

BENIGNO S. AQUINO, JR., TRINIDAD HERRERA, BISHOP FRANCISCO CLAVER, S.J., BISHOP ANTONIO NEPOMUCENO, BISHOP JESUS VARELA, BISHOP FELIX ZAFRA, BISHOP TEOTIMO PACIS, ET. AL., PETIT...

G.R. No. L-40004. January 31, 1975

Ponente: MAKASIAR, J.

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MAKASIAR, J.:

This petition for prohibition, which was filed on January 21, 1975, seeks the nullification of Presidential Decrees Nos. 1366, 1366-A, calling a referendum for February 27, 1975, Presidential Decrees Nos. 629 and 630 appropriating funds therefor, and Presidential Decrees Nos. 637 and 637-A specifying the referendum questions, as well as other presidential decrees, orders and instructions relative to the said referendum.

The respondents, through the Solicitor General, filed their comment on January 28, 1975. After the oral argument of over 7 hours on January 30, 1975, the Court resolved to consider the comment as answer and the case submitted for decision.

The first ground upon which the petition is predicated states that President Ferdinand E. Marcos does not hold any legal office nor possess any lawful authority under either the 1935 Constitution or the 1973 Constitution and therefore has no authority to issue the questioned proclamations, decrees and orders. This challenges the title of the incumbent President to the office of the Presidency and therefore is in the nature of a quo warranto proceedings, the appropriate action by which the title of a public officer can be questioned before the courts. Only the Solicitor General or the person who asserts title to the same office can legally file such a quo warranto petition. The petitioners do not claim such right to the office and not one of them is the incumbent Solicitor General. Hence, they have no personality to file the suit (*Castro vs. Del Rosario*, Jan. 30, 1967, 19 SCRA 197; *City of Manila & Antonio Villegas vs. Abelardo Subido, et. al.*, May 20, 1966, 17 SCRA 231-232, 235-236; *Nacionalista Party vs. Bautista*, 85 Phil. 101; and *Nacionalista Party vs. Vera*, 85 Phil. 127). It is established jurisprudence that the legality of the appointment or election of a public officer cannot be questioned collaterally -through a petition for prohibition which assails the -validity of his official acts.

The foregoing governing legal principles on public officers are re-stated in order to avert any misapprehension that they have been eroded by Our resolution in the instant petition.

Because of the far-reaching implications of the herein petition, the Court resolved to pass upon the issues raised.

II

This Court already ruled in the Ratification Cases "that there is no further judicial obstacle to the new Constitution being considered in force and effect." As Chief Justice Makalintal stressed in the habeas corpus cases, the issue as to its effectivity "has been laid to rest by Our decision in *Javellana vs. Executive Secretary* (L-36142, March 31, 1973, 50 SCRA 30, 141), and of course by the existing political realities both in the conduct of national affairs

and in our relations with other countries" (Aquino, Jr. vs. Enrile and 8 companion cases, L-35546, L-35538-40, L-35547, L-35556, L-35571 and L-35573, Sept. 17, 1974, 59 SCRA 183, 241).

III

In the aforesaid habeas corpus cases, We affirmed the validity of Martial Law Proclamation No. 1081 issued on September 22, 1972 by President Marcos because there was no arbitrariness in the issuance of said proclamation pursuant to the 1935 Constitution; that the factual bases had not disappeared but had even been exacerbated; that the question as to the validity of the Martial Law proclamation has been foreclosed by Section 3(2) of Article XVII of the 1973 Constitution, which provides that "all proclamations, orders, decrees, instructions 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 the lifting of Martial Law or the ratification of this Constitution . . ."; and that "any inquiry by this Court in the present cases into the constitutional sufficiency of the factual bases for the proclamation of Martial Law, has become moot and purposeless as a consequence of the general referendum of July 27-28, 1973. The question propounded to the voters was: 'Under 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 overwhelming majority of those who cast their ballots, including citizens beyond 15 and 18 years, voted affirmatively on the proposal. The question was thereby removed from the area of presidential power under the Constitution and transferred to the seat of sovereignty itself. Whatever may be the nature of the exercise of that power by the President in the beginning — whether or not purely political and therefore non-justiciable — this Court is precluded from applying its judicial yardstick to the act of the sovereign." (Aquino, Jr. vs. Enrile, supra, 59 SCRA 183, 240-242).

Under the 1935 Constitution, President Ferdinand E. Marcos was duly reelected by the vote of the sovereign people in the Presidential elections of 1969 by an over-whelming votes of over 5,000,000 electors as against 3,000,000 votes for his rival, garnering a majority of from about 896,498 to 1,436,118 (Osmeña vs. Marcos, Presidential Election Contest No. 3, Jan. 8, 1973). While his term of office under the 1935 Constitution should have terminated on December 30, 1973, by the general referendum of July 27-28, 1973, the sovereign people expressly authorized him to continue in office even beyond 1973 under the 1973 Constitution (which was validly ratified on January 17, 1973 by the sovereign people) in order to finish the reforms he initiated under Martial Law; and as aforesaid, as this was the decision the people, in whom "sovereignty resides . . . and all government authority emanates . . .," it is therefore beyond the scope of judicial inquiry (Aquino, Jr. vs. Enrile, et al., supra, p. 242).

The logical consequence therefore is that President Marcos is a de jure President of the Republic of the Philippines.

IV

The next issue is whether he is the incumbent President of the Philippines within the purview of Section 3 of Article XVII on the transitory provisions of the new or 1973 Constitution. As heretofore stated, by virtue of his reelection in 1969, the term of President Marcos under the 1935 Constitution was to terminate on December 30, 1973. The new Constitution was approved by the Constitutional Convention on November 30, 1972, still during his incumbency. Being the only incumbent President of the Philippines at the time of the approval of the new Constitution by the Constitutional Convention, the Constitutional Convention had nobody else in mind except President Ferdinand E. Marcos who shall initially convene the interim Assembly. It was the incumbent President Marcos alone who issued Martial Law Proclamation No. 1081 on September 22, 1972 and issued orders and decrees as well as instructions and performed other acts as President prior to the approval on November 30, 1972 of the new Constitution by the Constitutional Convention and prior to its ratification on January 17, 1973 by the

people. Consequently, since President Marcos was the only incumbent President at the time, because his term under the 1935 Constitution has yet to expire on December 30, 1973, the Constitutional Convention, in approving the new Constitution, had in mind only him when in Section 3(2) of Article XVII of the new Constitution it provided "that all the proclamations, orders, decrees, instructions 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 this 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 National Assembly."

The term incumbent President of the Philippines employed in Section 9 of the same Article XVII likewise could only refer to President Ferdinand E. Marcos.

This conclusion is further buttressed by Section 10 of the same Article XVII which provides that "the incumbent members of the Judiciary may continue in office until they reach the age of 70 years unless sooner replaced in accordance with the preceding section hereof." There can be no dispute that the phrase "incumbent members of the Judiciary" can only refer to those members of the Judiciary who were already Justices and Judges of the various courts of the country at the time the Constitutional Convention approved the new Constitution on November 30, 1972 and when it was ratified.

Because President Ferdinand E. Marcos is the incumbent President referred to in Article XVII of the transitory provisions of the 1973 Constitution, he can "continue to exercise the powers and prerogatives under the nineteen hundred and thirty five Constitution and the powers vested in the President and the Prime Minister under this Constitution until he calls upon the interim National Assembly to elect the interim President and the interim Prime Minister, who shall then exercise their legislative powers vested by this Constitution (Sec. 3[1], Art. XVII, 1973 Constitution).

Under the 1935 Constitution, the President is empowered to proclaim martial law. Under the 1973 Constitution, it is the Prime Minister who is vested with such authority (Sec. 12, Art. IX, 1973 Constitution).

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 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 US 304).

To dissipate all doubts as to the legality of such lawmaking authority by the President during the period of Martial Law, Section 3(2) of Article XVII of the New Constitution expressly affirms that all the proclamations, orders, decrees, instructions and acts he promulgated, issued or did prior to the approval by the Constitutional Convention on November 30, 1972 and prior to the ratification by the people on January 17, 1973 of the new Constitution, are "part of the law of the land, and shall remain valid, legal, binding and effective even after the lifting of Martial Law or the ratification of this Constitution, unless modified, revoked or superseded by subsequent proclamations, orders, decrees, instructions or other acts of the incumbent President, or unless expressly and specifically modified or repealed by the regular National Assembly."

The entire paragraph of Section 3(2) is 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.

Dr. Jose M. Aruego shares this view, when he states thus:

"108. . . . — These Presidential Proclamations, orders, decrees, instructions, etc. had been issued by the incumbent President in the exercise of what he considered to be his powers under martial law, in the same manner that the lawmaking body had enacted several thousand statutes in the exercise of what it considered to be its power under the Organic Laws. Both these classes of rules of law — by the President and by the lawmaking body — were, under general principles of constitutional law, presumed to be constitutional until declared unconstitutional by the agency charged with the power and function to pass upon constitutional law questions — the Judiciary, at the apex of which is the Supreme Court. Hence, the inclusion of both group of rules — Presidential rules and legislative rules — in the new Constitution for the people to approve or disapprove in the scheduled plebiscite." (Aruego, *The New Constitution*, 1973 Ed, p. 230).

Delegate Arturo Pacificador, a Floor Leader of the 1971 Constitutional Convention, in explaining Section 3(2) of Article XVII, underscores this recognition of the legislative power of the incumbent President as Commander-in-Chief during Martial Law, thus:

"The second paragraph sets forth the understanding of the Convention of the nature, extent and scope of the powers of the incumbent President of the Philippines, under martial law. It expressly recognizes that the commander-in-chief, under martial law, can exercise all necessary powers to meet the perils of invasion, insurrection, rebellion or imminent danger thereof. This provision complements Section 7, Article XVII of the Constitution that 'all existing laws not inconsistent with this Constitution shall remain operative until amended, modified, or repealed by the National Assembly.'

"The second paragraph is an express recognition on the part of the framers of the new Constitution of the wisdom of the proclamations, orders, decrees and instructions by the incumbent President in the light of the prevailing conditions obtaining in the country." (Montejo, *New Constitution*, 1973 Ed., p. 314, italics supplied).

The power under the second clause of Section 3(2) is not limited merely to modifying, revoking or superseding all his proclamations, orders, decrees, instructions or other acts promulgated, issued or done prior to the ratification of the 1973 Constitution. But even if the scope of his legislative authority thereunder is to be limited to the subject matter of his previous proclamations, orders, decrees or instructions or acts, the challenged Proclamations Nos. 1366 and 1366-A, as well as Presidential Decrees Nos. 629, 630, 637 and 637-A are analogous to the referenda of January, 1973 and July 27- 28, 1973.

The actions of the incumbent President are not without historical precedents. It should be recalled that the American Federal Constitution, unlike the 1935 or 1973 Constitution of the Philippines, does not confer expressly on the American President the power to proclaim Martial Law or to suspend the writ of habeas corpus. And yet President Abraham Lincoln during the Civil War, and President Roosevelt during the Second World War, without express constitutional or statutory authority, created agencies and offices and appropriated public funds therefor in connection with the prosecution of the war.

Nobody raised a finger to oppose the same. In the case of President Roosevelt, the theater of war was not in the United States. It was thousands of miles away, in the continents of Europe and Africa and in the Far East. In the Philippines, military engagements between the government forces and the rebels and secessionists are going on, emphasizing the immediacy of the peril to the safety of the Republic itself. There is therefore greater reason to affirm this law-making authority in favor of the incumbent President during the period of Martial law.

Petitioners further argue that the President should call the interim National Assembly as required of him by 3(1) of Article XVII, which National Assembly alone can exercise legislative powers during the period of transition.

It should be stressed that there is a distinction between the existence of the interim Assembly and its organization as well as its functioning. The interim Assembly already existed from the time the new Constitution was ratified; because Section 1 of Article XVII states that "there shall be an interim National Assembly which shall exist immediately upon the ratification of this Constitution and shall continue until the members of the regular National Assembly shall have been elected and shall have assumed office" However, it cannot function until it is convened and thereafter duly organized with the election of its interim speaker and other officials. This distinction was clearly delineated in the case of *Mejia, et. al. vs. Balolong, et. al.* where We held that from the phrase "the City of Dagupan, which is hereby created, . . .," Dagupan City came into existence as a legal entity upon the approval of its Charter; but the date of the organization of the city government was to be fixed by the President of the Philippines, and necessarily was subsequent to the approval of its organic law (81 Phil. 486, 490-492).

Petitioners likewise urge that the President should have convened the interim Assembly before the expiration of his term on December 30, 1973. The Constitutional Convention intended to leave to the President the determination of the time when he shall initially convene the interim National Assembly, consistent with the prevailing conditions of peace and order in the country. This was revealed by no less than Dr. Jose M. Aruego, noted authority in Constitutional Law, as well as delegate to the 1935 and 1971 Constitutional Convention. Dr. Aruego stated:

"109. Convening the interim National Assembly. — The Constitutional Convention could have fixed the date when the interim National Assembly should convene itself as it did with respect to the regular National Assembly. There would not have been any need for any Presidential call as there is none, with respect to the regular National Assembly.

"But considering that the country had been already placed under martial law rule the success of which was conditioned upon the unity not only of planning but also in the execution of plans, many delegates felt that the incumbent President should be given the discretion to decide when the interim National Assembly should be convened because he would need its counsel and help in the administration of the affairs of the country.

"And in the event that it should convene, why did the interim National Assembly not fix its tenure, and state expressly when the election of the members of the regular National Assembly should be called? Many of the delegates felt that they could not be sure even of the proximate date when the general conditions of peace and order would make possible orderly elections,...." (The New Philippine Constitution by Aruego, 1973 Ed., p. 230).

This was also revealed by Delegate Arturo F. Pacificador, one of the floor leaders of the 1971 Constitutional Convention, who stated:

"Under the first paragraph of this section, the incumbent President is mandated to initially convene the interim National Assembly.

"Note that the word is 'shall' to indicate the mandatory nature of the desire of the Constitutional Convention that the interim National Assembly shall be convened by the incumbent President. The Constitutional Convention, however, did not fix any definite time at which the incumbent President shall initially convene the interim National Assembly. This decision was deliberate to allow the incumbent President enough latitude of discretion to decide whether in the light of the emergency situation now prevailing, conditions have already normalized to permit the convening of the interim National Assembly." (Montejo, The New Constitution, 1973 Ed., p. 314).

It is thus patent that the President is given the discretion as to when he shall convene the interim National Assembly after determining whether the conditions warrant the same.

His decision to defer the initial convocation of the interim National Assembly was supported by the sovereign

people at the referendum in January, 1973 when the people voted to postpone the convening of the interim National Assembly until after at least seven (7) years from the approval of the new Constitution. And the reason why the same question was eliminated from the questions to be submitted at the referendum on February 27, 1975, is that even some members of the Congress and delegates of the Constitutional Convention, who are already ipso facto members of the interim National Assembly, are against such inclusion; because the issue was already decided in the January, 1973 referendum by the sovereign people indicating thereby their dislike for any Assembly as the former Congress failed to institutionalize the reforms they demanded and had wasted public funds through endless debates without relieving the suffering of the general mass of citizenry.

Petitioners likewise impugn the scheduled referendum on the ground that there can be no true expression of the people's will due to the climate of fear generated by Martial Law and that the period of free discussion and debate is limited to two weeks from February 7 to 21, without right of rebuttal from February 22 until the day of the referendum.

The first objection is not tenable because during the senatorial elections in 1951 and 1971, the privilege of the writ of habeas corpus was suspended, during which period of suspension there was fear of arrest and detention. Yet the election was so free that a majority of the senatorial candidates of the opposition party were elected and there was no reprisal against or harassment of any voter thereafter. The same thing was true in the referendum of July 27-28, 1973, which was done also through secret ballot. There was no Army, PC, or police truck, bus or other mode of transportation utilized to transport the voters to the various precincts of the country. There was no PC, Army or police personnel assigned to each election precinct or voting booth. And such assignment would be impossible; because the combined membership of the police, PC, and Army was then as now very much less than the number of precincts, let alone the number of voting booths. And no one would be left to fight the rebels or to maintain peace and order. And as heretofore stated, the voting was done in secrecy. Only one voter at a time entered the voting booth. The voting was orderly. There was no buying of votes or buying the right not to vote. And as opined by the Solicitor General, every qualified voters who fails to register or go to the polling place on referendum day is subject to prosecution; but failure to fill up the ballot is not penalized.

In the habeas corpus cases, *supra*, We declared that the result of the referendum on July 27 - 28, 1973 was a decision by the sovereign people which cannot be reviewed by this Court. Then again, it is too late now for petitioners to challenge the validity of said referendum.

Moreover, as stressed by the Solicitor General, the previous referenda of January and July, 1973, were a lot more free than the elections under the Old Society previous to the proclamation of Martial Law, where the will of the voter was subverted through "guns, goons and gold", as well as through fraud. All modes of transportation were utilized by the candidates and their leaders to transport the voters to the precinct. The voters were likewise wined and dined and so prostituted that they refused to vote until the required monetary persuasion was proffered, if they were not being subjected to various forms of intimidation. In some areas, the ballots were filled up and the election returns were accomplished before election day. Even animals and dead persons voted. The decisions in the electoral contests filed after every election under the Old Society attest to this very unflattering fact in our history.

The second objection that the two-week period for free debate is too short, is addressed to the wisdom of the President who may still amend the proclamation to extend the period of free discussion.

At any rate, such a brief period of discussion has its counterpart in previous plebiscites for constitutional amendments. Under the Old Society, 15 days were allotted for the publication in three consecutive issues of the Official Gazette of the women's suffrage amendment to the Constitution before the scheduled plebiscite on April

30, 1937 (Com Act No. 34). The constitutional amendment to append as ordinance the complicated Tydings-Kocialskowski Act of the US Federal Congress to the 1935 Constitution was published in only three consecutive issues of the Official Gazette for 10 days prior to the scheduled plebiscite (Com. Act No. 492). For the 1940 constitutional amendments providing for the bicameral Congress, the reelection of the President and Vice-President, and the creation of the Commission on Elections, 20 days of publication in three consecutive issues of the Official Gazette was fixed (Com. Act No. 517). And the Parity Amendment, an involved constitutional amendment affecting the economy as well as the independence of the Republic was publicized in three consecutive issues of the Official Gazette for 20 days prior to the plebiscite (Rep. Act No. 73).

The period of 14 days for free discussion can not compare favorably with the period required for publication of the proposed amendments under the Old Society.

WHEREFORE, PRESIDENT FERDINAND E. MARCOS IS HEREBY DECLARED DE JURE PRESIDENT OF THE REPUBLIC, PRESIDENTIAL PROCLAMATIONS NOS. 1366 AND 1366-A AND PRESIDENTIAL DECREES NOS. 629, 630, 637 AND 637-A ARE HEREBY DECLARED VALID, AND THE PETITION IS HEREBY DISMISSED. WITHOUT COSTS.

Aquino, J., concurs.

Makalintal, C.J., concurs in the result.

Castro and Muñoz Palma, JJ., see separate opinion

Antonio, Barredo, Fernandez, and Fernando, JJ., see concurring opinion.

Teehankee, J., see concurring and dissenting opinion.

CONCURRING OPINION

ANTONIO, J.:

I

The only rational way to ascertain the meaning and intent of paragraphs 1 and 2 of Section 3 of Article XVII (transitory provisions) of the New Constitution is to read its language in connection with the known conditions of affairs out of which the occasion for its adoption had arisen, and then construe it, if there be any doubtful expression, not in a narrow or technical sense, but liberally, giving effect to the whole Constitution, in order that it may accomplish the objects of its establishment. For these provisions can never be isolated from the context of its economic, political and social environment.

The New Constitution was framed and adopted at a time of national emergency. The delegates to the Constitutional Convention realized that the rebellion, lawlessness and near anarchy that brought about the declaration of martial law, were mere symptoms of a serious malady in the social order. They knew that the revolutionary reforms made by the incumbent President thru his decrees, orders and letters of instruction, such as the emancipation of the tenant-farmer from his bondage to the soil, reorganization of government, eradication of graft and corruption and measures to bridge the gap between the rich and the poor, were indeed imperative, if the exigency that brought about the military necessity was to be overcome, civil order restored, and the foundations of genuine democracy established. The actions of the incumbent President in promulgating those measures legislative in character during martial law was not without legal and historical basis. Democratic political theorists traditionally have assumed the need in time of emergency to disregard for the time being the governmental

process prescribed for peacetime and to rely upon a generically different method of government — the exercise by the Chief Executive of extraordinary or authoritarian powers, to preserve the State and the permanent freedom of its citizens.[1]

Thus, in my concurring opinion in *Javellana, et al vs. Executive Secretary, et al.*[2] it was stated that "to preserve the independence of the State, the maintenance of the existing constitutional order and the defense of the political and social liberties of the people, in times of grave emergency, when the legislative branch of the government is unable to function or its functioning would itself threaten the public safety, the Chief Executive may promulgate measures legislative in character, . . ." We considered then that the proclamation of martial rule marked the commencement of a crisis government and crisis government in a constitutional democracy entails the concentration and expansion of governmental powers and the release of the government from the paralysis of constitutional restraints in order to deal effectively with the emergency.[3] This was the view of the members of the Constitutional Convention when they framed the New Constitution.

In Our concurring opinions in *Aquino, et al. vs. Enrile, et al.*,[4] We declared that on the basis of the deliberations of the 166-man Special Committee of the Constitutional Convention, which was authorized to make the final draft of the Constitution, during their session on October 24, 1972, the Convention expressly recognized the authority of the incumbent President during martial law to exercise legislative powers not merely in the enactment of measures to quell the rebellion but, more important, of measures urgently required to extirpate the root causes of the social disorder which gave rise to the exigency.

It was with a view of the continuance of the exercise of these extraordinary powers that the Convention provided in paragraph 1, Section 3, of Article XVII of the transitory provisions of the New Constitution that: "He (the incumbent President) shall continue to exercise his powers and prerogatives under the nineteen hundred thirty-five Constitution . . ." and in paragraph 2 thereof also provided that: "All proclamations, orders, decrees, instructions, 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 ratification of this 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 National Assembly."

The conferment upon the incumbent President of those extraordinary powers necessarily implies that in view of the emergency, there might be a deferment in the convening of the interim National Assembly and, therefore, it was necessary that he be equipped with adequate legal authority and power to carry the body politic through the crisis.

Indeed, the need of the times was for a more expeditious mode of decision-making and policy formulation. The insurgency and the secessionist movement compounded by a world-wide economic inflation and recession generated problems which must be solved with immediacy and with policies that are flexible and responsive to the imperatives of the crisis.

II

The impossibility for the Convention to determine a priori, in view of the emergency situation, the time when conditions shall have sufficiently normalized to permit the convening of the interim Assembly, precluded them from fixing in the transitory provisions of the Constitution a definite period when the incumbent President shall initially convene that body. It was a matter which was wholly confided by the Constitution to the incumbent President. Since the exercise of this power was committed to the incumbent President in all the vicissitudes and conditions of the emergency, it has necessarily given him ample scope for the exercise of his judgment and

discretion. It was a political decision for which he is directly responsible to the people to whom he is accountable and for whose welfare he is obliged to act. As stated in the separate opinion of Justice Castro, concurred in by the Chief Justice, Justices Barredo, Esguerra, Fernandez, and the writer of this opinion, "The peripheral matter whether President Marcos should now or soon convene the interim National Assembly is completely outside the competence of the Supreme Court to resolve as . . . it is a political question addressed principally, basically, and exclusively to the President and the Filipino people."

III

Neither can it be asserted that the exercise by the incumbent President of those extraordinary powers is necessarily inconsistent with an absolute contradiction to the existence of a democracy.[5] When the exercise of such authoritarian powers is expressly conferred upon him by the Constitution, it represents the will of the sovereign people as the source of all political power. So long as the power is used to fulfill its true function in realizing the ethical purposes of the community, which is to ensure the economic and social well-being of its citizens and to secure to them justice, such power is employed for constructive and moral purposes. Its exercise is, therefore, legitimate as it represents the collective will of the people themselves. It is, therefore, logical that the incumbent President consult the people on issues vital to the public interest even through a consultative referendum. Such useful and healthy contact between the government administrator and the citizenry is the more necessary in a period of martial law, because the equal participation of the citizenry in the formulation of the will of the State and in its fundamental political decisions ensures the unity of the people in their efforts to surmount the crisis. The success then of the political leadership in leading the nation through the emergency would depend on its ability to convince and persuade, not to dictate and coerce; to enlist, not to command; to arouse and muster the energies, loyalties, and, if need be, the sacrifices of the people. As Leibholz aptly observed, "the one essential presupposition of democracy is that the people as a political unity retains its sovereignty, and that the majority of the active citizens can express their will in political freedom and equality." [6]

IV

It is, however, asserted that the questions asked may not logically be the subject of a referendum. Thus, it is claimed that some of the questions contemplate vital changes in the existing form of local government, which changes under Sections 2 and 3 of Article XI of the 1973 Constitution, must be submitted to the electorate for ratification in a plebiscite called for that purpose. Admittedly, the question of the coming referendum asked the voters in the Greater Manila Area, do not contain a full text of the law proposed for the ratification or rejection by the people. It is, therefore, not a plebiscite contemplated by the aforesaid Sections 2 and 3 of Article XI of the New Constitution but merely a referendum, advisory or consultative in character.

Political democracy is essentially a government of consensus. The citizen has "a right and a duty to judge his own concerns, his acts and their effects, as they bear on the common good. If they entail the common acts of the community, he again has the duty and right to contribute to the common deliberation by which the acts of the community are decided." [7] Common deliberation or mutual persuasion occurs on all levels of society, and as a result thereof a common judgment or consensus is formed on those matters which affect the democratic polity. This is based on the premise that sovereignty in a political democracy resides in the people and that their government is founded on their consent. It is in the formulation of this consensus whether in an election, plebiscite, direct legislation or advisory referendum or consultation, that the political community manifests its consent or dissent. The national leadership as the elected representative of the national community has the duty to be responsive and responsible to this sovereign will. It has been said that the President "speaks and acts as the people's agent. He lays claim to a mandate from them for his acts. Authority descends upon him from the nation, not from the other organs of government." [8] In his dual role as Chief Executive and Legislator under martial law, the incumbent President has, therefore, a greater degree of accountability to the political community. To discharge

effectively that responsibility, he has to ascertain the people's consensus or common judgment and to act in accordance therewith. Only then can it be said that his actions represent the people's collective judgment and, therefore, entitled to their whole-hearted support. The coming referendum is a national undertaking affecting the future of the country and the people. It, therefore, requires the involvement of every Filipino. By participating in the national consultation or advisory referendum of February 27, 1975, the Filipino people will prove to the rest of the world their maturity and capability as a people to make major decisions.

V

It is nevertheless asserted that a referendum held under present existing circumstances is of no far-reaching significance because it is being undertaken in a climate of fear. The infirmity of such a priori judgment is evident from the fact that it is not based on reality. It betrays a lack of awareness of the strength and character of our people. It is contradicted by past experience. There has been a deliberate policy to lift gradually the strictures on freedom attendant to a regime of martial law. Thus, State restrictions on press freedom had been removed, except over publications which, because of their subversive or seditious character, are deemed incompatible with the public safety. Freedom of discussion and of assembly are now encouraged. No less than the incumbent President of the Philippines has underscored the need for an accurate and honest canvass of the people's sentiments. As the nation's leader, he is called upon to make bold decisions in the face of the grave problems confronting the nation, but he is convinced that such decisions cannot be effective unless rooted in the will and reflective of the true sentiments of the sovereign people.

Given the determination of the incumbent President to ascertain the true sentiments of the people, and considering the measures, instituted by the Commission on Elections to safeguard the purity of the ballot, there appears, therefore, no basis for petitioner's apprehension that the forthcoming referendum will not reflect the people's untrammelled judgment.

The foregoing opinion contains in brief the reasons for my concurrence with the main opinion and the separate opinions of Justices Castro and Barredo.[1] John Locke called upon the English doctrine of prerogative to cope with the problem of emergency. He was of the view, that in times of danger to the nation, positive laws set down by the legislative might be inadequate or even a fatal obstacle to the promptness of action necessary to avert catastrophe. "In these situations the Crown retained a prerogative 'power to act according to discretion for the public good, without the prescription of the law and sometimes even against it.'" The prerogative "can be nothing but the people's permitting their rulers to do several things of their own free choice where the law is silent, and sometimes too against the direct letter of the law, for the public good and their acquiescing in it when so done." The prerogative was therefore exercisable only for the public good. Rousseau assumed that, in time of emergency, there is need for temporary suspension of democratic processes of government. Contemporary political theorists observed that in response to the problems posed by an emergency, constitutional democracies have employed constitutional dictatorship. The "President's power as Commander-in-Chief", wrote Corwin, "has been transformed from a simple power of military command to a vast reservoir of indeterminate powers in time of emergency". (Corwin, *The President: Office and Powers*, pp. 312, 318, 1948). Frederick M. Watkins, who made a classic study of the Weimar experience with emergency powers, places his real faith in a scheme of "Constitutional dictatorship" provided "it serves to protect established institutions from the danger of permanent injury in a period of temporary emergency, and is followed by a prompt return to the previous forms of political life." Clinton L. Rossiter, on the basis of the historical experience of Great Britain, France, Weimar Germany and the United States, adverts to the scheme of "Constitutional dictatorship" as solution to the vexing problem presented by emergency. Charles H. McIlwain clearly recognized the need to repose adequate power in government during emergency. "And in discussing the meaning of constitutionalism he insisted that the historical and proper test of constitutionalism was the existence of adequate processes for keeping government responsible.

He refused to equate constitutionalism with the enfeebling of government by an exaggerated emphasis upon separation of powers and substantive limitations on governmental powers." (Smith & Cotter: Powers of the President During Crisis, 1972 Ed.)

[2] L-36142, L-36164, L-36165, L-36236, and L-36283, 50 SCRA 30-392. This was concurred in by Justices Barredo, Makasiar and Esguerra.

[3] Ibid., 361-392.

[4] 59 SCRA 183; Separate opinion of Justice Barredo, Ibid., p. 322; Separate opinion of Justice Antonio with the concurrence of Justices Makasiar, Fernandez and Aquino, Ibid., p. 460; Separate opinion of Justice Fernandez, Ibid., p. 522.

[5] "The democracy of Rousseau is also intolerant and absolutist, in that it hands over the individual completely to the community, refusing to recognize the citizen's right to freedom; in this respect it sets itself in opposition to the democracy of the French Revolution, which proclaimed and took under its protection the Rights of Man. Even Bonapartism, so far as it is supported by the people and so far as the latter has not resigned its sovereignty, can appear as democracy which may bear a conservative, reactionary, collectivist or anti-constitutional character, according to the circumstances." (Gerhard Leibholz, Politics and Law, 1965 Ed., pp. 28-29.)

[6] Ibid., p. 29.

[7] Scott Buchanan, So Reason Can Rule, The Constitution Revisited.

[8] Joseph Kallenbach, The Presidency and the Constitution.

CONCURRING OPINION

BARREDO, J.:

I concur in the judgment dismissing the petition. The following opinion is without prejudice to a more extended one in due time.

Consistently with my opinion in the habeas corpus or martial law cases, the Court has jurisdiction over the instant petition even if, as will be shown later, the matter of calling a referendum is by nature a political matter. Anent the possible contention that the title of President Marcos as President of the Philippines may not be collaterally attacked and that the proper remedy is quo warranto, under the authority of *Nacionalista Party vs. Felix Angelo Baustista*, 85 Phil. 101, I concede that the remedy of prohibition is not altogether improper.

The first ground of the petition is that President Marcos does not have any legal authority to call the referendum because he is not holding any public office. The specific arguments supporting this contention are that (1) Marcos is no longer President under the 1935 Constitution; (2) he is not President nor Prime Minister under the 1973 Constitution; (3) he is not the "incumbent President" contemplated in the transitory provisions of the new constitution; and, in any event, his transitory powers as "incumbent President" have already lapsed. The second and third grounds are that President Marcos does not have any power to legislate nor the authority to issue proclamations, decrees and orders having the force of law, hence he cannot issue decrees appropriating funds and, therefore, the decree calling for the referendum is void.

It is my considered conviction that these grounds are untenable.

President Marcos' authority to continue exercising the powers of the President under the 1935 Constitution and to

exercise those of President and Prime Minister under the 1973 Constitution is specifically provided for in Sec. 3(I), Article XVII of the 1973 Constitution. It is to me unquestionable that by virtue of these provisions, President Marcos' being the President of the Philippines, is constitutionally indubitable.

It was precisely because upon the effectivity of the New Constitution President Marcos would cease to be President under the 1935 Charter and would not then be occupying any office under the New Constitution, and, on the other hand, there would yet be no new president and no prime minister, that he, as "incumbent President" at that time had to be expressly granted the authority to exercise the powers of the President under the Old Constitution as well as those of the President and the Prime Minister under the new one, pending the election of these officers. Necessarily, there had to be a head of government until the new parliamentary system could be properly installed, and whether or not it would have been wiser to confer the powers in questions on some other official or body is not for the Court to decide. In the meantime, the title of President is the most appropriate to be held by him.

The contention that President Marcos may not be considered the "incumbent President" referred to in the Constitution because what is contemplated therein is the one who would be in office at the time of its ratification and that pursuant to the Javellana decision of the Supreme Court, the constitution has not yet been ratified, whereas, on the other hand, the term of President Marcos under the 1935 Constitution expired on December 30, 1973, is predicated wholly on the old theory advanced in the habeas corpus cases and which has already been discarded in the opinions therein, although perhaps, it is best that the Court made a categorical ruling which would clear all doubts on the matter and thereby do away with this issue once and for all. To that end, I would say that as far as the Court is concerned, its holding in Javellana that "there is no more judicial obstacle to the New Constitution being considered as in force and effect" should be understood as meaning that the charter is as valid and binding for all purposes as if it had been ratified strictly in accordance with the 1935 Constitution as petitioner's would argue it should have been.

The problem of constitutional construction raised in the petition is, does the Constitution contemplate that the interim assembly created by it would meet immediately and forthwith elect the new President and the Prime Minister? If this question were to be answered in the light of normal conditions, there could be some plausibility in suggesting an affirmative response, albeit not altogether conclusive. But no one can ever escape the fact that the Constitution was formulated and approved under abnormal and exceptional circumstances. The members of the convention were well cognizant of the fact that the country was then as it still is under martial law and that normal processes of government have not been in operation since its proclamation. We must assume that as practical men they knew that the procedure of shifting from the presidential to the parliamentary system would have to be reconciled with the demands of the martial law situation then obtaining. Above all it must have been obvious to the delegates that under martial law, President Marcos had in fact assumed all the powers of government. In other words, it must have been evident to them from what was happening that the immediate convening of the legislative body would not be compatible with the way President Marcos was exercising martial law powers.

It is but proper, therefore, that these transcendental historical facts be taken into account in construing the constitutional provisions pertinent to the issue under discussion. As I see it, given the choice between, on the one hand, delaying the approval of a new charter until after martial law shall have been lifted and, on the other, immediately enacting one which would have to give due allowances to the exercise of martial law powers in the manner being done by President Marcos, the convention opted for the latter. To my mind, it is only from this point of view that one should read and try to understand the peculiar and unusual features of the transitory provisions of the New Constitution.

Otherwise, how can one explain why, instead of giving the interim Assembly itself the power to convene motu

proprio as was being done in the regular sessions of the old legislature and as in the case of the regular National Assembly provided therein, said power has been granted by the Constitution to the incumbent President? Very significantly in this connection, whereas Section 1 of Article XVII very explicitly uses the word "immediately" in reference to the existence of the interim Assembly, there is no time fixed as to when the incumbent President should initially convene it. Withal, even the authority to call for the election of the new President and the Prime Minister was not lodged in the assembly but again in the incumbent President. Is it not logical to conclude that the reason behind all these unprecedented provisions is to avoid putting any hindrance or obstacle to the continued exercise by President Marcos of the powers he had assumed under his martial law proclamation and his general orders subsequent thereto? If the Convention were differently minded, it could have easily so worded the said provisions in the most unequivocal manner. And what makes this conclusion definite is precisely the insertion in the transitory provisions of Section 3(2) of Article XVII which makes all the proclamations, decrees, orders and instructions of the incumbent President part of the law of the land, which, in my considered view, is the Convention's own contemporary construction that during martial law, the administrator thereof must of necessity exercise legislative powers particularly those needed to carry out the objectives of the proclamation, with no evident limitation except that no particular legislation not demanded by said objectives shall infringe Section 7 of Article XVII which reserves to the regular National Assembly the power to amend, modify or repeal "all existing laws not inconsistent with this Constitution". Neither paragraph (1) nor paragraph (2) of Section 3 of the same article would have been necessary if the Convention had intended that the interim National Assembly would be immediately convened and the new President and the Prime Minister would be forthwith elected. Indeed, it is implicit in the provisions just mentioned that the delegates had in mind that there would be a considerable time gap between the going into effect of the New Constitution and the election of the new President and the Prime Minister. And they could not have been thinking merely of the possibility of protracted delay in the election of said officers because the Assembly itself, once convened, could have readily provided in the exercise of its inherent powers for what might be required in such a contingency.

In support of the foregoing views, I invoke the testimonies of Delegates Aruego, Tupaz, Ortiz, Pacificador and others which were quoted during the hearing and the deliberations. I will quote them in my extended opinion.

It must be borne in mind that once martial law is proclaimed, all the powers of government are of necessity assumed by the authority that administers the martial law and the operation of the regular government, including its legislature and its judiciary, is subjected to its imperatives. Of course, the Constitution itself is not ousted, but by the power that the Constitution itself vests in the Executive to issue the proclamation, it yields the application and effects of some of its provisions to the demands of the situation, as the administrator may in his bona fide judgment so determine. Otherwise stated, since laws and regulations would be needed to maintain the government and to provide for the safety and security of the people, the orders of the administrator are given the force of law. In that sense, the administrator legislates. If he can legislate, so also he can appropriate public funds.

To my mind, these postulates underlie the provisions of Sec. 3(2) of Article XVII. To reiterate, the said provision recognizes legislative power in the incumbent President and the scope of said powers is coextensive with what might be needed, primarily according to his judgment, to achieve the ends of his martial law proclamation, and in all other respects, they are limited only by the provisions of Sec. 7 of the same article, but, evidently, even this limitation must be reconciled with the fundamental criterion that the New Constitution was conceived, formulated and enacted with the basic objective of establishing the New Society for which martial law was proclaimed. In other words, since the known broad objective of Proclamation 1081 is not only to contain or suppress the rebellion but also to reform our society and reorganize and restructure our government and its institutions as the indispensable means of preventing the resurgence of the causes of the rebellion, it is obvious that any decree promulgated by the President in line with these purposes, including those appropriating the necessary funds

therefore, cannot be assailed as beyond the pale of the Constitution.

There is nothing in the letter of the Constitution concerning referendums. But it would be absurd to think that such paucity may be deemed to indicate that the government has no authority to call one. If there is anything readily patent in the Constitution, it is that it has been ordained to secure to the people the blessings of democracy and that its primordial declared principle is that "sovereignty resides in the people and all government authority emanates from them." Of course, it establishes a representative democracy, but surely, there is and there could be no prohibition in it against any practice or action that would make our government approximate as much as possible a direct one, which is the ideal. On the contrary, it is self-evident that conditions and resources of the country permitting, any move along such a direction should be welcome. In fact, at this time when there are fears about what some consider as an emerging dictatorship, referendums in the manner contemplated in the impugned presidential decrees provide the means for the most vigorous assertion by the people of their sovereignty, what with the participation therein of even the fifteen-year olds and non-literates and the concrete efforts being exerted to insure the most adequate submission and the utmost freedom of debate and consensus as the emergency situation would permit and to have the fairest recording and tabulation of the votes. Granting the good faith of everyone concerned, and there is absolutely no reason why it should be otherwise, a unique exercise of essential democratic rights may be expected, unorthodox as the experience may be to those who cannot understand or who refuse to understand martial law Philippine style. In principle, to oppose the holding of a referendum under these circumstances could yet be a disservice to the nation.

A plebiscite or election of officials prescribed by the Constitution for specific occasions must be distinguished from a referendum, which is an inherent constitution democratic institution, perhaps not normally convenient to hold frequently or regularly, but which in certain periods in the life of the nation may be indispensable to its integrity and preservation. The administration of martial law is usually considered as nothing more than submission to the will of its administrator. Certainly, there can be no objection to said administrator's holding a dialogue with the people and adopting ways and means of governing with their full acquiescence manifested in whatever happens to be the most feasible way of doing it. If it be assumed that a referendum under the aegis of martial law may not be an ideal gauge of the genuine will of all the people, no one would deny that if it is undertaken in good faith, and giving allowances to the imperatives of the situation, it can somehow reflect their sentiment on the grave issues posed. Besides, whether or not the people will enjoy sufficient and adequate freedom when they cast their votes in the challenged referendum is a question that is unfair to all concerned to determine a priori and beforehand. In any event, it is history alone that can pass judgment on any given referendum.

Upon the other hand, whether a referendum should be called or not and what questions should be asked therein are purely political matters as to which it does not appear to be proper and warranted for the Court to exert its judicial power in the premises. To be sure, the referendum in question could be a waste of the people's money in the eyes of some concerned citizens, while it may be a necessary and fruitful democratic exercise in the view of others, but what is certain is that considering its nature and declared purposes and the public benefits to be derived from it, it is the better part of discretion, granted to it by the Constitution for the Court to refrain from interfering with the decision of the President.

The claim that the Comelec may not be considered as the independent and impartial guardian of the results of the scheduled referendum has no basis in fact. From extant circumstances, the recent activities of that body have not been characterized by any perceptible design to influence such results in any direction. Referendums being, as they are, in the Philippines today, in the nature of extra-constitutional innovations, it seems but natural and logical and at this stage that the Comelec has been assigned to undertake the functions of formulating the questions,

which, after all has been done after a more or less nationwide gathering of opinions, and of subsequently explaining them to the people to best enable them to vote intelligently and freely.

I see no cause to be apprehensive about the fate of those who might wish to vote "no". To start with, the voting will be secret and is guaranteed to be so. And when I consider that even a strongly worded petition to enjoin the referendum has been openly ventilated before the Supreme Court with full mass media coverage giving due emphasis to the points vehemently and vigorously argued by Senator Tañada, who did not appear to be inhibited in the expression of his views, I cannot but be confirmed in the conviction that the apprehensions of petitioners are unfounded.

Under the New Constitution, every citizen is charged with the duty to vote. To vote in a referendum is no less a sacred civic obligation than to vote in an election of officials or in a plebiscite. The impugned decrees cannot therefore be constitutionally faulted just because they provide penalties for those who fail to comply with their duty prescribed in no uncertain terms by the fundamental law of the land.

Makalintal, C.J., Antonio, Esguerra, and Fernandez, JJ., concur.

SEPARATE OPINION

CASTRO, J.:

I vote to deny the petition.

At the threshold, and only for the purposes of this separate capsule opinion, I will assume (a) that this case before us is not in the nature of a quo warranto proceeding; (b) that the petitioners possess legal standing before the Court; and (c) that all the petitioners, whatever be the persuasion of their counsel, recognize the Court as the supreme judicial tribunal operating and functioning under the 1973 Constitution.

I find no particular difficulty in resolving what I regard as the two crucial issues posed by the petition.

1. On the matter of whether Ferdinand E. Marcos is still the President of the Philippines, the Transitory Provisions (Art. XVII) of the 1973 Constitution, more specifically Secs. 2, 3, 9 and 12 thereof, even if they do not mention him by name, clearly point to and recognize Ferdinand E. Marcos as the constitutional and lawful President of the Philippines. If there is any doubt at all — and I do not personally entertain any — that the said Transitory Provisions refer to President Marcos as the "incumbent President," then such doubt should be considered as having been completely dissipated by the resounding affirmative vote of the people on this question propounded in general referendum of July 27-28, 1973: "Under 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?"

2. On the matter of whether President Marcos, at the present time, can constitutionally exercise legislative power, I do not need to postulate that he derives legislative power from the constraints of a regime of martial law. To my mind, pars. 1 and 2 of Sec. 3 of the Transitory Provisions are unequivocal authority for President Marcos to legislate. These paragraphs read:

"The incumbent President of the Philippines shall initially convene the interim National Assembly and shall preside over its sessions until the interim Speaker shall have been elected. He shall continue to exercise his powers and prerogatives under the nineteen hundred and thirty-five Constitution and the powers vested in the President and the Prime Minister under this Constitution until he calls upon the interim National Assembly to elect the interim President and the interim Prime Minister, who shall then exercise their respective powers

vested by this Constitution."

"All proclamations, orders, decrees, instructions, 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 [the] lifting of martial law or the ratification of this 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 National Assembly."

Stated elsewhere, my reading of these provisions is that they constitute an unmistakable constitutional warrant for the "incumbent President" (meaning President Marcos) to legislate (until, at the very earliest, the interim National Assembly shall have been convoked).

The peripheral matter of whether President Marcos should now or soon convene the interim National Assembly is completely outside the competence of the Supreme Court to resolve, as, in my view, it is a political question addressed principally, basically, and exclusively to the President and the Filipino people.

Makalintal, C.J., Barredo, Antonio, Esguerra, and Fernandez, JJ., concur.

CONCURRING OPINION

FERNANDEZ, J.:

The present case calls for an interpretation of the New Constitution, particularly its Transitory Provisions. Privileged as I was to be a member of the Constitutional Convention that drafted the Constitution, I feel it my duty to write this concurring opinion in the hope that I may be able to shed light, even if only modestly, on the fundamental questions involved in this case, on the basis of what I personally know and in the light of the records of the Convention, to show the understanding and intention of the Delegates when they discussed and voted on the constitutional provisions involved in this case.

The pertinent provisions of the New Constitution upon which the parties in this case base their respective claims are:

"ARTICLE XVII

"TRANSITORY PROVISIONS

"SECTION 1. There shall be an interim National Assembly which shall exist immediately upon the ratification of this Constitution and shall continue until the Members of the regular National Assembly have been elected and have assumed office following an election called for the purpose by the interim National Assembly. Except as otherwise provided in this Constitution, the interim National Assembly shall have the same powers and its Members shall have the same functions, responsibilities, rights, privileges, and disqualifications as the regular National Assembly and the Members thereof.

"SEC. 2. The Members of the interim National Assembly shall be the incumbent President and Vice-President of the Philippines, those who served as President of the nineteen hundred and seventy-one Constitutional Convention, those Members of the Senate and the House of Representatives who shall express in writing to the Commission on Elections within thirty days after the ratification of this Constitution their option to serve therein, and those Delegates to the nineteen hundred and seventy-one Constitutional Convention who have opted to serve therein by voting affirmatively for this Article. They may take their oath of office before any officer authorized to administer oath and qualify thereto, after the ratification of this Constitution.

"Sec. 3. (1) The incumbent President of the Philippines shall initially convene the interim National Assembly and shall preside over its sessions until the interim Speaker shall have been elected. He shall continue to

exercise his powers and prerogatives under the nineteen hundred and thirty-five Constitution and the powers vested in the President and the Prime Minister under this Constitution until he calls upon the interim National Assembly to elect the interim President and the interim Prime Minister, who shall then exercise their respective powers vested by this Constitution.

"(2) All proclamations, orders, decrees, instructions, 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 this Constitution, unless modified, revoked, or superseded by subsequent promulgations, orders, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly.

" x x x x x x x x"

The discussion on these Transitory Provisions in the plenary session[1] of the Constitutional Convention on October 18, 19 and 20, 1972[2] and the votes thereon clearly show:

1. That the determination of the date the interim National Assembly should be convened was left to the judgment of the President, the country being, as it still is, under martial law;
2. That the incumbent President legally holds office as such having been authorized to continue in office and to exercise not only the powers of the President under the 1935 Constitution but also those of the President and Prime Minister under the 1973 Constitution, from the time the New Constitution was ratified on January 17, 1973 until the election of the interim President and interim Prime Minister which up to now has not yet taken place; and
3. That included in the powers of the President under the 1935 Constitution and the powers of the Prime Minister under the 1973 Constitution is the power to declare martial law which in turn includes the power to make all needful rules and regulations with the force and effect of law until the termination of the martial rule.

The minutes of the plenary session of the Convention of October 18, 1972 contain the sponsorship speech of Delegate Yaneza, Chairman of the Committee on Transitory Provisions. He described the proposed interim government as a practical response to our abnormal conditions presently obtaining in the country. He explained that in order to effectively implement reform measures under the New Constitution, the nation should be relieved of the burden of political and national elections during the transitory period. The proposed interim National Assembly should therefore be composed of present elective government officials, together with members of the Convention who would vote for its creation and who could be of great help, in view of their familiarity with the provisions of the New Constitution, in the enactment of reform measures to be approved by the interim National Assembly pursuant to the mandates of the New Constitution. Delegate Yaneza was interpellated by Delegates Suarez, Tupaz (A), Jamir, Ledesma (F), Alano, Sanchez, Molina, Siguion Reyna, Pimentel, Laurel, Encarnacion, Pacificador, Ordonez, Teves, Gonzales, and his co-sponsor, Delegate Abundo.

The following exchange took place between Delegate Pimentel and Delegate Yaneza.

"DELEGATE PIMENTEL (V): Thank you, Mr. Chairman. Now, Section 3 has been repeatedly the basis of certain questions. It says: 'the incumbent President of the Philippines shall initially convene.' Will it not be better we state here, 'shall immediately convene? Or we should provide a certain number of days or months perhaps after the ratification of the Constitution when the President shall initially convene the ad interim Assembly?

"DELEGATE YANEZA: Yes, Your Honor, we can. We see you point and we have discussed that in the Committee lengthily, but we arrived at a decision to give our President flexibility regarding this particular matter, Your Honor. And we feel that we have decided this matter with some wisdom and with consideration of the present situation obtaining in our country."(*Italics supplied*)

The minutes of the plenary session of the Convention of October 19, 1972 show, among others, the following:

Delegate Reyes (J) inquired whether the incumbent President of the Republic would be at the same time President and the Prime Minister under the interim Government. Delegate Yaneza answered affirmatively, adding that the President would actually have a triple personality since he would exercise powers under the two Constitutions.

Delegate Garcia (L.M.) asked whether the interim Assembly could convene without the approval of the President, to which Delegate Britanico (a co-sponsor) replied in the negative.

Delegate Barrera (former Supreme Court Justice) was the first to speak against the approval of Sections 1, 2 and 3 of the Transitory Provisions. He was interpellated by Delegates Lim, Laggui and Raquiza. He was followed by Delegate Teves who also spoke against the Transitory Provisions in question. Teves was interpellated by Delegates Purisima, Adil, and Siguion Reyna. Delegate David (J) was the next opposition speaker. He was in turn interpellated by Delegate Tupaz (A.).

On October 20, 1972, Delegate Concordia continued the opposition against the Transitory Provisions, followed by Delegate Garcia (L.M.) who was interpellated by Delegates Bersola, Catan and Leido.

The chair then declared the period of rebuttal open and recognized Delegate Cuaderno as first speaker. Cuaderno said that he favored the article on the interim Government mainly because of the benefits of martial law.

Delegate Mutuc was the next rebuttal speaker. He confined his speech to the ratification of all proclamations, orders, decrees, instructions and acts proclaimed, issued or done by the present administration under martial law, contending that only the sovereign people could pass judgment with finality on the same.

Delegate Fernandez followed. And the last rebuttal speaker was Delegate Serrano who maintained that the interim National Assembly was a necessity, to fill the vacuum of constitutional processes that could arise should the President continue in office beyond his tenure so that he could see the fruit of his efforts to restore normalcy in the country.

The strongest attack on the Transitory Provisions was delivered by Delegate Jesus Barrera of Rizal, a former Justice of the Supreme Court. This was rebutted by Delegate Estanislao A. Fernandez of Laguna (now a humble member of this Court). Both speeches covered all the principal points.

Modesty aside, we now beg to summarize their arguments as follows:

Delegate Barrera: It is immoral for us to vote Yes, because that would be practically electing ourselves as members of the interim National Assembly when we were elected by the people only for the purpose of writing a Constitution.

Delegate Fernandez: True, when we were elected, our mandate from the people was only to write a new Constitution. But then there was no martial law yet. With martial law, there arose a need for an interim Government, specifically, an interim National Assembly. No one has previously received any mandate from our people on who should be members of this interim National Assembly. No one can say as of now whether it is immoral, and even moral, for us to vote Yes. For my part, I will vote Yes because if I vote No, I would foreclose my right to become a member of this interim National Assembly. I will vote Yes. Afterwards I will consult with the people of the second district of Laguna on this matter. If they say "Fernandez, you committed an error", then I will not take my oath. However, if they say "Fernandez, you did well so that we can have an additional representative in the interim National Assembly," then I will take my oath. By that time, I think nobody can say it was immoral for me to have voted Yes. But what is most important is whether or not the members of the interim National Assembly succeed in the discharge of their duties and responsibilities. If they fail, then our people and history will condemn them. If they succeed, our people and history may commend

them.

Delegate Barrera: As long as the interim National Assembly does not call for the election of the regular members of the National Assembly, the members of this interim Assembly will continue in office. For how long, it is not determined. In view of the high salary of the members of the National Assembly (P60,000.00 a year), there will be a temptation for them not to call for the election of the members of the regular National Assembly, for a long, long time.

Delegate Fernandez: I disagree. We must grant that the members of the interim National Assembly would be possessed with a sense of decency and patriotism that would make them realize the impropriety of overstaying in office. And the people will always be there to demonstrate thru the media and the streets to compel the interim National Assembly to call for a regular election.

Delegate Barrera: But it is wishful thinking on the part of the members of the convention to vote Yes and thereby become members of the interim National Assembly because the President may unduly delay the lifting of martial law and the calling of the National Assembly into a session. Then he will be President for life.

Delegate Fernandez: What is the premise of the conclusion of the Delegate from Rizal that the President will unduly delay the lifting of martial law and the calling of the interim Assembly into a session? Nothing. For my part, I wish to advance a premise. If it is valid, the conclusion will be valid. I believe President Marcos will want to go down in history as a good President. If this premise is good, and I believe it is, then he will not abuse. He will lift martial law and convene the interim National Assembly at the proper time. He will not be President for life.

Delegate Abundo then said that the committee had accepted the following amendment: "(b) the Marino amendment to Section 2 concerning 'those members of both the Senate and House of Representative to express in writing to the Commission on Elections their option to sit in the assembly within 30 days after the ratification of the Constitution, etc. 'There being no objection, the above amendment was approved.

Delegate Yuzon proposed to fix the date of the election of the members of the regular Assembly to "not later than May, 1976." Delegate Remulla proposed 1977 instead. Delegate Yuson accepted the amendment, but when submitted to a vote, the amendment was lost. Other amendments were proposed and were lost.

Delelgate Pacificador moved to suspend the rules so that voting on the draft Transitory Provisions could be considered as voting on second and third reading and proposed that absent delegates be allowed to cast their votes in writing and deliver them to the Committee on Credentials within 72 hours from that day.

The voting followed and the chair announced that by a vote of 274 in favor and 14 against the draft Transitory Provisions were approved on second and third reading. And among the delegates that voted affirmatively in favor of these Transitory Provisions whose interpretation is now the subject of the present case, were: Delegate Alonto (former Senator from Lanao), Delegate Aruego (the well-known author on the framing of the Constitution), Delegate Baradi (former Ambassador), Delegate Borra (former COMELEC Chairman), Delegate Cuaderno (Member of the first Constitutional Convention and Economist who recently passed away), Delegate De las Alas (former Speaker of the House of Representatives), Delegate Laurel (who was President Protempore of the Convention), Delegate Feliciano Ledesma (Dean of the College of Law of San Beda), Delegate Oscar Ledesma (former Senator), Delegate Leido (former Congressman and Secretary of Finance), Delegate Liwag (former Secretary of Justice and Senator), Delegate Marino (former Executive Secretary and Secretary of Justice), Delegate Mutuc (former Executive Secretary and Ambassador), Delegate Father Pacifico Ortiz, Delegate Ceferino Padua (lawyer of former Senator Sergio Osmena, Jr.), Delegate Jose Ma. Paredes (former Justice of the Supreme Court), Delegate Godofredo Ramos (veteran legislator), Delegate Sinco (former UP President and an authority on Constitution Law), Delegate Serrano (former Secretary of Foreign Affairs), Delegate Sumulong (former

Congressman), Delegate Sinsuat (former Member of the Cabinet), Delegate Domingo Veloso (former Speaker Protempore of the House of Representatives), Delegate Concordia (former Congressman), and Delegate Fernandez.

The foregoing, in our humble opinion, clearly show:

a) That when the Delegates to the Constitutional Convention voted on the Transitory Provisions, they were aware of the fact that under the same, the incumbent President was given the discretion as to when he could convene the interim National Assembly; it was so stated plainly by the sponsor, Delegate Yaneza; as a matter of fact, the proposal that it be convened "immediately", made by Delegate Pimentel (V), was rejected; and

b) That the incumbent President, or President Marcos to be more specific, was to continue in the office as President with triple powers, upon and even after the ratification of the New Constitution (January 17, 1973), and until the election of the interim President and interim Prime Minister (which has not taken place even up to now), and even after December 30, 1973 when the term of office of the incumbent President would have expired under the 1935 Constitution. Hence, the incumbent President continued and continues to be the constitutional and therefore de jure President of our country.

Subsequent events proved the wisdom of the decision of the Convention to give the President a wide discretion when to convene the interim National Assembly.

a) For although the peace and order condition of the country has improved, it suffered a relapse. The rebellion had not been completely quelled. Only last January 29, 1975, for instance, the newspapers carried the report that according to President Marcos — "Muslim insurgents had broken a truce in Mindanao and Sulu resulting in a fresh outbreak of hostilities and in heavy casualties." . . . "Muslim secessionists . . . had taken over three towns in Mindanao and Sulu." . . . " An Armed Forces contingent of 42 men, including three officers and the battalion commander, were wiped out in a surprise raid."

b) The oil crises which brought about worldwide inflation, recession and depression, created problems which, according to economic experts, can be solved effectively only with the President exercising legislative powers. A National Assembly would take a longer period of time to be able to pass the necessary legislation to cope with this worsening economic situation.

c) And what is most important is that in addition to the criticisms levelled in the Convention against the membership of the interim National Assembly, the people themselves expressed their disfavor against the interim Assembly by voting against its immediate convening when they ratified the Constitution on January 10-15, 1973. In the July 24, 1973 referendum, the Barangays reiterated their decision of January, 1973 to suspend the convening of the interim National Assembly. And in connection with the forthcoming February 27, 1975 referendum, many members of this interim National Assembly themselves asked that the question of whether or not the assembly should immediately be convened be eliminated, as in fact it was eliminated, because the people had already decided against the immediate convening of the interim Assembly.

Perhaps, it was a blessing in disguise that before this interim National Assembly could be convened, it has been "fiscalized" in advance by our people. The people apparently have expressed their distrust of this interim Assembly. This has become a standing challenge so that when this interim Assembly is finally convened, its members may discharge their duties and responsibilities in such a manner as to rebut successfully the basis for the opposition of the people to its being convened in the meantime.

I have adverted to the proceedings of the Constitutional Convention because it supports the literal interpretation of the Constitution which I now wish to make. The wording of the New Constitution is, I believe, clear. Considering the condition in which the country was at the time they approved the draft of the Constitution, it would have been

unthinkable for the Constitutional Convention not to have provided for a continuity in the office of the Chief Executive.

It is equally unthinkable that the Constitutional Convention, while giving to the President the discretion when to call the interim National Assembly to session, and knowing that it may not be convened soon, would create a vacuum in the exercise of legislative powers. Otherwise, with no one to exercise the lawmaking powers, there would be paralyzation of the entire governmental machinery. Such an interpretation of the Transitory Provisions is so absurd it should be rejected outright.

The original wording of Article XVII, Section 3(2) was that "all proclamations, orders, decrees, instructions and acts promulgated, issued or done by the present administration are hereby ratified and confirmed as valid." The words "ratified and confirmed" had been changed into "shall be part of the law of the land," because under the first clause, it would imply that the incumbent President did not have the authority to issue the proclamations, orders, decrees, instructions and acts referred to. The Convention conceded that the President had that power; and that is the reason why the phrase "shall be part of the law of the land" was the one finally used.

Parenthetically, the Constitutional Convention itself recognized expressly the legislative power of the incumbent President to enact an appropriation law when it asked and the same was given by the incumbent President additional funds at the time when there was already martial law.

I wish to add this legislative powers of the President under martial law should not be limited to the legislative power under the old classical concept of martial law rule. For the modern concept of martial law rule includes not only the power to suppress invasion, insurrection or rebellion and imminent danger thereof, but also to prevent their resurgence by the removal of the causes which gave rise to them; in a word, the reform of our society.

In the speech that I delivered as a Delegate from Laguna in the Constitutional Convention in its plenary session of October 20, 1972, I stated my firm conviction that President Marcos would want to go down in history as a good President. This was not only a belief but a challenge to him as well; and I am glad that subsequent events proved the correctness of my stand. In one of his books, he himself said:

"Moreover, we have embarked upon the experiment with the full knowledge that its outcome will depend on most of us, not just a few who are managing a 'command society.'" The misgivings are large; the most outstanding is the fear of a powerful few holding the many in subjection. But this fear misses the particularity of Philippine martial law; it cannot and will not exist without the clear and not manipulated consent of the governed. Our people will accept only sacrifices which are justifiable to them.

It is more than a homily to assert that the New Society is not a promised land that patiently awaits our arrival. More than a place in time or space, the New Society is a vision in our minds: this can be realized only through the strength of our resolution.

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." ((Marcos, *The Democratic Revolution in the Philippines*, 217-218, [1974])).

And in his speech before government elective officials of Bulacan last January 29, 1975 as reported in the newspapers of last January 30, 1975, he solemnly said that should the coming referendum fail to give him a vote of confidence, he would call the interim National Assembly to session and that more than that, he would ask the Assembly to immediately fix the date for elections of the members of the National Assembly; and that in such a case, he would run in his district for a seat in the Assembly.

And so, it is now up for the people to speak in the coming February 27, 1975 referendum. The information campaign should now go in full gear. The Commission on Elections should emphasize the freedom of debate during the campaign; it should emphasize the freedom of the people to express themselves not only in the debates but more so as they cast their ballots, by safeguarding the secrecy of the ballot. And the Commission should redouble its efforts to assure the people that there will be a true, correct and accurate reading of the ballots, counting of the votes, and a report of the results of the referendum.

IN VIEW OF ALL THE FOREGOING, I repeat my concurrence in the decision of this Court and in the separate opinions of Justices Castro and Barredo. The petition should thus be dismissed, without costs.

[1] Session of the entire Convention, not only of any of its Committees.

[2] At the time when martial law was already in effect, the same having been proclaimed on September 21, 1972.

CONCURRING OPINION

FERNANDO, J.:

It is a crucial question that is posed by this petition to call a halt to the February 27 referendum because of alleged constitutional transgressions. It is one fundamental in its essence, and what is more, impressed with the sense of immediacy to quiet doubts and to minimize uncertainties. There has been a quick response, hopefully not one given in haste, which is the enemy of thought. For all the vigor and the learning that characterized the advocacy of Senator Lorenzo M. Tañada, it did not suffice to elicit a favorable verdict. The petition did not prosper. So it has been adjudged, and I concur in the result reached. It is given expression in the notable opinion penned by Justice Makasiar which, on its face, betrays sensitivity to the magnitude and the grave implications of the serious problem posed. What is more, it has not avoided subsidiary issues which reach into vital areas of our constitutional system. To the extent that it reiterates tried and tested doctrines, I am of course in agreement. Certainly, there is not much difficulty for me in reaching the conclusion that the term "incumbent President" in the Transitory Provisions means what it says. If I submit this brief concurrence, it is only because of my belief that notwithstanding the brilliant and illuminating argumentation in depth by both eminent counsel, ranging far and wide in the domain of constitutionalism, there is no need as yet to express my views on some collateral matters. It suffices for me that I could rely on a juridical concept that is decisive. It is the fundamental principle that sovereignty resides in the people with all government authority emanating from them.^[1] It speaks, to recall Cardozo, with a reverberating clang that drowns all weaker sounds.

1. Respondents would interpose obstacles to avoid a decision on the merits. They are not insurmountable. They allege that the questions raised are political and therefore left for the political sovereign, not the courts.^[2] Such an assertion carries overtones of the Tañada vs. Cuenco^[3] ruling that a matter to be decided by the people in their sovereign capacity is of such a character. It has an aura of plausibility but it cannot stand the rigor of analysis. It confuses the end result with the procedure necessary to bring it about. It is elemental that constitutionalism implies restraints as well on the process by which lawful and valid state objectives may be achieved.^[4] What is challenged here is the actuation of the incumbent President for alleged failure to comply with constitutional requisites. It is much too late in the day to assert that a petition of that character is not appropriate for the courts. This is not to venture into uncharted judicial territory. There are landmarks all along the way. This is not then to trespass on forbidden ground. There is no disregard of the political question concept.

Then there is the attack on the standing of petitioners, as vindicating at most what they consider a public right and

not protecting their rights as individuals.[5] This is to conjure the specter of the public right dogma as an inhibition to parties intent on keeping public officials staying on the path of constitutionalism. As was so well put by Jaffe:[6] "The protection of private rights is an essential constituent of public interest and, conversely, without a well-ordered state there could be no enforcement of private rights. Private and public interests are, both in a substantive and procedural sense, aspects of the totality of the legal order." [7] Moreover, petitioners have convincingly shown that in their capacity as taxpayers, their standing to sue has been amply demonstrated. There would be a retreat from the liberal approach followed in *Pascual vs. Secretary of Public Works*, [8] foreshadowed by the very decision of *People vs. Vera* [9] where the doctrine was first fully discussed, if we act differently now. I do not think we are prepared to take that step. Respondents, however, would hark back to the American Supreme Court doctrine in *Mellon vs. Frothingham*, [10] with their claim that what petitioners possess "is an interest which is shared in common by other people and is comparatively so minute and indeterminate as to afford any basis and assurance that the judicial process can act on it." [11] That is to speak in the language of a bygone era, even in the United States. For as Chief Justice Warren clearly pointed out in the later case of *Flast vs. Cohen*, [12] the barrier thus set up if not breached has definitely been lowered. [13] The weakness of these particular defenses is thus quite apparent. [14]

2. Now as to the merits. The success of petitioners would signify that the referendum scheduled for February 27 of this year will not take place. Believing as I do that the opportunity of the people to give expression to their views is implicit in the fundamental principle that sovereignty resides in them, I am unable to find sufficient merit in this petition. For all its logical and plausible aspect, it still does not admit of doubt, in my mind at least, that a conclusion different from that reached by this Court would be attended by deplorable consequences. For one thing, it would impress with the stigma of illegality the viable procedure that under the stern realities of the present is the only one in the horizon for ascertaining the desires of the people. Moreover, under a republican regime, even under normal times, their role is limited to the choice of public officials, thereafter to be held to accountability through their informed, even immoderate, criticism. Now with this proposed referendum, they will be sounded out on what they think and how they feel on matters of significance. Even assuming its consultative character, it remains at the very least a step in the right direction. It may not go far enough, but there is progress of sorts that hopefully may eventually lead to the goal of complete civilian rule. It stands to reason, at least from my standpoint, that when people are thus allowed to express their wishes and voice their opinions, the concept of popular sovereignty, more so under crisis conditions, becomes impressed with a meaning beyond that of lyric liturgy or acrimonious debate devoid of illumination. Nor is this to discern new waves of hope that may ultimately dissolve in the sands of actuality. It is merely to manifest fidelity to the fundamental principle of the Constitution. It dates back to the American Declaration of Independence of 1776. The government it sets up derives its just powers from the consent of the governed. The basis of republicanism, to paraphrase Lerner, is that the majority will shall prevail, the premise being that an ordinary citizen, the common man, can be trusted to determine his political destiny. [15] Thereby, as Bryn-Jones pointed out, the controlling power, the governmental authority in the language of the Constitution, is vested in the entire aggregate of the community. [16] It is in that sense, as Justice Laurel stressed in *Moya vs. Del Fierro*, [17] that an "enfranchised citizen [is] a particle of popular sovereignty and [is] the ultimate source of established authority." [18] There is reliance likewise to this excerpt from the eloquent opinion of Justice Jackson in *West Virginia State Board of Education vs. Barnette*: [19] "There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." [20] If that is true of the United States, so should it be in our land. It caters to man's fundamental yearning for some degree of participation in the process of reaching fateful decisions. While courts have to deal with the necessities of their time, the ideal should remain untarnished.

3. It follows therefore that the will of the people given expression, even in an unofficial manner but accurately ascertained, is impressed with a decisive significance. It is more than just a foundation for societal or political development. Whenever appropriate, it determines what is to be done. Its significance is vital, not merely formal. It is understandable then why in *Javellana*,^[21] one of the issues passed upon by this Court is the effect of acquiescence by the people to the present Constitution even on the assumption that it was not ratified in accordance with the 1935 Charter. It may not be amiss to recall what I did state on that point in my separate opinion: "Nor is the matter before us solely to be determined by the failure to comply with the requirements of Article XV. Independently of the lack of validity of the ratification of the new Constitution, if it be accepted by the people, in whom sovereignty resides according to the Constitution, then this Court cannot refuse to yield assent to such a political decision of the utmost gravity, conclusive in its effect. Such a fundamental principle is meaningless if it does not imply, to follow Laski, that the nation as a whole constitutes the 'single center of ultimate reference,' necessarily the possessor of that 'power that is able to resolve disputes by saying the last word.' If the origins of the democratic polity enshrined in the 1935 Constitution with the declaration that the Philippines is a republican state could be traced back to Athens and to Rome, it is no doubt true, as McIver pointed out, that only with the recognition of the nation as the separate political unit in public law is there the juridical recognition of the people composing it 'as the source of political authority.' From them, as Corwin did stress, emanate 'the highest possible embodiment of human will,' which is supreme and must be obeyed. To avoid any confusion and in the interest of clarity, it should be expressed in the manner ordained by law. Even if such were not the case, however, once it is manifested, it is to be accepted as final and authoritative. The government which is merely an agency to register its commands has no choice but to submit. Its officials must act accordingly. No agency is exempt from such a duty, not even this Court. In that sense, the lack of regularity in the method employed to register its wishes is not fatal in its consequences. Once the fact of acceptance by the people of a new fundamental law is made evident, the judiciary is left with no choice but to accord it recognition. The obligation to render it obeisance fall on the courts as well."^[22]

To such a cardinal jural postulate is traceable my concurring and dissenting opinion in *Tolentino vs. Commission on Election*:^[23] "It was likewise argued by petitioner that the proposed amendment is provisional and therefore is not such as was contemplated in this article. I do not find such contention convincing. The fact that the Constitutional Convention did seek to consult the wishes of the people by the proposed submission of a tentative amendatory provision is an argument for its validity. It might be said of course that until impressed with finality, an amendment is not to be passed upon by the electorate. There is plausibility in such a view. A literal reading of the Constitution would support it. The spirit that informs it though would not, for me, be satisfied. From its silence I deduce the inference that there is no repugnancy to the fundamental law when the Constitutional Convention ascertains the popular will. In that sense, the Constitution, to follow the phraseology of Thomas Reed Powell, is not silently silent but silently vocal. What I deem the more important consideration is that while a public official, as an agent, has to locate his source of authority in either Constitution or statute, the people, as the principal, can only be limited in the exercise of their sovereign powers by the express terms of the Constitution. A concept to the contrary would to my way of thinking be inconsistent with the fundamental principle that it is in the people, and the people alone, that sovereignty resides."^[24]

As it was then, so, to my way of thinking, should it be now. With such a decisive consideration in mind, it is difficult to conclude that the infirmities imputed to the challenged Presidential decree are fatal. They do not suffer from the corrosion of substantial constitutional infractions. It is in that sense that I do not feel called upon to inquire into the nature of the authority conferred on the incumbent President under the Transitory Provisions, whether purely executive as contended by petitioners or both executive and legislative as argued by respondents. I leave that question for another day. What cannot be ignored is that with a National Assembly in existence but not

convened, it is only the Executive that can perform those essential and indispensable functions of dealing with the actual conduct of public affairs. That is the reality that stares us in the face. To deny his power to issue decrees and to appropriate public funds is thus to assure the paralyzation and impotence of government. Precisely then, if a referendum may lend itself to a reappraisal of the situation, by all means let it be conducted. This is not to deny that the judicial power to call a halt exists. It is merely to stress that it should be exercised with the utmost reluctance as is required by deference to the concept of popular sovereignty. To be more specific about the matter, this Tribunal should refrain from making use of that prerogative now.

Parenthetically, it may be observed that in 1973 when the Javellana decision was promulgated, I could not detect sufficient evidence as to the fact of acquiescence to the present Constitution. That was why I had to dissent from the judgment of the Court dismissing the various petitions assailing the validity of Proclamation No. 1102. Since then, with well-nigh two years having gone by, it is quite evident that the matter is no longer open to doubt. Under the standard set forth in the leading case of *Taylor vs. Commonwealth*,^[25] decided at the beginning of the century, no other conclusion is allowable. The present Constitution "having been thus acknowledged and accepted by the officers administering the government and by the people . . . and being, as a matter of fact, in force throughout . . . , and there being no government in existence . . . opposing or denying its validity, [it] is the only rightful, valid, and existing Constitution . . . and that to it all the citizens . . . owe their obedience and loyal allegiance."^[26]

4. There is finally, according to petitioners, a deficiency that mars the proposed referendum. It deserves serious consideration. It is their submission that under martial law, with people denied their basic freedoms, particularly their freedoms of expression and assembly, it cannot be validly held. In my concurring and dissenting opinion in *Planas vs. Commission on Elections*^[27] I express the apprehension that voters cannot "freely register their will," as "dissent may be fraught with unpleasant consequences."^[28] Further: "While it is to be admitted that the Administration has done its best to alleviate such a state of mind, I cannot in all honesty say, although I am prepared to concede that I may labor under a sense of undue pessimism, that the momentum of fear necessarily incident to such a regime has been reduced to a minimum."^[29] There is, I would say, still that feeling of insecurity as to what the morrow may bring, not from high and responsible officials, of course, but from those much lower in the ranks, whether in the armed forces or in the civilian component. Abuses, in the nature of things, cannot be completely curbed. In that sense, my misgivings are not unjustified. Nonetheless, I gain reassurance from the fact that as I did admit in my concurring and dissenting opinion in *Aquino vs. Enrile*,^[30] "the Philippine brand of martial law [is] impressed with a mild character."^[31] There is by and large a high degree of confidence in the capabilities and moderation of those entrusted with its implementation. To cite only an instance, it is a rare and impressive tribute to the Judge Advocate General, Justice Guillermo S. Santos of the Court of Appeals, that in a manifesto of reputable citizens both from the clergy and the laity, with a number of civic and political leaders, the suggestion was made that the conduct of the referendum should be under the auspices of a Committee of three with him as one of the members.^[32] I am not then in a position to press with the same degree of conviction my original stand. I would not be justified though in making such a concession if the constitutional rights to freedom of expression and the freedom of assembly may not be availed of. They are once again enshrined in our Bill of Rights — and in the very same language. If the Constitution is now fully in force, they must be allowed full operation. I do not deny that they are not absolute in character, but the limitation is supplied by the clear and present danger test. Nor do I deny that under emergency conditions, it is not unreasonable to enlarge the area of state authority, to seek national cohesiveness, and to discourage dissent. What I cannot sufficiently stress though is that dissent, even during such periods of stress, is not disloyalty, much less subversion. Thus the citizens can invoke in the exercise of the freedoms of expression and of assembly not the challenged decrees but their constitutional rights. Moreover, as thus construed as they should be to avoid any taint

of invalidity, they may be pulled back from the edge of the constitutional precipice. It would follow, and that to my mind would be to the credit of the Executive, that even in these trying and parlous times, there is adherence to a tolerant, compassionate view of life.

5. That is about all. In writing this brief concurrence, I had nothing in mind but to explain why I had to vote the way I did. It is quite obvious that for me the old landmarks of the law are still there to serve as guides, that precedents do serve as factors for continuity and stability not to be ignored but also not to be slavishly obeyed. For in constitutional law more than in any other branch of juristic science, much depends on the immediacy and the reality of the specific problems to be faced. Hence it has been truly said in days of crisis or of emergency, to stand still is to lose ground. Nonetheless, one has always to reckon with the imponderables and the intangibles, ever so often elusive to his understanding and disheartening to his deeply-cherished convictions. For he has no choice but to comply as best he can with the duty to decide in accordance with legal norms with roots that go far deeper than his personal preferences and predilections. So it has to be.

[1] According to Article II, Section 1 of the present Constitution: "The Philippines is a republican state. Sovereignty resides in the people and all government authority emanates from them." There is here a reiteration of Article II, Section 1 of the 1935 Constitution.

[2] Respondents' Comment, 6.

[3] Tañada vs. Cuenco, 103 Phil. 1051 (1957).

[4] Cf. Angara vs. Electoral Commission, 63 Phil. 139 (1936).

[5] Respondents' Comment. 5.

[6] Standing to Secure Judicial Review, 74 Harvard Law Rev. 1265 (1961).

[7] Ibid, 1266. Cf. Berger, Standing to Sue in Public Actions, 78 Yale Law Journal 816 (1969).

[8] 110 Phil. 331 (1960).

[9] 65 Phil. 56 (1937).

[10] 262 US 447 (1923).

[11] Respondents' Comment, 5.

[12] 391 US 83 (1968).

[13] Ibid, 92-95.

[14] Cf. Tan vs. Macapagal, L-34161, February 29, 1972, 43 SCRA 677.

[15] Cf. Lerner, Ideas Are Weapons, 470 (1939).

[16] Cf. Bryn-Jones, Toward a Democratic New Order 23 (1945).

[17] 69 Phil. 199 (1939).

[18] Ibid, 204.

[19] 319 US 624 (1943).

[20] Ibid, 641.

[21] Javellana vs. The Executive Secretary, L-36142, March 31, 1973, 50 SCRA 30.

[22] Ibid, 327-328. The works cited are Laski, Grammar of Politics, 4th ed., 34 (1937); McIver, The Web of Government, 84 (1947); and Corwin, The Higher Law Background of American Constitutional Law, in I Selected Essays on Constitutional Law 3(1938).

[23] L-34150, October 16, 1971, 41 SCRA 702.

[24] Ibid, 740-741.

[25] 44 SE 754 (1903).

[26] Ibid. Cf. Miller vs. Johnson, 92 Ky. 589, 18 SW 522 (1892); Bott vs. Wurts, 40 Atlantic 740 (1898); Arie vs. State, 23 Okl. 166 (1909); Hammond vs. Clark, 136 Ga. 313 (1911); Taylor vs. King, 130 A. 407 (1925); Wheeler vs. Board of Trustees, 37 SE 322 (1946).

[27] L-35925, January 22, 1973, 49 SCRA 105.

[28] Ibid, 159.

[29] Ibid.

[30] L-35546, September 17, 1974, 59 SCRA 183.

[31] Ibid, 300.

[32] Petition, Annex C. The other two members proposed are the President of the Integrated Bar, former Justice J.B.L. Reyes, whose reputation for probity and integrity is legendary, as Chairman, and another retired member of this Court.

SEPARATE OPINION**MUÑOZ PALMA, J.:**

The views I express in this separate opinion will briefly explain my position on the principal issues posed in this Petition for Prohibition.

1. President Ferdinand E. Marcos and no other is the person referred to as "incumbent President" in Article XVII to which we shall refer for short as the Transitory Provisions of the 1973 Constitution. That fact is beyond doubt because at the time the draft of the new Constitution was being prepared and when it was finally signed by the delegates to the 1971 Constitutional Convention on November 30, 1972, it was President Marcos who was holding the position of President of the Philippines.

2. As such incumbent President, President Marcos was vested by Section 3(1) of the Transitory Provisions with constitutional authority to continue as President of the Philippines during the transition period contemplated in said Article XVII that is, until the interim President and the interim Prime Minister shall have been elected by the interim National Assembly who shall then exercise their respective powers vested by the new Constitution, after which the office of the incumbent President ceases. During that transition period, President Marcos was given

extraordinary powers consisting of the powers and prerogatives of the President under the 1935 Constitution, and the powers vested in the President and the Prime Minister under the 1973 Constitution.[1]

3. Aside from the vast executive powers granted to the incumbent President as indicated above, he was granted under Section 3(2) of the same Transitory Provisions legislative powers, in the sense, that all proclamations, orders, decrees, instructions, and acts which were promulgated, issued, or done by the incumbent President before the ratification of the Constitution were declared part of the law of the land, to remain valid, legal, binding or effective even after the lifting of martial law or the ratification of the Constitution, unless modified, revoked or superseded by subsequent proclamations, etc., by the incumbent President or unless expressly and explicitly modified or repealed by the regular National Assembly. As to, whether or not, this unlimited legislative power of the President continue to exist even after the ratification of the Constitution is a matter which I am not ready to concede at the moment, and which at any rate I believe is not essential in resolving this Petition for reasons to be given later. Nonetheless, I hold the view that the President is empowered to issue proclamations, orders, decrees, etc. to carry out and implement the objectives of the proclamation of martial law be it under the 1935 or 1973 Constitution, and for the orderly and efficient functioning of the government, its instrumentalities, and agencies. This grant of legislative power is necessary to fill up a vacuum during the transition period when the interim National Assembly is not yet convened and functioning, for otherwise, there will be a disruption official functions resulting in a collapse of the government and of the existing social order.

4. Because the grant of vast executive and legislative powers to the incumbent President will necessarily result in what the petitioners call a one-man rule as there is a concentration of power in one person, it is my opinion that it could not have been the intent of the framers of the new Constitution to grant to the incumbent President an indefinite period of time within which to initially convene the interim National Assembly and to set in motion the formation of the Parliamentary form of government which was one of the purposes of adopting a new Constitution. I believe that the interim National Assembly came automatically into existence upon the ratification of the 1973 Constitution. As a matter of fact, from the submission of the Solicitor General, it appears that many if not all of those entitled to become members of the interim National Assembly have opted to serve therein and have qualified thereto in accordance with the requirements of Section 2 of the Transitory Provisions.[2]

We cannot, therefore, reasonably construe the absence of a specific period of time for the President to initially convene the interim assembly as placing the matter at his sole pleasure and convenience for to do so would give rise to a situation in which the incumbent President could keep the interim National Assembly in suspended animation and prevent it from becoming fully operational as long as he pleases. This would violate the very spirit and intent of the 1973 Constitution more particularly its Transitory Provisions to institute a form of government, during the transition period, based upon the fundamental principle of the "separation of powers", with its checks and balances, by specifically providing that there shall exist immediately upon the ratification of the 1973 Constitution an interim National Assembly in which legislative power shall be vested, that there shall be the incumbent President who shall exercise all the powers and prerogatives which are executive in character, and that the judicial power shall continue to be vested in the Judiciary existing at the time of the coming into force and effect of the 1973 Constitution. The situation would also render nugatory the provisions of Section 5 of the Transitory Provisions which assign to the Interim National Assembly a vital role to perform during the transition period.[3]

While it is true that the convening of the interim National Assembly cannot be said to be simply at the pleasure and convenience of the President, however, the matter is one addressed to his sound discretion and judgment for which he is answerable alone to his conscience, to the people he governs, to posterity, and to history.

5. Coming now to the particular problem of the coming referendum on February 27, 1975, it is my view that the

act of the President in calling such a referendum not really in the nature of a legislative act which violates the present Constitution. I do not see any prohibition in the Constitution for the Chief Executive or the President to consult the people on national issues which in his judgment are relevant and important. I use the word "consult" because in effect the measure taken by the President is nothing more than consultative in character and the mere fact that such measure or device is called a referendum in the Presidential Decrees in question will not affect nor change in any manner its true nature which is simply a means of assessing public reaction to the given issues submitted to the people for their consideration. Calling the people to a consultation is, we may say, derived from or within the totality of the executive power of the President, and because this is so, it necessarily follows that he has the authority to appropriate the necessary amount from public funds which are subject to his executive control and disposition to accomplish the purpose.

6. I am constrained to agree with petitioners that a referendum held under a regime of martial law can be of no far-reaching significance because it is being accomplished under an atmosphere or climate of fear. There can be no valid comparison between a situation under martial rule and one where the privilege of the writ of habeas corpus is suspended, as discussed in the Opinion of Justice Makasiar, because the former entails a wider area of curtailment and infringement of individual rights, such as, human liberty, property rights, rights of free expression and assembly, protection against unreasonable searches and seizures, liberty of abode and of travel, etc.[4]

7. Finally, whatever maybe the totality of the answers given to the proposed referendum questions on local government will be of no real value to the President because under Article XI, Section 2, 1973 Constitution, it is the National Assembly which is empowered to enact a local government code, and any change in the existing form of local government shall not take effect until ratified by the majority of the votes cast in a plebiscite called for the purpose, all of which cannot be complied with for the simple reason that for the present there is no National Assembly. Moreover, any vote given on this matter cannot be truly intelligent considering the vagueness of the question as drafted and the short period of time given to the citizenry to study the so-called manager or commission type of local government being submitted to the voters.

8. In conclusion, if I concur in the dismissal of the Petition for prohibition it is for the simple reason that I believe that calling a referendum of this nature is a valid exercise of executive power not prohibited by the Constitution as discussed in number 5 of this Opinion.

[1] Article XVII: Sec. 3 (1) The incumbent President of the Philippines shall initially convene the interim National Assembly and shall preside over its session until the interim Speaker shall have been elected. He shall continue to exercise his powers and prerogatives under the nineteen hundred and thirty-five Constitution and the powers vested in the President and the Prime Minister under this Constitution until he calls upon the interim National Assembly to elect the interim President and the interim Prime Minister, who shall then exercise their respective powers vested by this Constitution.

[2] Ibid, Section 2. The Members of the interim National Assembly shall be the incumbent President and Vice-President of the Philippines, those who served as President of the nineteen hundred and seventy-one Constitutional Convention, those Members of the Senate and the House of Representatives who shall express in writing to the Commission on Elections within thirty days after the ratification of this Constitution their option to serve therein, and those Delegates to the nineteen hundred and seventy-one Constitutional Convention who have opted to serve therein by voting affirmatively for this Article. They may take their oath of office before any officer authorized to administer oath and qualify thereto, after the ratification of this Constitution.

[3] Ibid, Section 5. The interim National Assembly shall 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.

[4] Aquino, Jr. vs. Enrile, et al., and other cases, L-35546 and others. September 17, 1974 per Opinion Munoz Palma, J., 59 SCRA, 183, 632.

CONCURRING AND DISSENTING OPINION

TEEHANKEE, J.:

I concur with the main opinion insofar as it recognizes President Ferdinand E. Marcos as the "incumbent President" and head of government who is vested with authority under Article XVII, section 3 (1) of the Transitory Provisions of the 1973 Constitution to "continue to exercise his powers and prerogatives under the 1935 Constitution and the powers vested in the President and Prime Minister under this Constitution."

I am constrained, however, to dissent from the remaining portion thereof which dismisses the petition, on the basis of serious constitutional grounds as briefly expounded hereinafter.

1. It cannot be gainsaid that the single most important change effected by the 1973 Constitution is the change of our system of government from presidential to parliamentary wherein the legislative power is vested in a National Assembly^[1] 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."^[2] The President who is likewise elected by a majority vote of all the members of the National Assembly from among themselves "shall be the symbolic head of state."^[3]

To carry out the "orderly transition from the presidential to the parliamentary system", section 1 of the Transitory Provisions decreed that:

"SECTION 1. There shall be an interim National Assembly which shall exist immediately upon the ratification of this Constitution and shall continue until the Members of the regular National Assembly shall have been elected and shall have assumed office following an election called for the purpose by the interim National Assembly. Except as otherwise provided in this Constitution, the interim National Assembly shall have the same powers and its Members shall have the same functions, responsibilities, rights, privileges, and disqualifications as the regular National Assembly and the Members thereof." (Art. XVII)

Section 2 of the Transitory Provisions provides for the members of the interim National Assembly. The Solicitor General stated at the hearing that the interim National Assembly came into existence after the proclamation on January 17, 1973 of the ratification of the Constitution per Proclamation No. 1102 when the members thereof took their oath of office and qualified thereto in accordance with the cited section and continues in existence at the present time without having been convened.

Petitioners raise the questions as to the scheduled referendum called for February 27, 1975 that the calling of a referendum and the appropriation of funds therefor are essentially legislative acts while the transitory powers and prerogatives vested in President Marcos until the election of the interim Prime Minister and interim President under section 3 (1) of the Transitory Provisions are executive and not legislative powers, since the powers of the President under the 1935 Constitution and those of the Prime Minister under the 1973 Constitution are essentially executive powers; more so, with respect to the powers of the President under the 1973 Constitution which are

symbolic and ceremonial.

While the Solicitor General has cited the President's powers under martial law and under section 3 (2) of the Transitory Provisions[4] as vesting him with legislative powers, there is constitutional basis for the observation that his legislative and appropriation powers under martial law are confined to the law of necessity of preservation of the state which gave rise to its proclamation[5] (including appropriations for operations of the government and its agencies and instrumentalities).

Rossiter, as extensively cited by Solicitor General, has thus stressed that "the measures adopted in the prosecution of a constitutional dictatorship should never be permanent in character or effect. . . . The actions directed to this end should therefore be provisional. . . Permanent laws, whether adopted in regular or irregular times are for parliaments to enact." and that "a radical act of permanent character, one working lasting changes in the political and social fabric (which) is indispensable to the successful prosecution of the particular constitutional dictatorship . . . must be resolutely taken and openly acknowledged [as exemplified by U.S. President Lincoln's emancipation proclamation] . . . Nevertheless, it is imperative that any action with such lasting effects should eventually receive the positive approval of the people or of their representatives in the legislature."[6]

Even 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[7] are limited to such necessary measures as will safeguard the Republic and suppress the rebellion (or invasion) and measures directly connected with removing the root causes thereof, such as the tenant emancipation proclamation.[8] The concept of martial law may not be expanded, as the main opinion does, to cover the lesser threats of "worldwide recession, inflation or economic crisis which presently threatens all nations"[9] in derogation of the Constitution.

On the other hand, those legislative powers granted in the cited section 3 (2), known as the validating provision which validated the President's acts and decrees after the proclamation of martial law up to the ratification of the Constitution are limited to modifying, revoking or superseding such validated acts and decrees done or issued prior to the proclaimed ratification, since section 7 of the Transitory Provisions[10] expressly reserves to the National Assembly the legislative power to amend, modify or repeal "all existing laws not inconsistent with this Constitution."

The question is thus reduced as to whether now after the lapse of two years since the adoption of the 1973 Constitution, the mandate of section 3 (1) of the Transitory Provisions for the convening of the existing interim National Assembly should be implemented — not for purposes of an action of mandamus which cannot be availed of because of the separation of powers — but for the present action of prohibition against respondents officials which asserts that the questioned referendum comes within the constitutional domain of the interim National Assembly and that after the coming into "immediate existence of the interim National Assembly upon the proclamation of ratification of the Constitution, the "initial convening" thereof with the election of the interim Speaker and the election of the interim President and the interim Prime Minister should have followed as a matter of course. The cited provisions reads:

"SEC. 3. (1) The incumbent President of the Philippines shall initially convene the interim National Assembly and shall preside over its sessions until the interim Speaker shall have been elected. He shall continue to exercise his powers and prerogatives under the nineteen hundred and thirty-five Constitution and the powers vested in the President and the Prime Minister under this Constitution until he calls upon the interim National Assembly to elect the interim President and the interim Prime Minister, who shall then exercise their 'respective' powers vested by this Constitution." (Art. XVII)

2. The above quoted pertinent provisions indicate an affirmative answer. It is axiomatic that the primary task in constitutional construction is to ascertain and assure the realization of the purpose of the framers and of the people in the adoption of the Constitution and that the courts may not inquire into the wisdom and efficacy of a constitutional or statutory mandate.

Where the language used is plain and unambiguous, there is no room for interpretation. "It is assumed that the words in which constitutional provisions are couched express the objective sought to be attained. They are to be given their ordinary meaning except where technical terms are employed in which case the significance thus attached to them prevails. As the Constitution is not primarily a lawyer's document, it being essential for the rule of law to obtain that it should ever be present in the people's consciousness, its language as much as possible should be understood in the sense they have in common use. What it says according to the text of the provision to be construed compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say." [11]

The mandate of section 1 of the Transitory Provisions that the interim National Assembly shall "exist immediately upon the ratification of this Constitution" calls for its coming into existence "right away" as conceded by respondents at the hearing. Likewise, as affirmed by the Solicitor General, its members as provided in section 2 duly took their oath of office and qualified thereto, upon the proclamation of ratification. The clear import of section 3 in order to give meaning and effect to the creation and "immediate existence" of the interim National Assembly is that the incumbent President shall then proceed to "initially (i. e. 'in the first place: at the beginning')[12] convene" it and preside over its sessions until the election of the interim Speaker after which he calls for the election of the interim President and the interim Prime Minister "who shall then exercise their respective powers vested by this Constitution". (The "incumbent President" then bows out and is succeeded by the Prime Minister who may of course be himself).

This view is further strengthened by the expectations aired in the debates of the 1971 Constitutional Convention that a parliamentary government would be more responsible and responsive to the people's needs and aspirations. Thus, in section 5 of the Transitory Provisions, the interim National Assembly was charged 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" — urgent and long lasting measures which the President has single-handedly confronted up to now.

3. The manifestation of the Solicitor General that the scheduled referendum is merely consultative and thus includes the participation of voters below 18 years of age but at least 15 years old (who are not qualified enfranchised voters under Article VI on suffrage of the 1973 Constitution which decrees a minimum age of 18 years for qualified voters) adds weight to the view that the existing interim National Assembly be now convened and perform its constitutional functions as the legislative authority. From the very nature of the transitory provisions which created it, its existence must likewise be interim, i. e. temporary, provisional, of passing and temporary duration (as opposed to permanent and the regular institutions provided for in the first 15 Articles of the Constitution) until after it shall have reapportioned the Assembly seats [13] and called for the election of the members of the regular National Assembly. [14] The convening of the interim National Assembly with its cross-section of knowledgeable representatives from all over the country was obviously hopefully conceived to serve (more than consultative referendums) to apprise the President of the people's and their constituencies' views as well as to assist him as mandated by the Constitution in the enactment of priority measures to achieve fundamental and far-reaching reforms.

4. While it has been advanced that the decision to defer the initial convocation of the interim National Assembly was supported by the results of the referendum in January, 1973 when the people voted against the convening of the interim National Assembly for at least seven years,[15] such sentiment cannot be given any legal force and effect in the light of the State's 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 to "give priority to measures for the orderly transition from the presidential to the parliamentary system" and the other urgent measures enumerated in section 5 thereof.[16]

This seems self-evident for the sovereign people through their mutual compact of a written constitution have themselves thereby set bounds to their own power, as against the sudden impulse of mere and fleeting majorities.[17] 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.[18]

5. Finally, the imposition of penal sanctions of imprisonment and fine upon the citizens who fail to register and vote in the scheduled referendum is open to serious constitutional question. It seems clear that the calling of "consultative referendum" is not provided for nor envisaged in the Constitution as the appropriate vehicle therefor is provided through the interim and regular National Assemblies. It should perhaps be reexamined whether the mandate of the Constitution that "it shall be the obligation of every citizen qualified to vote to register and cast his vote" (at elections of members of the National Assembly and elective local officials and at plebiscites, as therein provided for) and the criminal penalties imposed in the questioned decrees should be deemed applicable to such extra-constitutional consultative referendums wherein non-qualified voters (the 15-year olds up to below 18) are asked to participate.

[1] Art. VIII, sec. 1, 1973 Constitution.

[2] Art. IX, secs. 1 and 3, *idem*.

[3] Art. VII, secs. 1 and 2. *idem*.

[4] "(2) All proclamations, orders, decrees, instructions 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 this 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 National Assembly." (Art. XVII, sec. 3)

[5] "As necessity creates the rule, so it limits its duration."

[6] Solicitor General's Comment, at pp. 24-26, citing Constitutional Dictatorship, 1948 ed. by Clinton Rossiter, 1948 ed.

[7] Article IX, sec. 12, 1973 Constitution Martial Law provision

[8] P.D. No. 27, Oct. 21, 1972 and amendatory decrees.

[9] Main opinion, at page 5.

[10] "SEC. 7. All existing laws not inconsistent with this Constitution shall remain operative until amended, modified, or repealed by the National Assembly." (Art. XVII)

[11] *J.M. Tuason & Co., Inc. vs. LTC*, 31 SCRA 413, 422-423, per Fernando, J. *italics supplied*.

[12] Webster's Third Int. Dictionary.

[13] Art. XVII, sec. 6.

[14] *Idem*, sec. 1.

[15] Main opinion, at page 9. See Proc. No. 1103, dated Jan. 17, 1973 wherein the President proclaimed "that the convening of the interim National Assembly shall be suspended" on the basis of the therein stated premise that "fourteen million nine hundred seventy six thousand five hundred sixty-one (14,976,561) members of all the Barangays voted for the adoption of the proposed Constitution, as against seven hundred forty-three thousand eight hundred sixty-nine (743,869) who voted for its rejection; but a majority of those who approved the new Constitution conditioned their votes on the demand that the interim National Assembly provided in its Transitory Provisions should not be convened."

[16] *Supra*, at page 5.

[17] Cf. *Duncan vs. McCall*, 139 U.S. 449, 35 L. Ed. 219.

[18] Cf. *Tolentino vs. Comelec*, 41 SCRA 702 (Oct. 14, 1971) and cases cited.

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