From One-Man Rule to "People Power"

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I. The Antecedents of One Man Rule: A Strong Presidency

Presidencies are what presidents make of them. True enough, presidents work through constitutional structures. But presidents who take command can work *any* presidential structure. Conversely, presidents who cannot take command can be buried or paralyzed by the presidential structure. One can orate about a government of laws; but when the chips are down, it is men (or women) who can work the laws, or fail to work them.

The history of the American presidency is instructive. One same Constitution in the hands of different personalities can take on richly varied forms of either vigorous vitality or the lack of it. As Corwin put it in *The President: Office and Powers,*[1] after reviewing the history of various presidencies from Washington to Lincoln's dictatorship: "what the presidency is at any particular moment depends in important measure on who is the President."

The American Constitution was held the model for the 1935 Philippine presidency, although the architects of the historic document probably had one eye cocked in the direction of Manuel L. Quezon when they fashioned

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1. Edward S. Corwin, The President: Office and Powers 30 (1948).

it. It was that distinguished leader who set the trend for what the 1935 Constitution's presidency could mean. Without making use of the powerful emergency powers of 1935, Quezon dominated the scene in a manner that was *imperial*. His presidency confirmed the strength of the office of the 1935 Constitutional Convention had constructed.

Executive power under the 1935 Constitution was, as now, vested in the President. In vesting executive power in one person rather than in a plural executive, the evident intention was to invest the power holder with energy. Even as originally set down in the 1935 Constitution, the powers given to the president were both ample and couched in generalities. He enjoyed the power of appointment and removal, as well as control over all executive department, bureaus and offices.[2] He was Commander-in-chief of all the armed forces, could call on the armed forces to suppress lawless violence, and, under skeletal limits, suspend the privilege of the writ of *habeas corpus* or impose martial law.[3] He spoke for the nation in foreign relations.[4] As formulated, the powers were such that a President could test their limit and, in so doing, even overwhelm the two other theoretically co-equal departments.

President Marcos was the President who tested executive power to the limit. Ironically, however, the broad sweep of executive, reproduced from the 1935 Constitution in the 1987 version, was laid out generously against him by the Supreme Court in *Marcos v. Manglapus.*[5] In concluding that President Aquino had the authority to prevent the return of Mr. Marcos even in the absence of a specific law granting her such authority, the Supreme Court, speaking through Justice Irene Cortes, laid down the premise for its conclusion affirming the existence of "residual powers" not specifically mentioned in the Constitution:

The inevitable question then arises: by enumerating certain powers of the President did the framers of the Constitution intend that the President shall exercise those specific powers and no other? Are these enumerated powers the breadth and scope of "executive power'? Petitioners advance the view that the President's powers are limited to those specifically enumerated in the 1987 Constitution. Thus, they assert: "The President has enumerated powers, and what is not enumerated is impliedly denied to her. *Inclusio unius est exclusio alterius.*" [Memorandum for Petitioners, p. 4; Rollo p. 233.] This

2. 1935 Phil. Const. art. VII, § 10 (1).
3. *Id.* § 10 (2).
4. *Id.* § 10 (7).
5. 177 SCRA 668 (1989).

argument brings to mind the institution of the U.S. Presidency after which ours is legally patterned.[6]

The 1935 Constitution created a strong President with explicitly broader powers than the U.S. President. The 1973 Constitution attempted to modify the system of government into the parliamentary type, with the President as the mere figurehead, but through numerous amendments, the President became even more powerful, to the point that he was also the *de facto* legislature. The 1987 Constitution, however, brought back the presidential system of government and restored the separation of legislative, executive and judicial powers by their actual distribution among the three distinct branches of government with provision for check and balances.

It would not be accurate, however, to state that "executive power" is the power to enforce the laws, for the President is head of state as well as head of government, and whatever powers inhere in such positions pertain to the office unless the Constitution itself withholds it. Furthermore, the Constitution itself provides that the execution of the laws is only one of the powers of the President. It also grants the President other powers that do not involve the execution of any provision of law, *e.g.*, his power over the country's foreign relations.

On these premises, we hold the view that although the 1987 Constitution imposes limitations on the exercise of specific powers of the President, it maintains intact what is traditionally considered as within the scope of "executive power." Corollarily, the powers of the President cannot be said to be limited only to the specific powers enumerated in the Constitution. In other words, executive power is more than the sum of specific powers so enumerated.[7]

I. THE BEGINNINGS OF ONE-MAN RULE:

JAVELLANA V. EXECUTIVE SECRETARY

On March 16, 1969, the Philippine Congress, pursuant to the authority given to it by the authority given to it by the 1935 Constitution, passed

6. The Philippine presidency under the 1935 Constitution was patterned in large measure after the American presidency. But at the outset, it must be pointed out that the Philippine government established under the Constitutions of 1935, 1973 and 1987 is a unitary government with general powers unlike that of the United States, which is a federal government with limited and enumerated powers. Even so, the powers of the President of the United States have through the years, grown, developed and taken shape as students of that presidency have demonstrated.

7. *Marcos*, 177 SCRA at 689-92.

Resolution No. 2 (later amended by Resolution No. 4 passed on June 17, 1969) calling a Convention to propose amendments to the Constitution. Election of delegates to the Convention took its work on June 1, 1971. The draft of the article on the presidency that was taking shape featured a weakened presidency set in a parliamentary system.

Before the Constitutional Convention could complete its work, martial law was imposed on the entire Philippines on September 21, 1972. Even as some delegates were placed under detention and others went into hiding or voluntary exile, the Constitutional Convention continued. To what extent and how martial law conditions affected the final outcome of the convention still awaits thorough assessment. One thing is certain: after martial law was declared, the following provision was inserted in the Transitory Provisions:

> All proclamations, orders, decrees, letters of instruction, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding and effective even after lifting of martial law or the ratification of the Constitution, unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular Assembly.[8]

On November 29, 1972, the Convention approved its *Proposed Constitution of the Republic of the Philippines*. The next day, the President issued Presidential Decree No. 73, "submitting to the Filipino people for ratification or rejection the Constitution of the Republic of the Philippines proposed by the 1971 Constitutional Convention" and setting the date of the plebiscite on January 15, 1973. On January 7, 1973, however, the President issued general Order No. 20 directing "that the plebiscite scheduled to be held on January 15, 1973, be postponed until further notice."

Meanwhile, the Citizens Assemblies, organized by the Presidential Decree No. 86, were being asked to answer certain questions, among which was: "Do you approve of the New Constitution?" Then, suddenly, on January 17, 1973, while the Supreme Court was hearing arguments on petitions to enjoin the holding of a plebiscite, the President by Proclamation No. 1102 announced that the proposed Constitution had been ratified by an overwhelming vote of the members of the Citizen Assemblies.

Many could not and would not believe the announcement that the Constitution had been ratified. Some petitioned the Supreme Court to say that it was not so. On March 31, 1973, the Supreme Court splintered in several directions but jointly concluded in *Javellana v. Executive Secretary* that

8. Article XVII, § 3 (2) of what was to be the 1973 Constitution.

"there [was] no further judicial obstacle to the new Constitution being considered in force and effect."[9]

The 1973 Constitution was amended in 1976, principally to provide for an *interim Batasang Pambansa* to replace the projected *interim* National Assembly and to strengthen presidential powers through Amendment 6, which read:

> Whenever in the judgment of the President (Prime Minister), there exists a grave emergency or a threat or imminence thereof, or whenever the interim Batasang Pambansa or the regular National Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action, he may, in order to meet the exigency, issue the necessary decrees, orders, or letters of instruction, which shall form part of the law of the land.[10]

In 1981, the Constitution was revised to revert to a modified version of presidentialism.

II. The Pillars of One Man Rule

Then dispositive portion of Proclamation No. 1081, which placed the entire Philippines under martial law on September 21, 1972 read:

> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines by virtue of the powers vested upon me by Article VII, Section 10, Paragraph (2) of the [1935] Constitution, do hereby place the entire Philippines as defined in Article I, Section 1, of the Constitution under martial law and, in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees, orders and regulations promulgated by me personally or upon my direction.
>
> In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof. Or incident thereto, or in connection therewith, for crimes against national usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative.

Immediately thereafter, on September 22, 1972, the President promulgated General Order No. 1, which said:

> NOW, THEREFORE, I, Ferdinand E. Marcos, President of the Philippines, by virtue of the powers in me vested by the Constitution as Commander-in-Chief of the Armed Forces of the Philippines, do hereby proclaim that *I shall govern the nation and direct the operation of the entire Government,* including all its agencies and instrumentalities, in my capacity and shall exercise all the powers and prerogatives appurtenant and incident to my position as commander-in-chief of all the armed forces of the Philippines.[11]

This was followed on the same day by General Order No. 2, which ordered the arrest of a long list of individuals contained in a list accompanying the order, and by General Order No. 3, which ordered all executive offices to "continue to function under the present officers and employees and in accordance with existing laws"[12] and likewise the Judiciary to "continue to function in accordance with its present organization and personnel,"[13] but removing from the jurisdiction of the courts the following cases:

1. Those involving the validity, legality, or constitutionality of any decree, order or acts issued, promulgated or performed by me or by my duly designated representative pursuant to Proclamation No. 1081, dated September 21, 1972.
2. Those involving the validity, legality or constitutionality of any rules, orders or acts issued, promulgated or performed by me or by my duly designated representative pursuant to Proclamation No. 1081, dated September 21, 1972.
3. Those involving the crimes against national security and the law of nations.
4. Those involving crimes against the fundamental laws of the State.
5. Those involving the crimes against public order.
6. Those crimes involving usurpation of authority, rank, title, and improper use of names, uniforms, and insignia.
7. Those involving crimes committed by public officers.[14]

9. Javellana v. Executive Secretary, 50 SCRA 30, 141 (1973).
10. *See* Proclamation No. 1595 (1976).
11. Sept. 22, 1972 [italics supplied].
12. Dated Sept. 22, 1972.
13. *Id.*
14. *Id.*

On September 24, 1972, General Order No. 3-A added to the list of those removed from the jurisdiction of the courts all cases "involving *the validity, legality, or constitutionality of Proclamation No. 1081, dated September 21, 1972, or of any decree, order or acts issued, promulgated or performed by me or by my duly designated representative.*"[15]

Then followed numerous orders, instructions, and decrees, which collectively amounted to an assumption by the President of extensive legislative powers. Likewise, military tribunals were created to assume jurisdiction over civilians in numerous types of cases that had been removed from the jurisdiction of the civilian courts.

In subsequent months, in spite of General Order No. 3-A, the Supreme Court had to face monumental martial law cases. Most important among these were the cases that dealt with: (1) the validity of Proclamation No. 1081; (2) the effect of the imposition of martial law on the privilege of the writ of *habeas corpus;* (3) the legislative powers of the President under martial law; (4) the creation of military tribunals clothed with jurisdiction over civilians; and (5) the power of the President to propose amendments to the Constitution.

A. Martial Law Proclamation Declared Legal: Aquino, Jr. v. Enrile

Despite General Order No. 3-A's prohibition of judicial inquiry into the validity of the imposition of martial law, Proclamation No. 1081 was put to the test in Aquino, Jr. v. Enrile,[16] a petition for *habeas corpus* filed by several detainees who were being held by virtue of the martial law decree. The case squarely faced key issues raised by the martial law proclamation: the Supreme Court's power of judicial enquiry, the validity of martial law proclamation, and the effect of the proclamation of the privilege of the writ of *habeas corpus*. Unfortunately, however, the collegial document produced by the Court was not a decision in the traditional sense of consensus on both the conclusions and the reasons for the conclusions. Justice Barredo had prepared an opinion running into more than one hundred pages but, to his great disappointment,[17] the Court declined to adopt his opinion and came out instead only with a summary of the voting on the issues. Chief Justice Makalintal, having been been given the task of making the summary, explained why the Court could not produce a collegial opinion. He said that they could not agree on what issues to take up nor on the manner the issues

15. Dated Sept. 24, 1972 [italics supplied].

16. 59 SCRA 183 (1973).

17. *Id.* at 332.

should be approached. They were, he said, very much conscious of the "future verdict of history."[18] Hence, separate opinions were unavoidable.

Three key issues were faced by the Court: the justiciability of the martial law proclamation, the validity of the proclamation, and the effect of the proclamation on the privilege of the writ of *habeas corpus*. The individual opinions ran into more than four hundred pages. In the end, however, the Justices agreed that since *Javellana v. Executive Secretary*[19] had declared the 1973 Constitution operative, Article XVII, Section 3(2) of the 1973 Constitution which said: "All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land," the validity of the imposition of martial law had effectively been confirmed.

Finally, reference was also made to the sanating effect of the referendum of February 27-28, 1973 where the question: "[u]nder the (1973) Constitution, the President, if he so desires, can continue in office beyond 1973. Do you want President Marcos to continue beyond 1973 and finish the reforms he initiated under Martial Law?" the electorate had answered affirmatively.[20]

1. On Justiciablity

Solely from the argument based on Article XVII, Section 3(2) of the 1935 Constitution, one could already predict the outcome of the case. The position taken by the Justices on the issue of justiciability could also only lead to the same conclusion. Five Justices — Antonio, Makasiar, Esguerra, Fernandez, and Aquino — took the position that the proclamation of martial law and the arrest and detention orders accompanying the proclamation posed a "political question" beyond the jurisdiction of the Court. Justice Antonio, in a separate opinion concurred in by Maksiar, Fernandez, and Aquino, argued that the Constitution had deliberately set up a strong presidency, with concentrated powers in times of emergency in the hands of the President, and had given him broad authority and discretion which the Court was bound to respect. And, although Justices Castro, Fernando, Muñoz Palma, and implicitly, Teehankee, lined up on the side of justiciability, they adhered to the very narrow doctrine on justiciability in *Lansang v. Garcia.*[21] In *Lansang*, the Court said that its power was "merely to check — not to supplant — the Executive, or to *ascertain merely whether he*

18. *Id.* at 234.

19. 50 SCRA 30 (1973).

20. 42 SCRA 448, 480 (1971).

21. 42 SCRA 448, 480 (1971).

has gone beyond the constitutional limits of his jurisdiction, *not to exercise the power vested in him* or to determine the wisdom of his act." The Court in *Lansang* had accepted the Solicitor General's suggestion that it "go no further than to satisfy [itself] *not* that the President's decision [was] *correct* and the public safety [was] endangered by the rebellion and justified the suspension of the writ, but that in suspending the writ, the President did not act arbitrarily."[22]

Finally, none of the Justices was unduly daunted by the objection drawn from General Order No. 3-A, which prohibited the Supreme Court from looking into the constitutionality of the proclamation and the accompanying orders. They either ignored it, or apparently subscribing to the view that every word of the President is law, they said that the President himself had withdrawn General Order No. 3-A through his book *Notes on the New Society*.[23]

2. On the Validity of Proclamation 1081

With five Justices holding that the issues were political and with the rest holding to a very narrow scope for judicial review, the outcome of the case was easily predictable. Justice Castro upheld the proclamation of martial law on the basis of continuing rebellion,[24] and Fernando concluded that the presidential proclamation could stand as the product of careful executive evaluation of pertinent date.[25] Barredo said that Proclamation 1081 had merely placed the fundamental law "in a state of anesthesia, to the end that the much needed surgery to save the nation's life might be undertaken."[26] Palma too saw martial law as justified by extensive rebellion.[27] Teehankee suspended his judgment, while all the rest accepted the President's evaluation as conclusive.

3. On the Privilege of the Writ of Habeas Corpus

On the relation between martial law and the privilege of the writ of *habeas corpus*, Castro summed up the argument for the automatic suspension of the privilege thus:[28]

22. *Id.* at 481.

23. *Aquino*, 59 SCRA at 227, 377.

24. *Id.* at 227-78, 257-63.

25. *Id.* at 241.

26. *Id.* at 423.

27. *Id.* at 334-44.

28. *Id.* at 275-76.

It is thus evident that suspension of the *privilege* of the writ of *habeas corpus* is *unavoidably subsumed* in a declaration of martial law, since one basic objective of martial rule is to neutralize effectively — by arrest and continued detention (and possibly trial at the proper and opportune time) — those who are reasonably believed to be in complicity or are *particeps criminis* in the insurrection or rebellion. That this is so and should be so is ineluctable; to deny this postulate is to negate the very fundamental of martial law: the preservation of society and the survival of the state. To recognize the imperativeness and reality of martial law and at the same time dissipate its efficacy by withdrawing from its ambit the suspension of the *privilege* of the writ of *habeas corpus*, is a proposition I regard as fatuous and therefore repudiate.

Palma alone dissented saying that automatic suspension of the privilege could be justified only by the total collapse of civil courts.[29]

B. Broad Legislative Powers: Aquino, Jr. v. COMELEC

The next major martial law case was *Aquino, Jr. v. COMELEC*,[30] which involved a petition for prohibition seeking the nullification of presidential decrees calling for a referendum on February 27, 1975, and appropriating funds for the purpose. The referendum topics were in the form of consultative questions whereby the President sought to feel the pulse of the nation regarding certain vital topics. They did not seek any amendment to the Constitution; hence, constituent powers were not an issue. But since an act of appropriation of funds, legislative in nature, was involved, the principal question raised was whether the President could legislate. The issue, moreover, was raised at the time when no legislative body was functioning. The old Congress had been abolished by the new Constitution and the date for the activation of the legislative body created by the new Constitution had been left to the discretion of the President, who was in no hurry to entertain legislative competition. One of the referendum questions in fact was meant to verify whether the people wanted the *interim* National Assembly to be convoked *at all*.

The answer of Justice Makasiar, writing the main opinion, was unequivocal. He said:

> We affirm the proposition that as Commander-in-Chief and enforcer or administrator of martial law, the incumbent President of the Philippines can promulgate proclamations, orders, and decrees during the period of Martial Law essential to the security and preservation of the Republic, to the defense of the political and social liberties of the people and to the

29. *Id.* at 646.

30. 62 SCRA 275 (1975).

> institution of reforms to prevent the resurgence of rebellion or insurrection or secession or the threat thereof as well as to meet the impact of a worldwide recession, inflation, or economic crisis which presently threatens all nations including highly developed countries (Rossiter, Constitutional Dictatorship, 1948 ed., pp. 7, 303; see also Chief Justice Stone's concurring Opinion in Duncan vs. Kahanamoku, 327 U.S. 304).[31]

Makasiar added that article XVII, section 3(2), (1935), expressly affirming all proclamations, orders, and decrees issued by the President as "part of the law of the land" was "not a grant of authority to legislate, but a recognition of such power as already existing in favor of the incumbent President during the period of Martial Law."[32]

In this recognition of broad legislative power as flowing from martial law, Makasiar was supported by Justices Aquino, Barredo, Antonio, and Fernandez. Justice castro was satisfied to rely only on Article XVII, Section 3(2), (1973).[33] Fernando limited himself to saying that in the absence of a legislative body no one else but the President could "perform those essential and indispensable functions of dealing with the conduct of affairs" such as appropriating funds for a referendum. He declined to say whether this was executive or legislative, reserving his opinion for another day.[34] Teehankee would limit the scope of martial law legislative powers of the President to whatever was necessary for the "preservation of the state" but not to formulating permanent solutions to "worldwide recession, inflation or economic crisis."[35] Palma too would concede to the President *limited* legislative power needed to fill the vacuum during the transition period.[36]

It is difficult to see how the power to impose martial law can be the source of an all-embracing legislative power. The exercise of police power by the President under martial law has for its object "public safety" and not the entire breadth of the concept of public welfare. But this was not how the majority of the Supreme Court saw it. Later on, in a speech to the 8th World Peace Through Law Conference held in Manila, Chief Justice Castro was to proclaim proudly:

> As to purpose, martial law is known in the west as the drastic solution to a violent situation — to quell a riot, to suppress anarchy, to overcome rebellion. Here in the Philippines, this primary purpose remains, but it has been enlarged to embrace also the extirpation of the ills and conditions which spawned the riot, the anarchy, and the rebellion.

31. *Id.* at 298.
32. *Id.* at 298-99.
33. *Id.* at 305.
34. *Id.* at 312.
35. *Id.* at 317.
36. *Id.* at 347.

And since the ills and conditions which spawned the riot, the anarchy, and the rebellion form a long line that traces itself to the garden of Eden, the administrator of martial law was really, in the view of the Marcos Supreme Court, another Redeemer!

At any rate, any doubt about the scope of the legislative power of the President, in or out of martial law under the 1973 Constitution, was removed by Amendment No. 6 of 1976,[37] reproduced above, which in effect set up the President as a parallel legislative body to the legislature.

C. Military Tribunals: Aquino, Jr. v. Military Commission No. 2

The next martial law case in essence again involved the lawmaking authority of President Marcos. *Aquino, Jr. v. Military Commission No. 2*[38] challenged the validity principally of General Order No. 8[39] authorizing the Chief of Staff to create military tribunals, General Order No. 12[40] vesting military tribunals with jurisdiction "exclusive of civil courts" over crimes related to martial law, and Presidential Decree No. 39,[41] providing for the "Rules Governing the Creation, Composition, Jurisdiction, Procedure and Other Matters Relevant to Military Tribunals."

The simple answer to the Court was that this decree was within the ambit of authorization given by Article XVII, Section (3), (1973) to the President to "promulgate proclamations, order and decrees during the period of martial law." To the argument that jurisdiction of military tribunals over civilians would violate due process, the Court answered that martial law creates an exception to the general rule of exclusive subjection to civil jurisdiction when such exception is necessary for the attainment of the objects of martial law.

Any doubt as to this the Court swept away by saying "[i]n any case, We cannot close our eyes to the fact that the continued existence of these military tribunals and the exercise by them of jurisdiction over civilians during the period of martial law are within contemplation and intendment of Article XVII, Section 3(2)."[42]

37. *See* Proclamation No. 1595 (1976).
38. 63 SCRA 546 (1975).
39. Sept. 27, 1972.
40. Sept. 30, 1972.
41. Nov. 7, 1972.
42. *Id.* at 574-76.

The bare power of the President to create military tribunals is easily enough subsumed under the 1973's Article XVII, Section 3(2); but the sweeping grant of jurisdiction to such tribunals over civilians raised serious due process issues. But the Court said that due process was not the exclusive domain of civilian courts.

D. Constituent Powers: Sanidad v. COMELEC

Under the original 1973 Constitution, in the absence of a National Assembly, the body authorized to propose amendments to the Constitution was the *interim* National Assembly or a Constitutional Convention called by the *interim* National Assembly. Moreover, it was only the *interim* National Assembly which could call for elections for the regular National Assembly. The date of activation of the interim National Assembly, however, had been left by the Transitory Provisions to the discretion of the President. Moreover, the Supreme Court had held in *Aquino, Jr. v. COMELEC*[43] that the President could not be compelled to convene the *interim* National Assembly and, in the consultative referendum of 1975, the electorate had advised against the convening of the *interim* National Assembly. Thus, by September 1976, fully four years after the imposition of martial law and almost four years after the new constitution had taken effect, the President had not convened the interim National Assembly and he alone was the active legislative authority.

It was in that same month and in that constitutional morass that the President by Presidential Decrees proposed a coordinated series of amendments the principal thrusts of which were (1) to consign the *interim* National Assembly to oblivion, (2) to create an *interim* Batasang Pambansa, and (3) to grant full and concurrent legislative power to the President. This gave rise to *Sanidad v. COMELEC*[44] which decided the question whether the President may propose amendments to the Constitution in the absence of a grant of such constituent power to the President in the text of the Constitution. The Supreme Court held he could. Justice Martin wrote the main opinion and only Justices Teehankee and Muñoz-Palma dissented.

The opinion of Justice Martin is summarized easily enough. He said that the extraordinary conditions of martial law and of the government under the Transitory Provisions gave to the President legislative power. Legislative power does not normally include the constituent power to propose amendments to the constitution. However, since the normal repositories of constituent power were not operative, and since the people had voted in the referenda of 1973 and 1975 against the convening of the interim Natinal

43. 62 SCRA 275 (1971).

44. 73 SCRA 333 (1976).

Assembly, a stalemate had been created because only a constitutional amendment could effectively remove the interim National Assembly in order to five way to another legislative body. In the face of such stalemate, Martin could not see the Constitution as having set up a government that was powerless in the face of crisis. Hence, the power to propose amendments must be sought elsewhere. It did not take him long to find such power hidden in the folds of the presidential mantle of power. The President, after all, possessed legislative power, and the power to propose amendments to the constitution was, according to Martin, "but an adjunct, although peculiar, to [his] gross legislative power."[45]

One would have wished that Martin had stopped there. But he was to add, inspired by Clinton Rossiter, that the "separation of executive and legislature ordained in the Constitution presents a distinct obstruction to efficient crisis government."[46] Justice Barredo too rubbed salt to the wounds of Philippine Constitutionalism by arguing that the President had not proposed the amendments but had merely collated the amendments already proposed by the people in the earlier referenda![47]

III. JURISPRUDENTIAL LEGACY OF MARTIAL LAW

With the decision in *Sanidad*, the main lineaments of pre-1987 martial law jurisprudence were drawn: (1) the martial law proclamation of 1972 had been validly made on the basis of an existing rebellion; (2) the imposition of martial law carried with it the suspension of the privilege of the writ of *habeas corpus*; (3) the martial law administrator could legislate on any matter related to the welfare of the nation; (4) he could create military tribunals and confer on them jurisdiction to try civilians for crimes related to the purpose of martial rule; (5) in the absence of any other operative constituent body he could even propose amendments to the Constitution. All of the above, moreover, are confirmed by the broad grant of power found in Article XVII, Section 3(2), of the 1973 Constitution which, as will be seen below, was itself ratified in a most unique manner. The Supreme Court was to add later that, under martial law, claims of denial of a speedy trial were unavailing,[48]

45. *Id.* at 368.

46. *Id.* at 367.

47. *Id.* at 368.

48. Ocampo v. Military Commission No. 25, 109 SCRA 22 (1981).

and that the suspension of the privilege of the writ of *habeas corpus* also suspends the right to bail.[49]

On January 17, 1981, on the eve of the visit of Pope John Paul II to the Philippines (but not *propter quod*, it was said), martial law was lifted by Proclamation No. 2045. But not really. If the heart of martial law is the concentration of governmental powers in the hands of the Executive, the equivalent of martial law remained as part of normal day-to-day Government. This was the effect of Amendment No. 6 of 1976, which granted full legislative power to the President. It is said:

> Whenever in the judgment of the President (Prime Minister), there exists a grave emergency or threat or imminence thereof, or whenever the interim Batasang Pambansa or the regular National Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action, he may, in order to meet the exigency, issue the necessary decrees, orders or letters of instruction, which shall form part of the law of the land.[50]

Justice Barredo, writing for the Court in *Legaspi v. Minister of Finance*,[51] said that Amendment 6 had been designed to perpetuate martial law powers even after the lifting of martial law.

In addition to these specific powers, the immunity of the President from suit was specifically guaranteed by a 1981 amendment:

> The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders.

Under the circumstances of one-man rule, however, the guarantee was hardly necessary.

IV. The Waning of One-Man Rule and the Advent of People Power

The 1973 Constitution ended the same way that it started — unceremoniously. What may be considered the turning point of this historical development was the decision of Ferdinand Marcos to call for "snap elections." In response to the President's desire for a popular reaffirmation of his mandate, the Batasang Pambansa enacted B.P. Blg. 883

49. Buscayno v. Military Commission Nos. 1, 2, 6 and 25, 109 SCRA 273 (1981). *See Gumua v. Espino*, 96 SCRA 402, 412-20 (1980), for a summary of the principal Martial Law rulings of the Supreme Court.

50. *See* Proclamation No. 1595 (1976).

51. 115 SCRA 418, 437-39 (1982).

calling for special elections on February 7, 1986 for the offices of President and Vice-President would remain in office unless defeated in the special election. For this reason, the validity of B.P. Blg. 883 was challenged on the ground that neither office was vacant. A restraining order was sought by the Philippine Bar Association, but a divided Supreme Court did not issue a restraining order. Instead, the Court took judicial notice of what it saw as a *fait accompli* — the elections were on. The Executive and the Legislature wanted it. The political parties eagerly welcomed the opportunity for a first presidential election since 1969. The real issue according to the Court was no longer one of unconstitutionality because of the absence of vacancy. Significant events had transformed it into a political question.[52]

The widow of Benigno Aquino, Jr., Corazon Aquino, ran against incumbent President Marcos. Elections were held on February 7, 1986 as scheduled. In the course of the canvassing of the votes, however, claims of massive cheating were aired. This precipitated the bloodless uprising, popularly known as the EDSA[53] Revolution, which would catapult Mrs. Aquino to the presidency.

However, the *Batasan*, being the constitutionally deputized canvassing body for presidential elections, proclaimed Mr. Marcos President on February 15, 1987, and Mr. Marcos' Chief Justice, Ramon Aquino, swore him in on February 25. But on the same day that Chief Justice Ramon Aquino swore Mr. Marcos as President, and following the universal acclamation of Cory Aquino as the people's choice, Senior Supreme Court Associate Justice Claudio Teehankee swore her in as President of the new Republic. It was the culmination of a four day drama featuring soldier posed against soldier while an unarmed mass of the citizenry stood in between to tell the soldiers not to fight because the people had chosen Cory Aquino as President, and so should the soldiers. The soldiers did. And Mr. Marcos bowed out of Malacañang Palace going into Hawaiian exile.

What was the meaning of this popular proclamation and swearing in of Cory Aquino? For, indeed, she was proclaimed and sworn in not under the 1973 Constitution but in defiance of the prescribed processes of the 1973 Constitution.

It meant that the people rejected the Commission on Elections.

It meant that the people rejected the Marcos Supreme Court, which because of its subservience to the presidency, blessed every step Mr. Marcos took towards dictatorial power.

52. Philippine Bar Association v. COMELEC, 140 SCRA 455 (1985).

53. Stands for Epifanio de los Santos Avenue.

Finally, it meant the birth of "People Power." As the Supreme Court was to put it later, "[i]t was through the February 1986 revolution, a relatively peaceful one, and more popularly known as the "People Power Revolution" that the Filipino people tore themselves away from an existing regime."[54]

A month thereafter, on March 25, 1986, President Aquino issued Proclamation No. 3 as the new Constitution, which came to be popularly known as the Freedom Constitution. Proclamation No. 3 introduced the Freedom Constitution thus:

> WHEREAS, the new government under President Corazon C. Aquino was installed though a direct exercise of the power of the people assisted by units of the New Armed Forces of the Philippines;
>
> WHEREAS, the heroic action of the people was done in defiance of the provisions of the 1973 Constitution, as amended;
>
> WHEREFORE, I, Corazon C. Aquino, President of the Philippines, by virtue of the powers vested in me by the sovereign mandate of the people, do hereby promulgate the following Provisional Constitution.[55]

The legitimacy of President Aquino's assumption of power was first challenged in *Lawyer's League for a Better Philippines v. President Aquino.*[56] But the Court declared that "[t]he legitimacy of the Aquino government is not a justiciable matter. It belongs to the realm of politics where only the people are the judge. And the people have made that judgment; they have accepted that government."[57] Further the Court said:

From the natural point of view, the right of revolution has been defined as "an inherent right of a people to cast out their rulers, change their policy or effect radical reforms in their system of government or institutions by force or a general uprising when the legal and constitutional methods of making such change have proved inadequate or are so obstructed as to be unavailable." It has been said that "the locus of positive law-making power lies with the people of the state" and from there is derived "the right of the people to abolish, to reform and to alter any existing form of government without regard to existing constitution."[58]

54. Letter of Associate Justice Reynato Puno, 210 SCRA 589. 597 (1992).

55. *See* Proclamation No. 3 (1986).

56. G.R. No. 73748 (May 22, 1986) [unreported]. This case was cited in In re: Saturnino v. Bermudez, 145 SCRA 160, 163 (1986).

57. *Id.*

58. Letters of Associate Justice Reynato Puno, 210 SCRA 589, 597 (1992).

The case further reaffirmed that the Government of Corazon Aquino was set up directly by the mandate of the people in defiance of the Constitution.[59]

V. "PEOPLE POWER" IN THE 1987 CONSTITUTION

President Aquino was aware that a real constitution should be superior to government, and not a mere creation of government. Thus, the Proclamation itself contained the command that the President should appoint a Constitutional Commission to draft a new Constitution. She therefore issued Proclamation No. 9, announcing the convening of a Constitutional Commission whose members would be appointed by her.

The appointed Commission convened on June 2, 1986 and finished its work on October 15, 1986. Submitted to a plebiscite on February 2, 1987, the 1987 Constitution was overwhelmingly approved. It took effect on the same day.[60]

One of the factors which characterize the 1987 Constitution is in the presence of the provisions which institutionalize "people power." The first of these is Article II, Section 1 which defines the Philippines as a "republican and democratic state." Formulating the new Constitution before the euphoria of the People Power Revolution of 1986 had died down, the Constitutional Commission added a new word to describe the Philippine state: "democratic." The import of this addition, a monument to "people power" which re-won democracy in EDSA, is that the Philippines under the new Constitution is not just a representative government but also shares some aspects of direct democracy.

The various direct democracy elements in the new Constitution have been the subject of some litigation. Article VI, Section 32 provides:

> The Congress shall, as early as possible, provide for a system of initiative and referendum, and the exceptions therefrom, whereby the people can directly propose and enact laws or approve or reject any act or law or part thereof passed by the Congress or local legislative body after the registration of a petition therefor signed by at least ten per centum of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of the registered voters thereof." Commenting on this provision the Court said: "One of the means by which people power can be exercised is thorough initiatives where local ordinances and

59. *Id.* at 598. "Discussions and opinions of legal experts also proclaim that the Aquino Government was 'revolutionary in the sense that it came into existence in defiance of existing legal processes.'"

60. De Leon v. Esguerra, 153 SCRA 602 (1987).

> resolutions can be enacted or repealed. An effort to trivialize the effectiveness of people's initiatives ought to be rejected.[61]

Recall of local elective officials is now authorized by Article X, Section 3. On this subject, the Court has affirmed the constitutionality of direct people's action to curb betrayal of public trust saying: "[t]he 1987 Constitution is borne of the conviction that people power can be trusted to check excesses of government."[62]

Initiative and referendum, another form of direct action of the people, can also be used for proposeing amendments to the Constitution. However, implementing the legislation is need to make this provision effective. Attempts to use it in 1997 failed because people of the absence of an implementing law.[63]

Two other provisions found in Article XIII are significant. Section 15 says: "[t]he state shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means," and Section 16 provides that: "[t]he right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms."

VI. PEOPLE POWER IN 2001

When President Marcos seized power in 1972, he characterized his action as a "revolution from within." What happened when President Aquino was catapulted to power in 1986 is now know as "People Power" or the EDSA Revolution, a generally bloodless event. What happened during what is now known as "EDSA *Dos*," or the second bloodless revolution that took place along Epifanio de los Santos Avenue, must be seen against both the historical context within which the 1987 Constitution came into being, and the language of the 1987 Constitution. EDSA *Dos* had all the earmarks of a child of the 1987 Constitution.

EDSA *Dos* was the aftermath of the aborted impeachment trial of President Joseph Estrada. It started suddenly after the Senate, by a vote of 11 to 10, upheld the motion of the defense to block the presentation of crucial

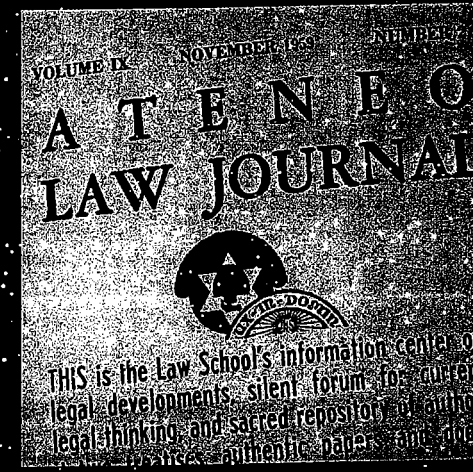
61. Garcia v. COMELEC, 237 SCRA 279, 282 (1994).

62. *Id.*

63. *See* PHIL. CONST. art. XVII, § 2. *See also* Santiago v. COMELEC, 270 SCRA 106 (1997); PIRMA v. COMELEC, G.R. 129754 (Sept. 23, 1997) (unreported).

Distribution of the *Ateneo Law Journal*, c. 1960.

The front matter of the *Journal*, c. 1950.



THE EARLY YEARS

Students of the Law School browse their copies of the *Journal*, c. 1960.

Staff Members conducting research work at the Library of the Padre Faura Campus, c. 1960.

Editorial work at the Law Publications Room of the Rockwell Campus, c. 2011.

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impeachment evidence. Within hours, the crowd started gathering at the EDSA shrine demanding the resignation of President Estrada.

The President refused to resign. Little by little, however, his support began to crumble. Abandoned by a majority of his Cabinet and later by the Philippine National Police and the Armed Forces, at about noon on January 20, 2001, Chief Justice Hilario Davide, Jr. swore in Vice-President Gloria Macapagal-Arroyo as President. While holed in at Malacañang Palace, President Estrada released a statement in the following tenor:

> 20 January 2001
>
> STATEMENT FROM PRESIDENT JOSEPH EJERCITO ESTRADA
>
> At twelve o'clock noon today, Vice-President Gloria Macapagal-Arroyo took her oath as President of the Republic of the Philippines. While along with many other legal minds of our country, I have strong and serious doubts about the legality and constitutionality of her proclamation as President, I do not wish to be a factor that will prevent the restoration of unity and order in our civil society. It is for this reason that I now leave Malacañang Palace, the seat of the presidency of this country, for the sake of peace and in order to begin the healing process of our nation, I leave the Palace of our people with gratitude for the opportunities given to me for service to our people. I will not shirk from any future challenges that may come ahead in the same service of our country. I call on all my supporters and followers to join me in the promotion of a constructive national spirit of reconciliation and solidarity. May the Almighty bless our country and beloved people.
>
> May the Almighty bless sour country and beloved people.
>
> MABUHAY!
>
> (Sgd.) Joseph Ejercito Estrada

On the same day, however, President Estrada also signed the following letter to the Speaker of the House of Representatives and to the President of the Senate:

> Sir:
>
> By virtue of the provisions of Section 11, Article VII of the Constitution, I am hereby transmitting this declaration that I am unable to exercise the powers and duties of my office. By operation of law and the Constitution, the Vice-President shall be the Acting President.
>
> (Sgd.) Joseph Ejercito Estrada

Article VII, Section 11 is a provision patterned after the 25th Amendment of the United States Constitution, which authorizes the President to temporarily hand over the presidency to the Vice-President in case he is unable to perform presidential functions. Eventually, President Estrada went to Court challenging the right of Gloria Macapagal-Arroyo to

become President and claiming that his departure from Malacañang was not a resignation but a temporary retreat under Article VII, Section 11. The challenge was the subject of *Estrada v. Arroyo.*[64]

The decision of the Court was unanimous in dismissing Estrada's petition and proclaiming that Gloria Macapagal-Arroyo had become the *de jure* President. However, four Justices merely concurred in the result. That usually means that, although they agree with the final conclusion, they do not necessarily agree with the manner in which the conclusion was reached.

The framework of the decision was that EDSA *Dos*, far from being a revolutionary incident, was merely an instance of the people exercising their constitutionality guaranteed right to petition the government for redress of grievances. Justice Reynato Puno, writing the main opinion, said:

> In fine, the legal distinction between EDSA People Power I EDSA People Power II is clear. EDSA I involves the exercise of the people power of revolution which overthrew the whole government. EDSA II is an exercise of people power of freedom of speech and freedom of assembly to petition the government for redress of grievances which only affected the office of the President. EDSA I is extra constitutional and the legitimacy of the new government that resulted from it cannot be the subject of judicial review, but EDSA II is intra constitutional and the resignation of the sitting President that it caused and the succession of the Vice President as President are subject to judicial review. EDSA I presented a political question; EDSA II involves legal questions.
>
> A brief discourse on freedom of speech and of the freedom of assembly to petition the government for redress of grievance which are the cutting edge of EDSA People Power II is not inappropriate.
>
> Freedom of speech and the right of assembly are treasured by Filipinos. Denial of these rights was one of the reasons of our 1898 revolution against Spain. Our national hero, Jose P. Rizal, raised the clarion call for the recognition of freedom of the press of the Filipinos and included it as among "the reforms *sine quibus non*." The Malolos Constitution, which is the work of the revolutionary Congress in 1898, provided in its Bill of Rights that Filipinos shall not be deprived (1) of the right to freely express his ideas or opinions, orally or in writing, through the use of the press or other similar means; (2) of the right of association for purposes of human life and which are not contrary to public means; and (3) of the right to send petitions to the authorities, individually or collectively." ... These rights are now safely ensconced in section 4, Article III of the 1987 Constitution:

64. G.R. No. 146738 (Mar. 2, 2001), *reconsidered on* Apr. 3, 2001.

> "Sec. 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."

Estrada's response to this petition, as may be gathered from the *ponencia* of Justice Puno, was his resignation. Or, as Justice Puno would prefer, Estrada abandoned the presidency. Does that make Estrada a hero for responding to popular clamor?

True enough, what happened was a radical redress of grievances; but the redress did not come from Mr. Estrada. It came from the military, the police and a majority of the Cabinet who together abandoned him. It is hard to see this form of redress as intra-constitutional. In fact, when one looks at the Court's recitation of the facts that lead to the oath taking of Gloria Arroyo, it can easily be seen that Estrada was driven out of office first by force of popular clamor and second by the fact of having been abandoned by his own government. He left Malacañang fearful of mayhem.

The court cited Estrada's January 20 press release and Executive Secretary Angara's diary recounting the last days of Estrada in Malacañang, later published in the *Inquirer*, as expressive of the will to resign. The press release came out several hours after Arroyo took her oath and Angara's diary a few day's later. The Justices attended the oath taking. Did the Justices already know of this press release and the contents of Angara's diary when they went to the EDSA Shrine to witness Gloria Arroyo take her oath as President? They could not have known it unless the Court had a mole in Malacañang monitoring proceedings there. What is more likely is that the Court learned of the happenings in Malacañang only after reading Angara's diary and after they lent their approval to Arroyo's oath-taking.

It is also interesting to note that the Court did not seem to see its own reasoning as dispositive of Estrada's claim that he was merely on leave. Thus the Court had to seek support from the judgment of Congress saying "[i]n fine, even if the petitioner can prove that he did not resign, still, he cannot successfully claim that he is President on leave on the ground the he is merely unable to govern temporarily. The claim has been laid to rest by Congress and the decision that respondent Arroyo is the *de jure* President made by a co-equal branch of government cannot be reviewed by this Court."

What was the basis of the judgment of Congress which the Court could not disturb? In the language of the resolution of the House of Representatives, Arroyo's "ascension to the highest office of the land under the dictum, 'the voice of the people if the voice of God." Freely translated, that means ouster by "people power." Neither the House resolution nor the Senate resolution spoke of resignation. Theirs was acquiescence with the clamor of the people. The Court considered the House resolution dispositive of Estrada's claim that he was merely going on leave.

Was Estrada's departure then resignation or ouster? It was involuntarily resignation. Ouster, in other words. But it is also understandable why the Court should wish to distance itself from such a view. Ouster by popular action is not in the constitutional vocabulary for removing a President. Article VII, Section 8 gives only four ways of rendering the presidency permanently vacant: death, permanent disability, removal from office by impeachment, or resignation. The language of the decision shows that the Court did not wish to project Estrada's leaving office as extra-constitutional, lest the impression be given that the government under Arroyo was revolutionary. A revolutionary government is its own master.

However, there was no real cause for such caution. The ouster of Estrada, in both intent and execution, was never meant to be a rejection of the Constitution as master. If you wish, EDSA *Dos* was an instance of extra-constitutional "recall" but not a revolution. If you wish, it was a unique form of peaceful revolution. It was a revolution different from EDSA 1. EDSA 1 was a revolution which ousted not just a President but an entire government and its Constitution. Cory Aquino was sworn in as President. She declared herself not governed by the 1973 Constitution. She refused an offer of the *Batasan* to reverse its proclamation of President Marcos and thereby legitimize her takeover but under the 1973 Constitution. She proclaimed instead a temporary Freedom Constitution, and formalized a revolutionary government.

EDSA *Dos* rejected neither the Constitution nor the government under it. EDSA *Dos* rejected only an administration. There is an important constitutional distinction between administration and government. Administrations come and go. They are the officials that run the government. Government is the institution. It can remain and usually remains as administrations change. EDSA *Dos* did not reject the government. EDSA *Dos* preserved the institution and led to the formation of a new administration following the order of succession in the 1987 Constitution.

The new administration is headed by Gloria Macapagal-Arroyo. She now occupies an office earlier vacated not by death, or removal according to the processes of the 1987 Constitution, but rather, by a forced "resignation." The people made their rejection of President Estrada heard. The Armed Forces and National Police heeded the call of the People. One by one the members of President Estrada's administration abandoned him. That is where the extra-constitutional process ends. What followed was and should be according to the 1987 Constitution, especially considering that the Supreme Court has called his departure a "resignation." The challenge that faces the new administration is how to make the Constitution work. Making a Constitution work is far more difficult that writing a new Constitution.

CONCLUSION

It is good to remember what Justice Holmes said in a 1904 case: "[g]reat cases like hard cases make bad law. For great cases are called great... because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."[65] It is difficult not to see that the vote of the eleven senators who blocked the impeachment evidence against Estrada and the events that followed were accidents of immediate overwhelming interest. So was the vote of 13 justices.[66]

65. Northern Securities Company v. United States, 193 U.S. 197, 400-01 (1904).

66. Only 13 Justices voted to uphold Arroyo's presidency because Chief Justice Hilario Davide, Jr. and Justice Artemio Panganiban inhibited themselves; Davide for having sworn in Arroyo, and Justice Artemio Panganiban for having earlier expressed support for Arroyo's presidency.