FORUM 4

Rapporteur's Report

President Ferdinand Marcos was known to be highly legalistic, i.e., he tried to ensure that everything that he did—including the declaration of martial law—had legal basis. Precisely how did Marcos do this? Why is this "legal architecture" rarely discussed? How was the judiciary, especially the Supreme Court, involved therein? Could the justices have prevented the dictatorship? Could "constitutional authoritarianism" happen again? These were the key issues discussed in the fourth forum of the "*Marcos Pa Rin! Ang mga Pamana at Sumpa ng Rehimeng Marcos* (Marcos Still! The Legacy and the Curse of the Marcos Regime)" series. The forum's panelists consisted of two law professors—one who was at the height of his career in the University of the Philippines (UP) College of Law during the Marcos administration, another a law student during the dictatorship who later became a legal academic of international renown—and a journalist who has pioneered in-depth investigative reporting on the Supreme Court of the Philippines. A fourth panelist—human rights lawyer Rene Saguisag—was unable to attend due to health concerns. He did, however, sent a short note addressing the forum's key questions. The moderator read this to the audience.

Third World Studies Center director Ricardo T. Jose highlighted how many of Marcos's legal issuances—especially his presidential decrees, which were legally at the same tier as congressional/parliamentary acts—remain in force. He also noted the difficulty of deciphering "legalese," thus entrusting the panelists with the task of discussing legal issues "in more understandable language."

"Marcos was Just Being President"

The first speaker was Froilan Bacungan, who was an alumnus of the UP College of Law and the dean thereof from 1978-1983. Before becoming

dean, he was the director of the UP Law Center. Bacungan answered the forum's guide questions in a straightforward manner, mainly by citing legal provisions. He stated that Marcos was just "fully implementing his oath of office" as per Article VII, Section 7 of the 1935 constitution throughout his time in office. On the rarity of public discussions about the legal structure that supported/legitimized the Marcos regime, Bacungan lamented that this was because "the discussion about the Marcos regime in public has been only to the extent that you justify your position as pro-Marcos [or] anti-Marcos."

Prompted by the question concerning lawyers who were part of the dictatorship, Bacungan insisted that he was "never a part of the Marcos regime," listing his duties at the UP College of Law. He also mentioned that at the time martial law was promulgated, he was the executive secretary of the Philippine Chamber of [Commerce and] Industries. He thereafter stated that he shared the views of his contemporaries in legal academia such as Crisolito Pascual and Irene Cortez, who believed that Marcos was simply "being president under the 1935 constitution." Turning the spotlight to the Supreme Court, Bacungan highlighted that the Supreme Court is limited by the prevailing constitution—their task is to "interpret what is [in] the constitution"; if it does "something else," then "it is a fake Supreme Court."

Bacungan highlighted the provisions of the 1987 constitution that ensure that an authoritarian regime will never engulf the country again—unless the Philippines reverts to the 1935 constitution, which he believed should never happen. Martial law, he again emphasized, was promulgated by a commander-in-chief under the 1935 constitution. He described Ferdinand Marcos as "the valedictorian of his class, the best and [most] brilliant mind of the legal profession at the time." Marcos was also supported by many Supreme Court justices and other highly regarded lawyers were "all friends."

"Anointing Power with Piety"

Raul Pangalanan borrowed Roberto Unger's phrase "anointing power with piety" to encapsulate his presentation. His talk's focus was on "anointing dictatorial power with constitutional piety because that was the role that the law played in legitimizing the dictatorship." Pangalangan noted that "the best challenge of liberal lawyers against Marcos is that he was lying: that there was no basis for the declaration [of martial law, as] either he was exaggerating the communist threat, or

fabricating uprisings." This challenge "failed to deligitimize the rule of Marcos"; the human rights lawyers—who had to disguise "Left theory" as "bourgeois liberalism" to broaden their appeal to the forces opposing Marcos, especially after the assassination of Benigno "Ninoy" Aquino—did eventually become the opposition's leaders, but their legal theorization was, since the promulgation of *Lansang v. Garcia* on 11 December 1971, outpaced by that of Marcos.

Pangalangan dwelled on what he saw as a paradox. *Lansang v. Garcia*, which focused on the legality of arrests made while Marcos suspended the privilege of the writ of habeas corpus in 1971, was traditionally taught in law schools as a "good decision," as it was an "assertion of the primacy of civilian authority over the military, [of] the primacy of courts over commander-in-chief powers." It applied "the test of strict legality." Meanwhile, the 1973 case *Javellana v. Executive Secretary*, which legitimized the ratification of the 1973 constitution, thereby allowing Marcos to practically extend his dictatorial rule indefinitely, was usually interpreted as a "bad decision," seeing as how the facts of the ratification process was disputed, even by some of the Supreme Court justices. Democrats, according to Pangalangan, criticized *Javellana* because it "replaced strict legality with political reality after the fact." But Marcos always saw both as being in his favor—in fact, as per his diaries, Marcos considered *Lansang* to be crucial for his legal and political designs for the country.

Pangalangan resolved the paradox by showing (1) that *Lansang* resolved that the Supreme Court had the power to review the factual bases of the president's use of his commander-in-chief powers, but it conceded that the commander-in-chief was in the best position to know whether there is evidence (say, of rebellion) for employing those powers—that was "a very low threshold of validity"; (2) having thus validated through *Lansang* that a state of rebellion existed in the country, he could thus declare martial law unopposed by the Supreme Court (some members of which he was "cozy" with anyway, as per his diaries); (3) having legitimately declared martial law (at least in the eyes of the law), thus effectively conferring upon himself dictatorial powers, Marcos's determination of the "legal" way to ratify the 1973 constitution, supposedly still with the people's consent, could not be questioned by the Supreme Court.

Pangalangan emphasized that this was the same logic applied by the Supreme Court to support the validity of Corazon Aquino's assumption of the presidency after the EDSA Revolution—it was in violation of the

1973 constitution, but "Cory, being in effective control of the entire country, [meant that] the legitimacy of her government was not justiciable but belongs to the realm of politics where only the people are judge." Pangalangan, however, noted that the Supreme Court "pretended to apply" strict legality to validate the (constitutional) assumption of the presidency of Gloria Macapagal-Arroyo after EDSA 2. It alleged factual bases for the resignation of president Joseph Ejercito Estrada, citing then executive secretary Edgardo Angara's diary, which was "not even presented before in court" but published in the *Philippine Daily Inquirer* after EDSA 2 concluded. Pangalangan thus asked, "if *Lansang*'s insistence on judicial supremacy was a high moment, then why would the court apply strict legality to validate EDSA 2?"

In conclusion, Pangalangan castigated liberal lawyers for having no other counterargument to Marcos's bases for martial law other than the claim that Marcos was lying. Pangalangan stated that Marcos was mostly telling the truth—there was an ongoing left-wing rebellion. It was human rights discourse that gave them a "common point of reference" with traditional (opposition) politicians, who shared in their view that law, especially the Bill of Rights, was "the embodiment of reason." However, Pangalangan emphasized that this view is also fallacious, as law is in fact "the embodiment of compromises, and dirty compromises at a deeper level."

CHALLENGES IN WRITING MEMORIES OF MARTIAL LAW

Marites Dañguilan-Vitug started her talk by asking, "Why is there a scarce popular documentation of the legal sleight of hand that was behind martial law?" The short answer was the state of archives in the Philippines—woefully incomplete. Dañguilan-Vitug shared that she had tried to locate transcripts of the oral arguments on the issues in *Javellana v. Executive Secretary*, but found none in relevant public and private libraries. She was able to find one journalistic account, by Fernando del Mundo, of one hearing, wherein the debate was rendered moot and academic because "news was relayed to the Supreme Court that Marcos at that very moment has just issued in Malacañang a decree proclaiming the plebiscite was approved by viva voce vote and the [new] constitution that he said was now in effect." Dañguilan-Vitug also noted that the justices did not leave behind memoirs. This lack of documents, which translates to a lack of work on important persons

written for a popular audience, was blamed by Dañguilan-Vitug for the still sterling reputations enjoyed by prominent lawyers who directly supported the dictatorship.

Dañguilan-Vitug then focused on some important documents that are publicly available—the Marcos diaries, which can be viewed at the library of the Presidential Commission on Good Government. In particular, she showed entries wherein the justices met with Marcos to discuss issues that were up for resolution by the Supreme Court—a blatant violation of the separation of powers of coequal branches of government. One particular highlight was Marcos's discussion with his "spy," Justice Fred Ruiz Castro, who once "disturbed" Marcos by stating, as per one diary entry, that "the justices are only human, affected by media, demonstrations, and propaganda or which is otherwise known as public opinion." Marcos also talked about a 1971 deal proposed by Castro wherein he would gradually lift the suspension of the privilege of the writ of habeas corpus so that "the decision to uphold [the legality of the suspension] would be unanimous." In an October 1972 entry, Castro mentioned to Marcos that they were studying cases by the US Supreme Court wherein the legality martial law was tackled only after it was lifted; he believed that the Supreme Court would do the same.

However, Dañguilan-Vitug highlighted what she believed should be taken with a grain of salt: in entries describing the issue of the ratification of the Marcos constitution, Marcos claimed that the only concern of the justices was security of tenure. Marcos stated that they did not approve of the provision wherein the president would be able to remove them from office. However, Dañguilan-Vitug showed one entry wherein, at a dinner with the justices in Malacañang, there was an agreement that it was now impossible to "unscramble the eggs already scrambled." After showing one last entry—wherein Marcos stated that the aforementioned dinner "went well"—Dañguilan-Vitug concluded by saying that "there is a need for popularly written, maybe book or a paper that will show how Marcos related with the justices, and of course, after forty-one years look at what a lack of our memory has brought us."

OPEN FORUM

Moderator Maria Luisa Camagay started the discussion by seconding Dañguilan-Vitug's observations about record keeping in the Philippines.

She noted that some important persons have a "hesitancy to write memoirs," and that "they prefer not to be interviewed." This was a running thread throughout the open forum. Dañguilan-Vitug talked about other (fruitless) hunts for documents, as well as the belief that there should be many other notes/letters/memoranda by Marcos, as he "kept notes of a lot of things that he did." A member of the audience raised the possibility of doing research (i.e., oral history) on the batchmates of Ferdinand Marcos in law school. Camagay noted that there are newly available or little-examined sources besides those already discussed, such as documents turned over by the military to the Commission on Human Rights, oral history interviews, published memoirs, and some presidential papers. Pangalangan noted that at least one human rights lawyer during the martial law era stated that they continued to file cases questioning the actions under martial Law even if they knew they would lose to "document the events because the cases will be the official record of what happened."

Pangalangan responded to the more law-related queries. He noted that Marcos and his lawyers tackled issues on a more theoretical level than their opponents, who relied on "tired, old, liberal theories." Thus, one of Marcos's legacies is showing that the theoretical underpinnings of legal legitimacy can be changed (e.g., to suit a chief executive's purposes). Pangalangan noted that such legalism was utilized by Arroyo, who avoided having most of her "state of emergency" declarations judicially voided by avoiding "the language of the constitution" on the use of commander-in-chief powers. Pangalangan believed that Filipinos are "schizoid about rules"—at times wanting literal interpretations, at times wanting "more common-sense [readings] of the rules"—which translates to the "kind of interpretative leeway" courts are afforded in differing (political) contexts. The left-Marcos dynamic—the former providing the latter with the factual basis for martial law, the latter using the former's acts to form airtight legal rationale for dictatorial rule—was also touched upon. On people power "as a process" of removing presidents, Pangalangan reiterated that it is "difficult to fit into a constitutional straightjacket," but there is nevertheless always an attempt to because of the allure of law—the equality before it that it purportedly promises, the protection of rights, etcetera.

During the open forum, Camagay also relayed comments sent by Rene Saguisag in response to the forum's guide questions. Saguisag said that Marcos became "superexecutive, supercourt, superlegislature, and

one-man Constitutional Convention (Amendment No. 6)" during martial law, whose orders (which had the effect of law) can at times be distilled as "the first lady [Imelda Marcos] wants this." Saguisag then stated that fear and dread, developed after years of foreign subjugation, kept the public from discussing Marcos's legal architecture. He then characterized the legal professionals who worked with/for Marcos as "Good Filipinos," like "Good Germans" during the time of Hitler, who were merely "following the law." Lastly, Saguisag opined that the way Estrada's ouster was validated by the Supreme Court is one indication that the executive can still exercise control over the judiciary, thus "we have to be eternally vigilant."❁**—PAOLO NIÑO REYES**

MARIA LUISA T. CAMAGAY, professor, Department of History, College of Social Sciences and Philosophy, UP Diliman served as the forum's moderator.