All in all, the institution of the law review remains a pivotal player in the field of legal scholarship and, concomitantly, in the realm of the judiciary. For how else can we in the judiciary deal with the difficult and nearly incomprehensible questions of law without reference to those who lead the way like canaries in the mining caves probing the darkest corners of the legal field? That is the function of the law review. And it is here that the law review remains a great friend and ally of the judiciary, with an influence all too great, and all too often unrecognized.

The Very Essence of Constitutionalism

*Claudio S. Teehankee, Sr.**

I congratulate the officers and members of the Philippine Bar Association (of which I am proud to be a member) for taking the lead in the annual celebration of Law Day and renewing our firm commitment to the Rule of Law, specially in these times.

We are gathered on this auspicious occasion to commemorate Law Day, on the eve of the fourth anniversary of the issuance on September 21, 1972 of President Marcos' Proclamation 1081 placing the entire Philippines under martial law and on September 22, 1972 of General Order No. 1 whereby he proclaimed that he would "govern the nation and direct the operation of the entire Government, including all its agencies and instrumentalities, in (his) capacity and (shall) exercise all his powers and prerogatives appurtenant and incident to (his) position as such Commander-in-Chief of all the armed forces of the Philippines."

The people were then filled with fear and apprehension, for in the President's own words "martial law connotes power of the gun, meant coercion by the military, and compulsion and intimidation", [1] and in the Secretary of Justice's outline on the exercise of legislative power by the President under martial law, it was affirmed that "martial law is neither more nor less than the will of the general in command of the army. It overreaches and supersedes all civil law by the exercise of the military power."[2]

But President Marcos as the foremost member of the Philippine Bar 'is oriented towards the protection of the Bill of Rights". He was thus quoted in an August 24, 1971 press conference: "if you will remember, I have repeatedly said that if it were not for the Bill of Rights I would not be here now. If it were not for the judicial process, I would not be the President of the Republic of the Philippines."[3]

The President was thus quick to assure the nation in explaining his two objectives (in proclaiming martial law) "to save the Republic and reform our Society" that

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* This was delivered as a speech by Justice Claudio Teehankee as guest speaker at the Philippine Bar Association's Law Day celebration on Sep. 18, 1976 at the Manila Hilton. It was published in 21 ATENEO L.J. 1 (1976).

1. Daily Express, Nov. 29, 1972, page 4, cited in 50 SCRA 30, 132.
2. As reported in Lawyer's Journal, Mar. 31, 1973 page 90, citing In re: Egan 8 Fed. Cas. 367.
3. Manila Times, Aug. 30, 1971.

"The proclamation of martial law is not a military takeover. I, as your duly elected President of the Republic, use this power implemented by the military authorities to protect the Republic of the Philippines and our Democracy. A republican and democratic form of government is not a helpless government when it is imperilled by the danger of a violent overthrow, insurrection and rebellion. It has inherent and built-in powers wisely provided under the Constitution. Such a danger confronts the Republic.

"Thus, Article VII, Section 10, paragraph (2) of the Constitution provides:

"The President shall be Commander-in-Chief of all the armed forces of the Philippines and whenever it becomes necessary he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection or rebellion. In case of invasion, insurrection or rebellion or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the Writ of Habeas Corpus, or place the Philippines or any part thereof under martial law.'

"I repeat, this is not a military takeover of civil government functions. The Government of the Republic of the Philippines which was established by our people in 1946 continues. xxx xxx xxx."[4]

We have much to be thankful for that it was such Constitution-oriented President as Ferdinand E. Marcos who declared martial law. For as he was to reveal later, he rejected *ab initio* the idea of setting up a revolutionary government that made its own law; he said that "[t]his was one of the agreements with those with whom I met before we agreed to proclaim martial law ... that we would follow the Constitution and not establish a revolutionary form of government and start fighting all over the countryside again."[5] And more recently, during the induction of the Philconsa officers, last July 28, 1974, he revealed that he had to reject the idea of discarding even the Constitution. As reported in the press:

"According to the President he was confronted with a 'proscription list' of men who were allegedly obstacles to the New Society and therefore should not only be incarcerated but eliminated.

"In what he called a 'crisis of conscience', the President said that instead of wiping out the 'ideological opposition', he utilized his power under the Constitution and proclaimed martial law instead.

"The President said that the first proposal of establishing a revolutionary government is a self-defeating process.

4. Statement to the Nation of September 23, 1972.

5. Pres. Marcos at satellite world press conference of Sept. 20, 1974; Phil. Daily Express issue of Sept. 23, 1974.

"For if the proscription list was even so much as allowed to be published as approved by the planning group, this would be utilized as an excuse by all parties claiming to be supporters of the new regime to give vent to personal vengeance and retaliation', the President said.

"The President recalled that other countries had a very sad experience regarding this and resulted in the loss of hundreds of thousands of lives, some of whom are even innocent."[6]

The President was further quoted thus: "[t]o me this was a crisis of conscience, as well as a crisis of constitutional training, xxx xxx xxx. But perhaps, history will mark that it was mu feeling then, and it is still my feeling now that there must be some kind of standard and guide even for the most powerful."[7] On this last point, he added that "while discipline certainly means continued cooperation with the powers, it doesn't mean silence and complete oppressiveness" and that "[t]hese are the basic principles on which I differ from the ideologies of the rightists and the leftists."[8]

The President thus reaffirmed his faith in the Constitution 'as a guidepost for even the most powerful and in its capability of coping with new "crisis situations," social, economic and political and "indicated his continuing determination to press forward the process of normalization."[9]

Had the President not been of such orientation, the observance four years ago on September 19, 1972 of Law Day at which Justice J. B. L. Reyes was your guest speaker in the midst of recriminations over what he termed as "a series of isolated bomb-explosions, by way of prelude to the actual drama" might well have been the last. You will recall that allaying the open speculation about the imminent imposition of martial law which was to be a reality in a few days, Justice Reyes had then said that 'serious revolutionsists would not engage in bombing — of all places — comfort rooms (referring to the Con-Con offices at the Quezon City Hall Building), where people are not prone to congregate — unless the subversives are testing a new method of revolution — by constipation;" and that at any rate "the President is not the sole arbiter in imposing martial law . . . that under existing legal precedents, military rule supersedes civil authority only in those places where the actual clash of arms prevents civil courts from functioning."[10]

While this did not exactly turn out to be the case, the President has acknowledged that "[m]artial law necessarily creates a command society. But

6. Phil. Daily Express and Times Journal issues of July 29, 1976.

7. Bulletin Today issue of July 29, 1976.

8. Idem.

9. Idem.

10. See Manila Times issue of September 20, 1972.

a new society cannot emerge out of sheer command alone. In the first place, martial law is a temporary constitutional expedient of safeguarding the republic; at most, it is a necessary transition, in our specific case, between the old and the new society."[11] He has declared that "[t]he New Society looks to individual rights as a matter of paramount concern, removed from the vicissitudes of political controversy and beyond the reach of the majorities. We are pledged to uphold the Bill of Rights and as the exigencies may so allow, we are determined that each provision shall be executed to the fullest, xxx xxx."[12]

He has further declared that "martial law should have legally terminated on January 17, 1973 when the new Constitution was ratified" but that the "popular clamor manifested in the referendum [was] that the National Assembly be temporarily suspended" and the reaction in the July, 1973 referendum "was violently against the stopping the use of martial law powers," adding that "I intend to submit this matter at least once a year to the people, and when they say we should shift to the normal functions of government, then we will do so."[13]

And it should be noted, as I first pointed out in my dissent in the Referendum cases last year[14] that the President's acts and decrees are now issued by him no longer under the martial law powers vested in him as commander-in-Chief of all the Armed Forces of the Philippines but "by virtue of powers in (him) vested by the Constitution."

After four years almost to the day, with the recent capture of Dante, Corpus and other leaders of the rebel New People's Army and the announced decimation of their ranks, the country bidding to be the international convention center in this part of the world with the inauguration of its complex of buildings that has been acclaimed as second to none, an open skies policy following the simultaneous construction of some fifteen first-class hotels and an aggressive tourism development program projected to bring in over a million tourists by 1980, it is well that the men of the law ponder in line with the free discussion and debate announced (from September 11, 1976 to October 15, 1976) for the referendum called for next October 16th on the question of continued imposition of a state of martial law.

11. President Marcos: Foreword Notes on the New society, p. vii.

12. President Marcos, "Democracy: A Living Ideology" delivered May 25, 1973 before the U.P. Law Alumni Assn., Times-Journal issue of May 28, 1973.

13. U.S. News and World Interviews, Phil. Daily express issue of August 18, 1974.

14. 62 SCRA 275, Jan. 31, 1975 and Gonzales vs. Comelec, L-40117, February 22, 1975.

With reference to this question, my dissenting opinion is of record that the general question of "[d]o you want the President to continue exercising such [martial law] powers" even if viewed as "purely consultative" is subject to grave constitutional objection. The continuance of martial law hardly presents an appropriate subject for submittal in a referendum (with the participation of non-qualified 15-year olds). In the Habeas Corpus cases, five members of the Court voted to erode the Court's *unanimous* ruling to the *contrary* in *Lansang vs. Garcia* and opined that "the determination of the necessity for the exercise of the power to declare martial law [and also to declare its termination] is within the exclusive domain of the President and his determination is final and conclusive upon the courts and upon all persons."[15] I submitted, then, that by the same token, when the conditions of rebellion (or invasion) which called for the declaration of martial law under the Constitution no longer exist in the President's determination, then martial law itself thereby ceases to exist, regardless of the holding of any referendum or the outcome thereof. Prescinding from the question of whether it is subject to judicial review and determination, (as unanimously held in *Lansang*) the termination of martial law is not a matter of choice for the pople (who much less than the courts can have "judicially discoverable and manageable standards" nor "the complete picture of the emergency" to make the determination) but a matter of the President's constitutional duty to determine and declare the termination of martial law when the necessity therefor has ceased. As necessity creates the rule, so it limits its duration.

Parenthetically, I would like to bring up at this point a newspaper item just a few days ago that former Chief Justice Makalintal (who is here with us) had urged the continuation of martial law. I was surprised and so I asked him about it and it turns out that there was no such thing. What actually happened — and he has asked me to state it here publicly — was that he was asked at the Sangguniang Bayan meeting at our old town of San Juan about this and what he said precisely was that "legally and technically, the lifting of martial law is the President's exclusive prerogative and duty" and that any question thereon submitted at the referendum would be "purely consultative and could not bind the President." The item was quite surprising for we were unanimous in the Supreme Court under Chief Justice Makalintal as well as not that the declaration and lifting of martial law is only as long as necessary" to wit, "of course the problem here is, if you say that martial law leads to democracy, how long are you going to maintain martial law? I say

15. See separate opinion of Justice Antonio at 59 SCRA 460, 472, concurred in by Justices Makasiar, Esguerra, Fernandez and Aquino. Five other members Makalintal, C.J., Castro, Fernando, Barredo and Munoz Palma, JJ. In effect applied the Lansang formula and saw no arbitrariness in the declaration, with most holding that the question had been foreclosed by the validating article of the Transitory Provisions of the 1973 Constitution.

again that only as long as necessary. As the constitutionalists put it, necessity gave life to martial law and martial law cannot continue unless necessity allows it to live."[16]

The responsibility of declaring and terminating martial law is vested in the President and paraphrasing Walter Lippmann (considered as one of the greates political thinkers of the century,) "(I)t is the President's responsibility, of which he cannot divest himself, to judge as wisely as he can what in the end is likely to be the right course, to make that judgment on the best advice he can obtain, to explain his decision and then trust that the people will support a conscientious, carefully considered decision."

Lippmann denounced as a "supreme political heresy" the concept that "the majority (of the people) is bound by no laws because it makes the laws. (That) it is itself the final judge, from whom there is no appeal, of what is right and what is wrong. This doctrine has led logically and in practice to the totalitarian state . . ." (which, as we all know, is euphemistically termed the "people's democracy" or "people's republic" by the communist countries).

He warned democracy would be reduced to an absurdity if one says that "today's majority had the right to deprive tomorrow's majority of its rights . . . who will say that free institutions (may be used) to destroy free institutions? That a temporary majority may impose its transient will upon all future majorities? That men may use freedom of speech to acquire the power to destroy freedom of speech? That they may use elections to abolish elections? That they may exploit the constitutional guarantees to subvert them?"

He stressed that "free institutions are not the property of any majority. They do not confer confer upon majorities unlimited powers. The rights of the majority are limited tights. They are limited not only by the constitutional guarantees but by the moral principle implied in those guarantees. That principle is that men may not use the facilities of liberty to impair them. No man may invoke a right in order to destroy it. The right of free speech belongs to those who are willing to preserve it. The right to elect belongs to those who mean to transmit that right to their successors. The rule of the majority is morally justified only if another majority free us to reverse that rule" and that "[t]o hold any other view that this is to believe that democracy alone, of all forms of government, is prohibited by its own principles from insuring its own reservation."

Which is but to say that a people's natural right to freedom cannot be waived and that when the condition for martial law ceases to exist, the people cannot vote that martial law continue.

16. Phil. Daily Express issue of Sept. 23, 1974.

This basic principle of inalienable rights has been reaffirmed by the President himself, as already adverted to, when he declared that individual rights are "a matter of paramount concern, removed from the vicissitudes of political controversy and beyond the reach of the majorities."

In the forceful language of Mr. Justice Robert Jackson, the Bill of Rights as guaranteed by the Constitution (and which concededly is seriously impaired by a state of martial law) exists to withdraw "certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's rights to life, liberty and property, to free speech, or free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."

This is the very essence of constitutionalism. The Constitution is the supreme law and the sovereign people themselves have thereby restricted themselves in the exercise of the powers of the sovereignty. Having established a government for their own governance and having delimited the powers of government and distributed the different powers to the great departments of government, the Constitution "leaves those powers to be exercised by those departments, and leaves to the sovereign people themselves no other power than that of choosing their own officers or representatives. The people can do no act, except make a new constitution of make a revolution."[17]

And when an amendment of the Constitution is proposed (by the legislature acting as a constituent assembly or by a constitutional convention), the Supreme Court had rigidly required strict adherence to the specific amending process prescribed in the fundamental law and prohibited the submittal to the people for approval in the 1971 election of the Con-Con's proposed partial amendment lowering the voting age from 21 to 18 years on the ground that the provisions of the existing constitution "dealing with the procedure or manner of amending the fundamental law are binding upon the Convention and the other departments of the government . . . (and) they are no less binding upon the people."[18]

Along the same premise, as against the argument advanced in the Referendum cases that the decision to defer the initial convocation of the interim National Assembly was supported by the results of the referendum in January of 1973 when the people voted against the convening of the interim National Assembly for at least seven years, I stressed in my dissent therein that such sentiment should not be given any legal force and effect in the light

17. Commonwealth vs. Collins, 8 Watts (Pa) 331, 349.

18. Tolentino vs. Comelec, 41 SCRA 702 (Oct. 16, 1971).

of the State's pleadings and admission at the hearing that such referendums are merely consultative and cannot amend the Constitution or any provision or mandate thereof such as the Transitory Provisions which call for the "immediate existence" and "initial convening" of the interim National Assembly, and that "this seems self-evident for the sovereign people through their mutual compact of a written constitution have thereby set bounds to their own power, as against the sudden impulse of mere and fleeting majorities, and hence have provided for strict adherence with the mandatory requirements of the amending process through a fair and proper submission at a plebiscite, with sufficient information and full debate to assure intelligent consent or rejection."

I further raised therein the question of "whether the 'purely consultative' character of the referendum would constitutionally permit the holding of the same as against the contrary assertion that the 1973 Constitution does not provide for nor authorize referendums, since there can be no valid referendum of any enacted law except pursuant to constitutional authority."[19]

(I should perhaps state at this point — as is quite evident — that my views represent the dissenting and definitely minority view and beg the indulgence of all concerned for inadequately presenting here the majority views which are quite well known to all, for obvious limitations of time, not to mention as in the martial law cases that there was not one opinion of the Court but nine separate individual opinions (of 11 members) totalling 468 printed pages.).

The imposition of martial law calls for the use of the military power of the State by the President in his capacity as their Chief Executive and Commander-in-Chief only 'in case of invasion, insurrection or rebellion or imminent danger thereof, when the public safety requires it" by express provision of both the 1935 and the 1973 Constitution.[20]

I thus had occasion to point out in the referendum cases that "(E)ven from the declared Presidential objective of using Martial Law powers to institutionalize reforms and to remove the causes of rebellion, such powers by their very nature and from the plain language of the Constitution are limited to such necessary measures as will safeguard the Republic and

19. The referendum power of the pople is defined as "a negative power through which appeal may be taken directly to the people from an affirmative action taken by their representatives" 82 C.J.S. 197-198.

20. As expounded by Justice A. P. Barredo in his separate opinion in Aquino vs. Enrile 59 SCRA 424, "The primary and fundamental purpose of martial law is to maintain order and to insure the success of the battle against the enemy by the most expedition and efficient means without loss of time and with the minimum of effort."

suppress rebellion (or invasion) and measures directly connected with removing the root causes thereof, such as the tenant emancipation proclamation. The concept of martial law may not be expanded, as the main opinion does, to allow the President to legislate to cover the lesser threats of 'worldwide recession, inflation or economic crisis which presently threatens all nations' in derogation of the Constitution."

I added that the legislative power is vested by the Transitory Article in the interim National Assembly which is expressly charged in Section 5 thereof with the mandate to "give priority to measures for the orderly transition from the presidential to the parliamentary system, the reorganization of the Government, the eradication of graft and corruption, the effective maintenance of peace and order, the implementation of declared agrarian reforms, the standardization of compensation of government employees, and such other measures as shall bridge the gap between the rich and the poor;" and

That there is only one way permitted by the Constitution for the President (or the Prime Minister in the 1973 Constitution) to acquire legislative power and that is through specific delegation to him of legislative power in times of war or other national emergency for a limited period, with the further limitation and safeguard now provided that "Unless sooner withdrawn by resolution of the National Assembly, such (delegated) powers shall cease upon its next adjournment" (obviously to prevent the recurrence of the last post-war spectacle when the then Chief Executive refused to return the delegated emergency powers to the congress and sought to reject and veto Congress' resolution withdrawing the delegation of powers.

The imposition of martial law concededly does not abrogate the Constitution, yet as an articulate colleague in the Supreme Court described it, the Constitution has since then been "in a state of anaesthesia, to the end that much needed major surgery to save the nation's life may be successfully undertaken."[21]While the Constitution has continued "in a state of anaesthesia," the enforcements of its express provisions and spirit have remained in *suspenso*.

The single most important change effected by the 1973 Constitution, i.e. the change of the system of democratic government from presidential to parliamentary wherein the legislative power is vested in a National Assembly[22] and the executive power is vested in the Prime Minister who shall be elected by a majority of all the members of the National Assembly from among themselves,[23] remains suspended. (I had pointed out in the

21. Justice A. P. Barredo's separate opinion in Aquino vs. Enrile, 59 SCRA 423.

22. Art. VIII, sec. 1, 1973 Constitution.

23. Art. IX, secs. 1 and 3, idem.

Referendum cases that this change allows for continuity of the leadership, with the "incumbent President" bowing out [upon initially convening the interim assembly and calling for th election of the interim Speaker and interim Prime Minister as well as the interim President as the symbolic head of state"] and thereafter being succeeded by the interim Prime Minister who may of course be himself.)

The structure of government as provided in the Constitution has thus been noted by professors and scholars to have been radically altered by the Supreme Court rulings, since the incumbent President is not only the sole repository of executive power but is also now held to be vested with legislative power.[24] It is pointed out that with the majority of the Supreme Court having further held in effect that his acts are exempt from judicial review,[25] the combined effect of these two doctrines was to vest in the incumbent President total governmental power unlimited by judicial review.[26]

This of course is in contrast to the previous consistent stance of the Supreme Court as reaffirmed in *Lansang* through then Chief Justice Roberto Concepcion that adherence and compliance by the Executive as well as by the Legislative departments with the limitations and restrictions imposed by the Constitution "may, within proper bounds, be inquired into by courts of justice. Otherwise, the explicit constitutional provisions thereon would be meaningless. Surely, the framers of our Constitution could not have been intended to engage in such a wasteful exercise in futility."[27]

The Bill of Rights of the Constitution specifies the powers that have been withheld from the government and are reserved to the people. But the freedoms guaranteed by it against the overwhelming power of the State would be meaningless and of no use unless the citizens could vindicate and enforce them against the government officials and agencies by proper procedures in the courts, under the rule of law.

However the efficacy of the Bill of Rights remain *in suspenso*. Under martial law and the resultant suspension of the privilege of the writ of habeas corpus, an individual nay be indefinitely detained in connection with matters covered by the martial law proclamation and is powerless to seek relief or his liberty from the courts.

The great freedom of speech and of the press (the most recent monumental and almost incredible demonstration of which was the exposé

24. Aquino vs. Comelec, 62 SCRA 275 (Jan. 31, 1975).

25. Aquino vs. Enrile, 59 SCRA 183 (Sept. 17, 1974).

26. Prof. Perfecto V. Fernandez: Civil Liberties under Martial Law, delivered at UP Law Center, Jan., 1975).

27. 41 SCRA 474.

of the Watergate coverup that toppled in August, 1974 the President of the U.S. for breach of faith and for having defiled the process of law) remain tentative. But the windows have been opened and a letter writer to the editor the other day in urging that "President Marcos must be a president for life" wrote with nostalgia that (I) also dream of normal times. I dream of the return of our freedom of speech. I dream of the return of our freedom of the press. But laws should be decreed to ensure no abuse of these rights, as in the past."[28]

Well may we call to mind former Chief Justice Concepcion's injunction in the *Lansang* case that "we bear in mind that our political system is essentially democratic and republican in character and that the suspension of the privilege affects the most fundamental element of that system, namely, individual freedom. Indeed, such freedom includes and connotes, as well as demands, the right of every single member of our citizenry to freely discuss and dissent from, as well as criticize and denounce, the views, the policies and the practices of the government and the party in power that he deems unwise, improper or inimical to the commonweal, regardless of whether his own opinion is objectively correct or not. The untrammelled enjoyment and exercise of such right — which, under certain conditions, may be a civic duty of the highest order — is vital to the democratic system and essential to its successful operation and wholesome growth and development."[29] Indeed, as Cardoso stressed, our freedoms as enshrined in the Bill of Rights should be ever preserved "against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, and the scorn and derision of those who have no patience with general principles."[30]

My colleague Justice Cecilia Muñoz Palma's plea for the Rule of Law a year ago, before you, to raise your voices and protest if need be, for the full and complete return of criminal jurisdiction to the regular courts and for withdrawal of the conferment of judicial power on military commissions (which do not form part of the judicial system and are composed of non-lawyers) to try civilians for common criminal offenses, even while our civil courts have been functioning freely and without interruption, and "that in the interest of a free and independent judiciary, a time limit should be fixed by the President for him to act on all the pending courtesy resignations of judges so as to avoid an indefinite state of insecurity of their tenure in office" remains to be fulfilled.

The salutary provisions of the 1973 Constitution prohibiting cabinet members (and members of the National Assembly) from holding multiple positions in the Government including government-owned or controlled

28. Bulletin Today issue of Sept. 15, 1976, p.7.

29. 42 SCRA 448, 474-475.

30. Justice Cardoso, Nature of Judicial Process, 90-93.

corporations[31] and providing for the creation of the Sandiganbayan (a special court with jurisdiction over criminal and civil cases involving graft and corrupt practices of public officers and employees)[32]and of the office of the Tanodbayan (Ombudsman) to receive and investigate complaints relative to public office[33]remain to be implemented.

Former UP President Salvador P. Lopez summed up the situation in this wise: "Our political system, our economic system, indeed the whole society as a whole (has) required the double therapy of deep purgation and shock treatment. X x (But) such radical therapy is not without risk, and care must be taken to ensure that the deepseated vices are eradicated without killing the patient. Unduly prolonged, a regime of martial law soon becomes counter-productive. The holders and beneficiaries of emergency power, seduced by the attractions of unrestrained authority, may soon come to believe that the delegation of power to them is permanent. The absence of traditional checks and balances tends to encourage corrupt practices and abuse of authority. Because of its vital role in martial law, the military may develop certain inclinations and interests that could eventually dilute its attachments to the Republic and the Constitution."

The President himself appreciates this view as witness his famous Luneta speech on Law Day last year when he denounced the surfacing of a 'new government elite" and a "new oligarchy" and his concluding statement in his book, *The Democratic Revolution in the Philippines*, that "I am mindful of the fact that historically authoritarian regimes tend to outlive their justification. I do not intend to make a permanent authoritarianism as my legacy to the Filipino people. It is sufficiently clear to them, I believe, that martial law is an interlude to a new society, that it is, in sum, a Cromwellian phase in our quest for a good and just society. Certainly, the enterprise is worth a little sacrifice."[34]

And in his last interview with TIME, where he expressed the hopes that his administration 'will be remembered as a period of national rebirth," he again reiterated almost as an obsession that "the greatest thing I would still like to achieve is the shift back to normalcy." And just two days ago, he said "I don't intend to leave to our people the legacy of having been the man who proclaimed martial law, established a crisis government, and did not have the will nor the wisdom to dismantle it when the time came."[35]

31. Artcile IX, sec. 8, 1973 Constitution.

32. Article XIII, sec. 5.

33. Idem, sec. 6.

34. At page 218.

35. Phil. Daily Express issue of September 17, 1976.

Upon the declaration of martial law, I sad then and I say it now that freedom cannot be taken for granted nor abused but must be nurtured and cherished constantly and faithfully.

The President himself stressed nine years ago in an address before the Civil Liberties Union that "(T)he citizens must be the ultimate guardians of their liberties and rights, for such guardianship may be delegated only at their peril. Liberties should never be a matter of benevolence on the part of teh government. For the power to confer has, as its corollary, the power to withdraw. What is conferred can be taken back. But where the liberties are considered to be an inherent right of citizens, for which the ultimate responsibility resides in the citizens themselves, then the government is rightly put in its place as a mere caretaker of the people's interests subject tom and never above, the popular will."

I think the President can now rest assured that the people have by and large learned the lesson that a constitutional democracy, as Brandeis expressed it so well, "is a serious undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain that to achieve. It demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government."[36]

Whatever be the case, let us harken once more to Lippmann's observation, with reference to the scorn poured out upon the endless and often tiresome talking done in representative parliaments that "In great emergencies it may be dangerous. But this endless talking marks a very great advance in civilization. It required about five hundred years of constitutional development among the English-speaking peoples to turn the pugnacity and the predatory impulses of men into channels of talk, rhetoric, bombast, reason, and persuasion. Deride the talk as much as you like, it is the civilized substitute for street brawls, gangs, conspiracies, assassinations, private armies. No other substitute has as yet been discovered."

Among all the extremes between mob rule and one-man rule, I would say that we as men of the law know that there is no substitute for the democratic form of government established in both the 1935 and 1973 Constitutions wherein the sovereign power of a government of laws, not of men, is vested in the people and exercised by them indirectly through a system of representation and delegated authority, with separation of powers and checks and balances, and the people with the assistance of the political parties organized by them choose their officials and representatives at periodically held free and honest elections.

As we celebrate Law Day tonight, realizing that law is one of the most significant records of a people's history and culture, and that "the law is the

36. Mason: Brandeis, p. 585.

witness and external deposit of our moral life," let us resolve, as did the President on the first anniversary of the 1973 Constitution "to remain steadfast on the rule of law and the Constitution" and pledge with him that

> "Let all of us of age, let all of us then pass away as a pace in the development of our country, but let the Constitution remain firm and stable and let institutions grow in strength from day to day, from achievement to achievement, and so long as that Constitution stands, whoever may the man in power be, whatever may his purpose be, that Constitution will guide the people and no man, however, powerful he may be, will dare to destroy and wreck the foundation of such a Constitution."[37]

Finally, let us keep faith with Claro M. Recto, architect of the 1935 Constitution (reviled in life as a communist fellow-traveler and revered in death as nationalist and patriot) who taught us that

> "For all of us, regardless of ideology or condition, must suffer equally from the debasement of the Constitution and the resulting impairment of democracy. Isolated actions, if left uncorrected, become in time pernicious habits. If the Constitution is violated in one provision, it will be easier to violate it in another provision. If the Constitution is suspended against one group of citizens, it can be suspended against another group of citizens. If one department of the government can incade and usurp the totality of power and if, as a result, the Constitution goes overboard, all of us shall go with it, the learned and the untutored, the farsighted and the improvident, the courageous and the hesitant, the wealthy and the poor, the lovers of liberty and its enemies and detractors. For let us not forget that the ideals of democracy, the spirit of the Constitution, can not only be uprooted of felled by direct assault but also wither through disuse, laches and abandonment. Because in the course of our national existence, we shall face, oftener than not, the temptations of expediency, the anger and anguish of suffering, and the fears that ripen into despair, the faith of our people in the Constitution must be constantly kept militant, vigorous and steadfast."

37. Phil. Labor Relations Journal, Vol. VII, Jan. 1974, p. 6.

The Writ of Amparo: A Remedy to Enforce Fundamental Rights

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I. INTRODUCTION

The writ of *amparo*[1] originated in Mexico, where it was provided for in the Constitution of the State of Yucatan in 1841 and later in the Federal Constitution of 1857.

Noteworthy it is that it was also in Mexico that the modern trend of incorporating fundamental social and economic rights in the Constitution started. The Mexican Constitution of February 5, 1917, which is still basically in force, opened up new perspectives. It was more advanced than even the German Constitution of October 1919, thus antedating the latter by two years in establishing as constitutional a number of fundamental social rights.[2]

The social transcendence of human rights was thus constitutionally recognized. And in addition to those rights that have traditionally been granted to the individual, others have arisen that put him in a new dimension: his integration into the various social groups of which contemporary society is made up. Speaking on the new Constitutions of the world, B. Mirkins Guetzevitch aptly observed that, in the 20th century, the social purpose of law is not only a doctrine or a school of legal thought but the very essence of life.[3]

Recently, however, contemporary jurists as well as facts of history have shown that human rights cannot be effectively safeguarded by incorporating them in the Constitution. And many constitutional lawyers today consider that human rights can be effectively guaranteed by specific procedures for their protection.

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1. *Amparo* is a word meaning protection, from *amparar* meaning "to protect."
2. P. ROUSIX, GENESIS DE LOS ARTICULOS 27 Y 12 DE LA CONSTITUCION POLITICA DE 1917 27 ET. SEG. (2D ED. 1959).
3. LAS NUEVAS CONSTITUCIONES DEL MUNDO 34 (1931).

Now among the different procedures that have been established for the protection of human rights, the primary ones that provide direct and immediate protection are *habeas corpus* and *amparo*. The difference between these two writs is that *habeas corpus* is designed to enforce the right of freedom of the person, whereas *amparo* is designed to protect those other fundamental human rights enshrined in the Constitution but not covered by the writ of *habeas corpus*.[4]

Amparo, therefore, has been said to have been done for the social and economic rights what *habeas corpus* has done for civil and political rights. Speaking of the effectiveness of *amparo*, the Director of the Institute of Legal Research at the National University of Mexico says: "*Amparo* is, in my view the most effective remedy for the specific protection of the human rights set out in the Constitution."[5]

After Mexico, the first country to introduce *amparo* was El Salvador, in its Constitution of August 13, 1886. It was followed by Honduras, in its Constitution of 1894, Nicaragua on November 10, 1911, Guatemala on March 11, 1921, Panama on January 2, 1941, Costa Rica on November 7, 1941, Argentina in the Constitution of the Province of Santa Fe of August 13, 1921, and more recently, Venezuela in its Constitution of 1967.

It has also spread to other parts of the world, such as India, whose Constitution of 1965 — considered a model in progressive and modern constitution-making — provides in Part III, Section 32, Subsections 1-4, a "Right to Constitutional Remedies" to enforce "Fundamental Rights" embodied in said portion of the Constitution.

Finally, the writ of *amparo* was raised to the international level by its inclusion in Aricle. XVIII of the Inter-American Declaration of Human Rights, a regional convention approved at Bogota on May 2, 1948. These landmark provisions state:

> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect (*"amparo"* in Spanish) him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Finally, *amparo* first found expression in a multilateral instrument of universal application in the Universal Declaration of Human Rights, which was approved by the General Assembly of the United Nations on December 10, 1948. Article 8 of the Universal Declaration states:

4. Zamudio, *Latin American Procedures for the Protection of the Individual*, J. INTL COM JURISTS 86 (1968).

5. *Id.* at 77.

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by the law.

II. DIFFERENT FORMS OF AMPARO

The nature and time-tested role of *amparo* has shown that it is an effective and inexpensive instrument for the protection of human rights enshrined in the Constitution.

As practised, *amparo* has been found so flexible to the particular situations of each country that, while retaining its essence, it has developed various procedural forms. There is therefore a Mexican *amparo*, an Argentinian *amparo*, a Chilean *amparo*, and so on.

The forms of *amparo* mainly differ according to the scope of protection given. Briefly, these are as follows:

(a) In some countries, *amparo* is regarded solely as an equivalent to *habeas corpus*, being available only to protect the individual from unlawful acts or from irregularities in criminal proceedings. This is the meaning it has in Chile, and the same holds in the Transitional Provision 5 of the 1951 Venezuelan Constitution which uses the term *amparo de la libertad personal* as a synonym of *habeas corpus*.

(b) In Argentina, Venezuela, Guatemala, El Salvador, Costa Rica, Panama, and very recently, in Bolivia, Ecuador, and Paraguay, as well as in Mexico, *amparo*, has come to mean an instrument for the protection of constitutional rights with the exception of freedom of the person, which is protected by the traditional *habeas corpus*.

(c) A third group of countries also uses *amparo* as a petition for judicial review to challenge unconstitutional laws, as in Mexico, Honduras and Nicaragua.

III. SURVEY OF PROVISIONS OF AMPARO IN MODERN CONSTITUTIONS

The Venezuelan Constitution of January 1961 provides for *amparo* in Article 49:

> The courts shall protect ('*ampararan*' in Spanish) all inhabitants of the Republic in the exercise of the rights and guarantees established by the Constitution, in accordance with law. The Procedure shall be brief and summary ...

Article 48(3) of the Constitution of Costa Rica, of November 7, 1949, lays down rules for *amparo*:

> To maintain or restore the enjoyment of the rights laid down in this Constitution (other than freedom of the person which is protected under par. 1 of the Article by *habeas corpus*) everyone shall also have the right of *amparo* in such courts as the law may determine.

Article 19 of Bolivia's Constitution of February 2, 1967 provides:

> In addition to right of habeas corpus, to which the preceding article refers, *amparo* lies against illegal acts or omissions of officials or private individuals that restrict or deny the individual rights and guarantees recognized by the Constitution and the law.

The Constitution of Ecuador, of May 25, 1967, provides for *amparo* in Article 28 (15) in the following terms:

> Without prejudice to other inherent rights of the individual, the State shall guarantee ... the right to demand judicial *amparo* against any violation of constitutional guarantees, without prejudice to the duty of the public power to ensure the observance of the Constitution and the laws.

The Constitution of Paraguay, of August 25, 1967, provides for *amparo* in Article 77:

> Any person who considers that a right or guarantee to which he is entitled under this Constitution or under law has been or is in imminent danger of being seriously injured by an individual and who, because of the urgency of the case, cannot have recourse to the ordinary remedies may file a petition for *amparo* with any judge of first instance. The proceedings shall be short, summary, free and held in public, and the judge shall be empowered to safeguard the right or guarantee or to restore immediately the legal position infringed. Regulations governing the procedure shall be laid down by law.

Since the Revolution of 1955, *amparo* has found a place in a large number of Argentinian provincial Constitutions.

Article 58 of the Constitution of Honduras, of June 3, 1965, in Paragraph 1 states that *amparo* may be sought by an aggrieved party or by any person on his behalf, for the following purpose: "(a) to maintain or restore the enjoyment of the rights and guarantees established by the Constitution ..."

As stated, the Constitution of India provides for a writ of *amparo* in its Part III, Section 32, Subsections 1-4.

The success of the land reform program of Mexico was due in large measure to the writ of *amparo*, which, under the Constitution of Mexico, is available to challenge decisions of agricultural authorities that affect the rights of their farming cooperatives there, called *ejidos*, or rights of their farming members, called *ejiditarios*, under the Constitutionally-established agrarian reform system of said country.[6]

Professor Zamudio attests: "An examination of the various procedures for protecting fundamental human rights, shows, it is submitted, that no other institution has the prestige, roots and traditions of amparo (or its equivalent, the Brazilian *mandado de seguranza*) to provide a coherent procedure with uniform bases for the protection of fundamental rights set forth in various ... Constitutions."[7]

IV. Constitutional Basis of the Writ

As earlier mentioned, constitutional lawyers around the world believe that human rights can be effectively safeguarded only if, in addition to their being embodied in the Constitution, a specific procedural device to protect them is likewise provided for in the Constitution. The reason is obvious. By including in the Constitution a right to an effective remedy to protect social and economic rights, we spare them from the possible curtailment or destruction by the vagaries of shifting political majorities in the legislature. After all, these are human rights, deemed to spring from and adhere to the very nature, person, and dignity of man. They are not within the competence of society to abrogate — even by majority vote; they are in fact sometimes called "rights over society."

Furthermore, there can be no clearer way of showing the degree of seriousness and determination to see the realization and fulfillment of the social and economic rights enshrined in the fundamental law than to provide for an effective procedural remedy to enforce them.

The Philippine Constitution provides the basis for the Philippine writ of *amparo*, by introducing a new provision in Article VIII, Section 5(5), that empowers the Supreme Court to: "Promulgate rules concerning the protection and enforcement of constitutional rights ..." This formulation was the idea of former Chief Justice Roberto Concepcion, Chairman of the Judiciary Committee of the Constitutional Commission, in connection with the proposal for a writ of *amparo*.

6. See *Id.* at 86.
7. *Id.* at 89 (emphasis supplied).