan. 31, 1975, 62 SCRA 275. The Supreme Court, in holding that the president has the power to legislate, reasoned that the president's decree-making power is essential not only for "the security and preservation of the Republic" and "the defense of the political and social liberties of the people" but also for "the institution of reforms" that would prevent "the resurgence of rebellion or insurrection or secession or the threat thereof" as well. Emergency was also equated with "recession, inflation or economic crisis."

[58] G.R. No. L-44640, Oct. 12, 1976, 73 SCRA 333. The Law-making powers of the President in this case was extended to include the President's capacity to propose constitutional amendments, including the familiar Amendment no. 6, to the people for ratification.

[59] G.R. No. L-58289, July 24, 1982, 115 SCRA 418. The decision was understandably in error when it assumed that no sort of politico-legal theory (i.e., Constitutional Authoritarianism) underlied Amendment no. 6:

> Any hint or tinge of authoritarianism in Amendment No. 6 is not there for the sake of the ideology of dictatorship or authoritarianism itself. Such hue of a one-man authoritarianism it somehow connotes is there only because it is so dictated by paramount considerations that are needed in order to safeguard the very existence and integrity of the nation and all it stands for.

[60] In Burin, *Supra* Note 14, at 315:

tionalism formalizes and implements the principle that the Supreme Court has the duty of maintaining the broadest dispersal of power and authority among social institutions;[61] the character of constitutional authoritarianism is exactly the reverse—the concentration of governmental power in limited institutions.[62] Lastly, while constitutionalism asserts that the separation of powers is the only historical channel to attain the objective of human rights or human liberty, constitutional authoritarianism not only denies this relationship but also formulates an alternative end of human fulfillment different from western human rights.[63]

b. Rule of Law Under Constitutional Authoritarianism

The claim that the Rule of Law is observed and has been enhanced by the regime must be understood as an assertion of an unusual Rule of Law concept that is evolved and shaped by constitutional authoritarianism. The claim is epitomized by this view:

> The Philippine experience is rather unique. What we have, in the language of President Marcos, is constitutional authoritarianism. There is emphasis in the role of authority but there is no disregard to the limitations of the constitution as found in both the present and the past charters. What is more, martial rule itself under the conditions therein set forth was itself

---

> Historically and psychologically, Rule of law and the concentration in one hand of all public powers have been proved incompatible propositions. In this broad sense one can accept Montesquieu's view of the fusion of the legislative and executive as the essence of tyranny.

[61] *See* Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). The author asserts that the judiciary's "great task is to help maintain a pluralist equilibrium in society." This, he says, is the "safest foundation of social freedom."

[62] The power of the judiciary in this system of government is necessarily subdued. This is evidenced in the case of *Garcia-Padilla v. Ponce Enrile*, 121 SCRA 472, 489:

> The superior mandate received by the President from the people and his oath to do justice to every man should be sufficient guarantee without need of any judicial overseeing against commission by him of any act of arbitrariness in the discharge particularly of these duties imposed upon him for the protection of public safety which in itself includes the protection to life, liberty and property.

[63] The established priority of values of Constitutional Authoritarianism would rank presidential power as primary and individual constitutional rights only secondary in case of conflict. In judicial litigation, this means that the superior cause for presidential power will be upheld against any challenge from the Bill of Rights standpoint. This hypothesis is initially proved by comparing the PCO cases, viz. *Moralles v. Enrile*, G.R. Nos. 61016 and 61017, April 26, 1983, 121 SCRA 538 and *Garcia-Padilla v. Enrile*, G.R. No. 61388, April 20, 1983, 121 SCRA 473, with *Reyes v. Bagatsing*, G.R. No. L-65366, Nov. 9, 1983, 125 SCRA 553, which sustained constitutionally guaranteed individual freedoms.

In MARCOS, THE DEMOCRATIC REVOLUTION IN THE PHILIPPINES 319 (1977) it is stated:

> We have seen . . . that "human rights" conceived mainly in terms of political liberty is finally a limitation on human freedom, and that in our national history, there has always been a hidden tension between those who confidently proclaim liberty and equality and the underprivileged, between rich and poor, who did not share in reality the same opportunities to life and rights to dignity and welfare.
>
> I will go further now to say that the mantle of protection given by our Bill of Rights did not only conceal from the view the real inequalities and oppression in our society; it also served to preclude all possibility of liberation.

> recognized as a mode of coping with emergency conditions. There was need, to my mind then for fuller understanding of the environmental forces, political, social, and legal, that called for its imposition. It is my submission that a dispassionate appraisal of the Philippine experience yields the conclusion of the observance of the traditional concept of rule of law. The power the government exercises is traceable to its interpretation of the constitution and applicable jural narms. There is no obstacle to its acts being challenged in court. It cannot be said therefore that under martial rule, the Philippines has departed from its long standing tradition of adherence to the rule of law.[64]

This *new* concept of Rule of Law under constitutional authoritarianism may be considered as a historical product of the Philippine experience of constitutionalism but is, in itself, not similar to nor consistent with the concept of Rule of Law defined as a constitutionalist tradition inherited from western legal history. The rule of law endorsed by the regime departs and is aberrant from the logical direction of the movement of the Rule of Law that sets off from the constitutionalist gospel of human rights advocacy through separation of powers. Given the framework of study for the crisis of constitutionalism, what must be taken as conclusive is the victory of constitutional authoritarianism over Philippine constitutionalism, and this is an accomplished fact. The *coup 'de grace* war formally delivered in *Sanidad* when the judicial imprimatur for the design of Amendment No. 6 was given. Constitutional authoritarianism must remain as the *élan* of Philippine politics, as it has remained for over a decade. Only the conditions of a major upheaval can impel a challenge to the Rule of Law concept under constitutional authoritarianism. This major upheaval cannot however be likened to the social conditions that inaugurated the entry of constitutional authoritarianism and the exit of constitutionalism in Philippine political life in 1972. The emergency conditions of 1972, it must be remembered, were alleviated by constitutional authoritarianism, when constitutionalism failed to propitiate the anarchic social forces that were wrecking the state. The same conditions, even if it had on a more intensive major scale, cannot render a situation of crisis for constitutional authoritarianism since it was precisely these erratic conditions that gave constitutional authoritarianism its birth and its omnipresent rationale. Therefore, constitutional authoritarianism can only be made vulnerable to a crisis, as conceptualized historically, when those conditions that limit or nullify the application of its rationale are widely recognized. Like the previous crises of the Rule of Law concept in history, the conditions that pressure a crisis for constitu-

---

[64] Fernando, *Rule of Law under Martial Law*, PHILCONSA READER IN CONSTITUTIONAL AND POLICY ISSUES 677 (1979). *See also*, FERNANDO, RULE OF LAW UNDER MARTIAL RULE: THE PHILIPPINE EXPERIENCE (1975). What is equally deserving of notice in this respect is the following excerpt from MARCOS, HUMAN RIGHTS AND THE RULE OF LAW 36-37 (1977):

> Constitutionalism and the rule of law must prevail and circumscribe our program or reform. All government officials must be subject to law. The people must not be governed by the capricious whims, uncontrolled discretion, or arbitrary will of officials but by regularly enacted laws applicable to both the governors and the governed.

tional authoritarianism, or its Rule of Law Concept, are those that directly address the capacity of constitutional authoritarianism to respond to the economic expectations built around it. It is in this regard that the economic debacle of the 80's gains added significance. Once more, the stage is set for the emergent crisis of a political philosophy.

2. THE CRISIS OF CONSTITUTIONAL AUTHORITARIANISM

The assaults against Amendment No. 6 are no less than a defiance to constitutional authoritarianism as the dominant philosophy of politics and governmental power. It was noted earlier that the debate over presidential powers has intensified since the commencement of the economic collapse. This is only logical, for constitutional authoritarianism offered a promise for social amelioration that constitutionalism failed to fulfill when constitutionalism was the prevailing *weltanchauung* of national leadership. Faltering in its economic mission, the revolt against constitutional authoritarianism follows from an acute frustration of the expectations it was required to satisfy.[65] It is axiom in history that only the pathological conditions, effected by a grave economic exigency, have the strongest possibility of urging men to re-think the prospects of existing world views, particularly political philosophies, and to attune their minds to the idea of change. With specific reference to constitutional authoritarianism, the ideas that underpin its Rule of Law concept must inevitably be the subject of rigorous reexamination and criticism during an economic fall. This process recalls the background of the constitutional revolution in the U.S. The transition of the Rule of Law concept from *Lochner v. New York*[66] to *Bunting v. Oregon*[67] and finally to *National Labor Relations Board v. Jones & Laughlin Steel Corporation*[67a] was symptomatic of a social mallaise about existing economic relations; the period was definitely marked by intense doubt and questioning about a philosophy whose inadequacies were later answered by the New Deal. The doubt and questioning came about because of felt deficiencies of an economic system of relations in sustaining and broadening the ends of greater well-being. At the more general level of history, it reminisces the ordeal of the *ancien régime* during the era of the French Revolution, or the struggle of medieval Catholicism during the Reformation. The economic profiles of these scenes are likewise significant. Whether or

---

[65] A penetrating insight on this matter is given by LASKI, REFLECTIONS ON THE REVOLUTION OF OUR TIME 15-16 (1952):

> Those who speak of restoring the rule of law forget that respect for law is the condition for its restoration. And respect for law is at least as much a function of what law does as of its formal source. Men break the law not out of an anarchistic hatred for the law as such, but because certain ends they deem fundamental cannot be attained within the framework of an existing system of laws. To restore the rule of law means creating the psychological conditions which make men yield allegiance to the law. No limitations upon government can be maintained when society is so insecure that great numbers deny the validity of the very foundations upon which it is based.

[66] 198 U.S. 45 (1904).

[67] 243 U.S. 830 (1916), which reversed *Lochner*.

[67a] 301 U.S. 1 (1937).

not constitutional authoritarianism and the Rule of Law it exhibits will survive the economic test and successfully revive a viable economic system is yet to be seen. In the final analysis, the validity of the New Rule of Law, and its imprinted authority in the regime's constitution, will depend on the ability of constitutional authoritarianism to sustain the conditions necessary and sufficient to fulfill the basic needs and expectations of ordinary but significant (i.e., in the political sense) people. It is however undeniable that constitutional authoritarianism is in crisis.

It would not be sufficient to suggest the existence of a crisis of constitutional authoritarianism without an explanation of the rival philosophy that purports to be the better alternative. The history of the Rule of Law concept demonstrates that a crisis of a conceppt is accompanied by the rise of an opposing body of ideas. It was moreover discerned that the contest between competing world views reflects the objective social conflict between groups and individuals that represent antagonistic philosophies.

An assessment of the venues of attack against presidential powers will point out the resurgence of constitutionalism as the alternative politico-legal philosophy. The spectacle of a progressive movement that initially demands the repeal of Amendment No. 6 through popular, legislative, or judicial fiat, indicates an atavistic reaffirmation of constitutionalism as an alternative principle for government. For as long as the purposes of state power, and all the potentialities that these suggest, are perceived to emanate from the presidency, the call for a separation of powers has perennial relevance. The 'state of the political economy' interprets the onslaught against the 'political economy of the state' ordained by constitutional authoritarianism. It would be a crude fallacy to think that constitutionalism is *passe* when people can revivify the hope of expanding welfare under its auspices. As it is today, the depth in which constitutionalism has taken its hold in Philippine polity is uncertain. Its chances of regaining significant influence in political thinking will depend on the extent to which the routines of constitutional authoritarianism can prove resilient to the economic challenge. To repeat, the ultimate test for constitutional authoritarianism is its prospect of steering the national economy toward increasing material well-being for the significant majority.

It is not, therefore, in the Supreme Court, the enclosed chamber of judicial tradition, where the battle of constitutional authoritarianism takes place. The historical crisis of concepts occur within the whole locus of society; as such, the arena of competition must take place in the minds of individuals participating actively in the collective social process. Constitutional authoritarianism, or for that matter constitutionalism, can only be vindicated in the consciousness of each individual social participant.[68]

---

[68] This conceptualization repeats Justice Laurel's vision that "In the last and ultimate analysis then must the success of our government in the unfolding years to come be tested in the crucible of Filipino minds and hearts than in consultation rooms and court chambers." *Angara v. Electorial Commission,* 63 Phil. 139, 159 (1936).

In arguing that the Supreme Court plays a minor role in the resolution of the crisis of constitutional authoritarianism, it must be remembered that the crisis of a concept is not an analytically arguable issue of law but a historical matter of social necessity. I have attempted to explain this by the historical approach to the Rule of Law concept. Judicial review is a modern institution that cannot be absolutized as a universal means of resolving crises, either of concepts of realities, lest the myths of the "juridical world outlook" be taken as eternal truths. At best, judicial review participates in the legal resolution[69] of the conflicting claims of concepts at the level of the *rechtsstaat*. This role is significant only because it provides landmarks that indicate the state of a crisis and its resolution, both of concepts and reality. To give an illustration, the validity of the New Deal in the U.S. was won not because the Supreme Court decided to have a constitutional revolution. The phenomenon of the constitutional revolution, as it was seen, is much less simplistic. In upholding eventually, each of the laws in the New Deal package, the U.S. Supreme Court affirmed the steady ascendency of the Rule of Law concept that the New Deal and its socio-economic undertones had contoured.

In the experience of the Philippines, the crisis of constitutionalism as a political world outlook in the early 70s was definitely not a crisis of constitutional law alone whose clarification or solution lay in deeper academic study of judicial standards. The *Javellana* decision, for all its worth in curricular constitutional law, did not signal an overnight victory for constitutional authoritarianism and an automatic demise for constitutionalism. The crisis of constitutionalism continued to the time when the *Aquino* cases[70] were decided, until its collapse was innaugurated by *Sanidad* and reiterated in *Legaspi*. The crisis of a concept is a process that takes place over a period of time. It is also during this period of crisis that initial adjustments in ideas and institutions are made, according to the strength of the dominating philosophy. For constitutional authoritarianism, the crucial term of adjustment took place from *Javellana* to *Legaspi*, in so far as the conflict of separation of powers and executive legislation is concerned. Therefore, the law, or more particularly, the judicial adjudication of opposing concepts, merely makes formal the triumph or conquest of a principle of government which in turn, really symbolizes a broader idea.

The relation of Philippine judicial review, or the institution of the Supreme Court, to the crisis of constitutional authoritarianism is meaningful because the content of the decisions rendered during and after the

---

[69] Judicial review would include not only the traditional "checking" function of courts but more importantly their "legitimating "function — a function that has become a dominant theme in contemporary judicial review. For the history and analysis of the legitimating function of courts, *see* BLACK, THE PEOPLE AND THE COURT, 56-86 (1960); MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

[70] Aquino v. COMELEC, *Supra*, Note 57.; Aquino v. Ponce Enrile, G.R. No. L-35546, Sept. 17, 1974, 59 SCRA 183; Aquino v. Military Commission No. 2, G.R. No. 37364, May 9, 1975, 63 SCRA 546.

period of national economic ordeal involving presidential power,[71] will be a pointer to the state of resolution of the crisis of the regime's Rule of Law. At the same time, these decisions will reflect the strength of resurrected constitutionalist invocations as contending principles of government. For the conclusion of the crisis, much depends on the flexibility of the institutions of constitutional authoritarianism to grapple with the economic requirements of the state and provide the ordinary citizen with expected basic necessities for a decent and humane life.

V. Broader Implications: Reimagining the Crisis of Constitutional Authoritarianism

This paper was set with the purpose of speculating a justification for Philippine executive legislation on the basis of constitutionalism. Constitutionalism, it was said, was a possible backdrop for the efforts toward consensus the attainment of which will restore political stability amidst the national trauma of an economic debacle. Approaching this problem with a conceptual model that traces the historical movement of concepts and political philosophies about the Rule of Law, several conclusions were reached. *One,* constitutional authoritarianism—the political philosophy of the regime, Amendment No. 6 being merely its legal expression—is logically inconsistent and practically irreconcilable with constitutionalism. *Two,* the present rivalry between constitutionalism and constitutional authoritarianism, defined as a historical collision of political world views, reflects the objective conflict among groups and individuals in Philippine society. *Three,* the resulting crisis of constitutional authoritarianism was brought about because of widespread apprehension towards the regime's ability to maintain the conditions necessary to fulfill the most basic requirements of ordinary people. *Lastly,* the crucial test of the capacity of the regime, or ideally, constitutional authoritarianism, is its competence to rescusitate a collapsed economy in accordance with the essence, or the logic, of its concept.

In the light of these conclusions, the conventional wisdom that prescribes for the consensual solution to the situation of political instability in the Philippines must be re-evaluated. Although much could be said about reasoned consensus as the only amiable mode of dissolving political cleavage and violence, this option is not possibly available. Either constitutional authoritarianism absolutely persists or unconditionally succumbs in any eventuality. The case for consensus—legal or political—is never one of personal preference but of historical feasibility. This proposition, if valid, must lead to the further generalization that the crisis of constitutional authoritarianism is an impersonal process that awaits an impersonal solution. If this is so, the focus of analysis should then be shifted away

[71] As of this writing, the validity of Pres. Decree 1835 (the Anti-Subersion Law which provisions for the deprivation of citizenship against its transgressors) and Pres. Decree 1834 (which punishes political crimes as capital offenses) are being questioned in the Supreme Court.

from the issue of constitutionalism versus constitutional authoritarianism to the more fundamental forces of historical transformation and causation.

From the point of view that concepts or ideas undergo crises reflective of significant historical changes, it was seen that actual economic processes have the most crucial impact on the movement of concepts. The transformations from medieval society to the monarchial state system and then to republican states were somehow dictated by the forces that shaped feudalism to mercantilism to free trade capitalism. I have explained that the changes in the Rule of Law concept and the political institutions it wrought, were manifested at every stage of these evolutionary developments. Moreover, there was seen the importance of the forces that direct men to expand the ends of well-being and social production. The particular theories of government or constitutional law only reshaped, confirmed and reflected the more basic configuration of society as a unit of production. In the U.S., the change in the meaning of the Rule of Law concept during the era of the constitutional revolution was evidently dictated by the economic requirements of the New Deal—a historic policy program that definitely responded to the lessons of the Great Depression. What therefore derives from this overview is the primacy of the economic process in social change. The economic process is the determinant of the movement of concepts and ideas from which political philosophies are evinced.

In analyzing the Philippine situation, attention must hence be given to the economic presuppositions of political and constitutional forms. The question is not whether it is desirable to have constitutional authoritarianism instead of constitutionalism, or otherwise, but whether there are identifiable economic compulsions that necessitate the movement from constitutionalism to constitutional authoritarianism, or from constitutional authoritarianism to constitutionalism, or other political concepts. I will assert, without resort to a lengthy elaboration, that the requirements of an open economy, whose origins are traceable to the period of colonialism, have indubitably imposed a crisis to constitutionalism and then the crisis of constitutional authoritarianism. The external sector, i.e. international transactions and its financial framework, of the economy had always been of crucial importance in conditioning the economic relations that subsist in Philippine society. This system of economic relations is of determinative importance in the content and direction of social change. The economic process of the state, even after political independence was had in 1946, has basically remained the same. The patterns of an open economy are still unquestionably unaltered: the import-dependent, export-oriented economic patterns. When Philippine constitutionalism had substantially failed to generate the social conditions that were necessary for the purposes of the open economy, there was crisis, and constitutional authoritarianism—whose methods of social regeneration based on the same economic determinants were more effective—superseded Philippine constitutionalism as the dominant

politico-legal ideology. An analogy to the present crisis of constitutional authoritarianism could readily be hypothesized: constitutional authoritarianism will not be replaced by constitutionalism or any other concept of government for as long as it can remain faithful to the demands of the open economy, the basic operating principles of which were inherited from the Philippine experience of colonialism. The reality of the Philippine external economy, together with the system of production relations this involves, are the economic determinants of the New Rule of Law.

Given this evaluation of constitutional authoritarianism, and its prospects as it undergoes a crisis, it may be said that the ultimate justification for constitutional authoritarianism is simply is temporal necessity within an economic process whose direction and future it cannot frame nor comprehend. This connection between the constitutional system and the economic process cannot be viewed in any other manner. The destiny of constitutional authoritarianism will depend on the extent to which it can be instrumental in expressing the inner purposes of the open economy. Pursuing the analysis further ,it will be discerned that constitutionalism, serving the ends of given national economic patterns, has already outlived its historical usefulness when constitutional authoritarianism emerged, and it will be futile to invoke its principles (or struggle for a comeback of this brand of constitutionalism) as a theme of government, if it will embody the same historical weakness. Orthodox Philippine constitutionalism has undergone a crisis in the 70s because of its contradiction with the ends of the economic patterns of the open economy. More specifically, there was a contradiction between the separation of powers and an economically determined social purpose that the historical martial rule had to resolve. Thus, it cannot be invoked successfully during the crisis of constitutional authoritarianism if it retains the same character that had rendered it in contradiction with a more compelling economic force. If this is the case, there is not only a regretable impossibility of consensus during the present state of political turmoil but also a foreboding pessimism against constitutionalism as a feasible long run alternative to constitutional authoritarianism. The choice between constitutional authoritarianism and constitutionalism, stripped of all its political charms, is an illusion. There is really no option that history offers for the state between constitutional authoritarianism and constitutionalism. This in mind,, the only true historically feasible alternative to constitutional authoritarianism is that which can recognize the possibility of transforming economic patterns. Unless a deeper consciousness is made prominent that may finally enable transformative political action to comprehend and mold historical economic processes, the necessities of an open economy will persist and remain unchartable.

Why the possibility of effectively restoring and sustaining constitutionalism in the Philippines is dim can be proved, furthermore, from another angle of analysis. A review of the international scene will reveal

that constitutionalism, as a global concept that evolved from the tradition of European liberalism, is itself undergoing a crisis. This more profound level of crisis is proved by nothing less than the breakdown of constitutionalist regimes in formerly colonial states. The Philippines of 1972 is a case in point that makes particular the worldwide crisis of constitutionalism. The authoritarian trend since the last World War in the states of Asia, Africa and Latin America, that were originally raised with constitutionalist social institutions, is indicative of the crisis of constitutionalism as a world historical concept.

Attention must again be given to the change in the content of the Rule of Law concept under study. The movement of Rule of Law concept from a purely state principle to a principle for international or world society[72] has truly significant methodological dimensions. The Rule of Law concept that was developed from the ideas of liberalism since the Reformation, has acquired a character that is given a meaning relevant for an international society of states. This shift, or extension, of meaning signifies a crisis of the concept, and therefore a crisis of reality. Today, what is evident is the crisis of constitutionalism situated in a world divided basically into two powerful and dominant ideological systems. The declining authority of liberalism is the offshoot of the ascending claims of socialism. Constitutionalism, the concept in crisis, represents the interests of the democratic-liberal camp in world society, and the competing, antagonistic concept is socialism (a concept that has a history of its own), espoused by the socialist states. The confrontation between liberalism and socialism features the outstanding crisis of world history, and like any other crisis, if reference is made to our respective, its resolution will depend on the direction that the world economic process will take.

The crisis of constitutional authoritarianism in the Philippines must, therefore, be viewed from a panorama where the worldwide crisis of constitutionalism is simultaneously taking place. If the crisis of global constitutionalism has been manifested in the country, then the concept of a global alternative system, i.e. socialism or its variants, could have been similarly witnessed. To what extent the roots of this alternative outlook have been secured cannot yet be determined, but the crisis of constitutional authoritarianism is not defined merely by the resurgence of constitutionalism but also by the increasing influence of an alternative concept that does not adopt political action along constitutionalist lines. This means that this alternative to constitutionalism, or constitutional authoritarianism for that matter, must take the form of a movement that proposes a reorientation of the patterns of the open economy. More radical therefore, i.e., offering more fundamental alterations in social relations, will the transformative courses of action be

[72] *See* J. STONE, *Supra* note 38; *See also* J. READ, THE RULE OF LAW ON THE INTERNATIONAL PLANE (1961), which explores the possibility of the International Court of Justice being the international institution to realize the ideal of Rule of Law among nations, and A. LARSON, THE INTERNATIONAL RULE OF LAW (1961).

under the plan of this alternative. Consequently, and if I may say, in the last of all ultimate analyses, the final historical option will be whether the state, through a corresponding constitutional poise, will anchor its development to the requirements of the established open economy or some other model entailing a different grasp of economic processes. With this version of truth, I must say that the deeply revered conviction that the constitution and its vestal principles do not embody a particular economic theory,[73] is a fallacy whose enkindled spirit remains to be a historically transient intuition in the legal community. Verily, so much depends on how the constitution mirrors the economic process, and vice versa.

VI. Conclusion

A description of a particular reality may be made more meaningful and significant if this persuades people to react not only to the description as such but, more importantly, also to the objective reality that calls for description. In this article, I attempted to describe a reality that I thought required a description of a more exacting nature. It was evidently ambitious to convey this description through an elaboration of the concepts emblazoned in the article's title. The hope, however, that my descriptions will induce the reader to give a closer look at a shared reality remains. In order that this inspiration may properly be understood, a concluding note on the concept of "reflection" (as used in the title) is necessary.

The problem of cognizing reality is more a practical than a philosophical problem that all thinking people encounter. There are conditions however that render the nature of this problem much more complicated, and these conditions could probably be described as occasions of "crises." I have elaborated on a general, risky definition of "crisis" and I do not attempt to escape the implications of this definition at the individual or personal level.

It has been observed that the problem of formulating a definition of a "crisis" is an acute concern, especially during the period of an actual crisis itself. This problem not only poses theoretical questions of explanation but also inquires into the practical possibilities of concrete action and prescription. Periods of crisis afterall are marked by widespread feelings of confusion and uncertainty which necessitate the need to seek humanely consoling understanding about the causes, nature, and wherefores of a crisis situation. This need logically extends to the clarification of trans-

[73] Justice O. W. Holmes in his dissenting opinion in Lochner v. New York, *supra* Note 66 at 75-76, writes:

> *A constitution is not intended to embody a particular economic theory,* whether of paternalism and the organic relation of the citizen to the state or of *laissez faire.* It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgement upon the question of whether statutes embodying them conflict with the constitution of the U.S. (emphasis supplied).

formative programs of action whose adoption or rejection inheres in the very character of the crisis that brought about their potentialities in the first place. The substance and direction of the efforts involved to resolve the crisis are therefore integral to the very definition of the crisis that is sought to be comprehended. During the period of crisis, how this relationship is explained almost always reflects the prejudices of a votary whose suggestions for change can even add to the confusion and conflict already immanent. But it is also in this light that any attempt to understand and articulate transformative insight can acquire fuller and more precise meaning. The depth of any clarification, together with the contrast of competing "points of view" that materials of clarification can offer, indicates not only the seriousness of the critical state of affairs but also the degree of consciousness that is wrought in the making of historic decisions.

This paper, definitely, does not pretend an impartial exposition of the constitutional regime in the Philippines by an unprejudiced observer. The disquieting thesis of a crisis in constitutional authoritarianism may even render it highly suspect as a generated reaction. Nevertheless, the disquisition is intended to challenge, especially at the methodological level, certain views about (1) the actual dispensation of constitutional law in the country, and (2) the possibilities of proposal that arise from this. For all purposes, its motivations are traceable to the state of social crisis that undeniably obtains today in the Philippines. At the heart of this crisis lies the unprecedented national economic debacle of the 80s which continue to provoke a pervasive necessity to question the foundational presuppositions of the constituted relations in social life. To be sure, much thinking and rethinking have already been made to formulate and elaborate the problems and the solutions that are perceived to be most relevant in this respect. Much doubt and divisiveness have likewise resulted from these in which this paper must be put in context. All the more then must causes be found to understand the essence of an ever-inviting, ever-intriguing Philippine constitutional reality.