

A DEMOCRACY BY ANY OTHER NAME
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*We stand with the Philippines,
we stand with you, sir [Ferdinand E. Marcos] ...
We love your adherence to democratic principles
and to the democratic processes[.]*

-Vice President George H.W. Bush¹

*Ferdinand E. Marcos provided the
atmosphere of impunity that allowed
the molestations, rape, torture, death,
and disappearance of thousands of
Filipinos. Ferdinand E. Marcos was
the President who, rather than preserve
and protect the public trust, caused
untold anguish upon thousands of
Filipino families. Their trauma, after
all these years, still exists.*

-J. Leonen ²

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¹ George H. W. Bush, Memorable Quotes About Marcos, The Washington Post, (March 30, 1986), https://www.washingtonpost.com/archive/politics/1986/03/30/memorable-quotes-about-marcos/83e24b71-8ce2-4990-8203-be9c0fbb782e/?utm_term=.c246027b1c35

² *Ocampo v. Enriquez*, G.R. No. 225973. November 8, 2016. (Leonen dissenting).

INTRODUCTION

Democracy, despite manifold practice, has escaped strict definition. Though the European Court of Human Rights has pronounced a *right* to democratic governance as a legal norm, history has likewise illustrated the dangers democracy holds. In the Philippines, the Marcos regime may have initially been the product of democratic processes, but it was simultaneously the nation's darkest chapter. Under Marcos' rule, tens of thousands of Filipinos were stripped of their fundamental rights as violence was used as a medium to enforce civil control. As of 1977, about 70,000 Filipinos were political detainees. A reported 34,000 were victims of torture, which included an array of methods such as confinement, isolation, rape, and molestation.³ About 3,240 were victims of *salvaging*—the colloquial reference for enforced disappearances.⁴

In both doctrine and practice, the Philippine notion of democracy shifted through the ages. It was not until the people's uprising in 1986, in what is now popularly referred to as the *People Power Revolution*, that the dictator was "forced out of office and into exile after causing twenty years of political, economic and social havoc."⁵ Unbeknownst to many, just half a decade prior his ouster, Marcos was celebrated as a bastion of democracy.⁶ Unexpected to all, just three decades later, the Philippine republic would face a second wave of authoritarian rule in its democratically elected President, Rodrigo Roa Duterte; himself a Marcos apologist.

The question is posed: Is human rights protection possible in the absence of genuine electoral democracy? With a heavy heart, the author seeks to illustrate how it may be so. Like the pen and the sword, a system of government is but a political tool—a mere instrument which holds both the prospect of poetic justice and the perils of ineffable abuse. Some argue that one is mightier than the other. I say that argument has been overtaken by history. Might is not found in the tool, but in the hand that wields it; whether it be clenched in iron fist or clad in velvet glove.

³ Presidential Communications Development and Strategic Planning Office, Martial Law in Numbers: A Martial Law Infographic, <https://drive.google.com/file/d/0B9c6mrXl4zoYcThkOENJmhtZEE/view> (last accessed Nov. 15, 2017).

⁴ *Id.* See generally Pangalangan, Fernandez, Tugade, Marcosian Atrocities: Historical Revisionism and the Legal Constraints on Forgetting, 19 Asia-Pac. J. on Hum. Rts. & L. 140 (2018).

⁵ *Marcos v. Manglapus*, G.R. No. 88211, September 15, 1989.

⁶ Lyndon B. Johnson, Memorable Quotes About Marcos, The Washington Post. (March 30, 1986), https://www.washingtonpost.com/archive/politics/1986/03/30/memorable-quotes-about-marcos/83e24b71-8ce2-4990-8203-be9c0fbb782e/?utm_term=.c246027b1c35

I. DEMOCRACY AND HUMAN RIGHTS

It has been emphatically proposed that “[w]ithout an effective democracy, human rights cannot be guaranteed.”⁷ Democracy refers to a system of government—the power or rule of the people.⁸ A rule not only expressed through electoral processes, but captured only through a “consolidation of democratic institutions and the strengthening of democratic practices, with democratic values and norms embedded in all parts of society.”⁹ *Human Rights*, on the other hand, refers to the rules of governance to which even the sovereign power must yield. Both the naturalist and political schools of thought, though disagreeing as to its deontology, merge as to its teleological purpose: the recognition of the *summum bonum* beyond the reach of political caprice.

Democracy and *Human Rights* are separate and distinct concepts yet are tightly intertwined; the former purportedly being a necessary means to enforce the latter:

A challenge common to all the freedoms is how to ensure that, where such restrictions are in principle necessary, they are implemented by the state in a proportionate manner. That requires a democratic society and one built on the rule of law. The freedoms are, in turn, part of the foundation of a democratic society.... They are all essential if a democratic society based on the participation of its members is to function successfully.¹⁰

The argument conflates necessity with feasibility; jejunely justifying the principle of democracy through prudential considerations. Undoubtedly, it may be argued that “free and fair elections are much more likely to protect individual rights, and vice versa[.]”¹¹ but neither does it assure it.

Hand-in-hand, the conclusion is far removed from reality. Even democratic governments, in both its procedural and substantive sense, may propagate human

⁷ Sangeeta Shah, *Thought, Expression, Association, and Assembly*, p. 233 in Moeckli et al.’s *International Human Rights Law*, (2nd Ed. Oxford University Press, 2014.) [hereinafter Shah]

⁸ Marc F. Plattner, *Populism, Pluralism, and Liberal Democracy*, *Journal of Democracy* 21.1, pp. 83. (2010) [hereinafter Plattner]

⁹ Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?* *European Journal of International Law* 22.2, pp. 515-516 (2011). [hereinafter Marks]

¹⁰ Shah, p. 236.

¹¹ Plattner, p. 84.

rights violations much in the same way that the human rights project is not isolated to democratic systems alone.¹² Indeed, Philippine history has shown that democratic states depart from human rights practices with political winds. This is seen in the phenomenon that is *Dutertismo*—a rejection of democratic principles legitimized through free and democratic elections. I ask: If democracy were in itself the cure to political ills, why has it resulted in the restoration of *Marxosian* repression?

II. COUNTER-MAJORITARIAN DEMOCRACY

It is difficult to accept democracy as a *sine qua non* to human rights protections when it, when left unqualified, positions as a source of human rights violations. Unfettered majoritarian rule poses the danger of opening the floodgates to an illiberal *Democracy* and utilitarian justification; setting aside individual rights for the greatest happiness for the greatest number.¹³ While liberal democrats argue *Vox populi, vox Dei*—the voice of the people is the voice of god—history has shown that the clamor of the crowd at times echoes the madness of the masses.

The reality is this: democracy is not without flaws.¹⁴ Populist democracies—genuinely elected by misguided majorities—do violate human rights. Democracy alone would not suffice absent the rule of law¹⁵—a quality not isolated to any one system of government. Indeed, it may be argued that that the remedy to the imperfections of democracy is less democracy:

Majoritarianism by itself does not capture the contemporary understanding of democracy... The principle of majority rule does not by itself constitute democracy... The solution to the problems of democracy cannot simply be more democracy, because liberal democracy is in tension with itself[.]¹⁶

The majoritarian tendencies of democracy must thus be tempered with counter-majoritarianism—a non-democratic process for democracy's dilemma. This is aptly illustrated by the courts of law, which is often the subject of counter-majoritarian critique. Judicial review, all-the-more judicial activism, is at times

¹² Anthony J. Langlois, Human Rights without Democracy? A Critique of the Separationist Thesis, *Human Rights Quarterly*, 25, p. 998 (2003). [hereinafter Langlois]

¹³ Plattner, p. 91.

¹⁴ Marks, p. 523.

¹⁵ Shah, p. 236.

¹⁶ Plattner, p. 84.

denounced for substituting the will of the masses with that of the magistrate.¹⁷ That critique, however, falls on its own terms; the judicial function being vital precisely to compensate for the flaws of democracy.

III. DEMOCRACY AS NECESSITY: AFFIRMING THE CONSEQUENT

Similar to Bentham's rights and remedy objection, it is argued that without democracy human rights would cease to be rights *per se*, but optional norms at the discretion of the sovereign.¹⁸ On the other hand, it is professed that "[w]ith democracy, the sovereign must serve the rights of the people."¹⁹ Langlois argues that it is only through democracy that:

[t]he people are able to ensure and demand their rights by having at their disposal mechanisms that would discipline the rights authority if it acted arbitrarily or in ways that abuse or neglect peoples' rights. Without this feedback mechanism giving people the right to ensure their rights are going to be properly administered, rights mean nothing. They are reduced to the level of glorified governmental largess.²⁰

It is not questioned that democracy and the protection of human rights are correlated in the sense that the former allows for the safeguard of the latter. However, it is a completely different matter to argue for its causation—that one serves as a *conditio sine qua non* to the other. It is not the legal system in place that determines the quality of governance, but the leadership entrusted to govern. The remedy thus lies not in the rigidity of legal structure, but in fluid social mores and the force of political will.²¹

This argument is met by definitional retreat—that “democracy is not just a matter of procedures and institutions, values and norms, transition and consolidation. It is a matter of struggle against determined, protracted, and highly organized resistance.”²² The argument follows the reasoning that a *true* democracy is one not

¹⁷ *Biraogo v. Philippine Truth Commission*. G.R. Nos. 192935 & 193036, December 7, 2010. (Serenio dissenting).

¹⁸ Langlois, p. 1016

¹⁹ *Id.*, at p. 1019

²⁰ *Id.*, at p. 1016

²¹ Marks, pp. 515-6

²² *Id.*, at p. 524.

only in form, but in practice. Thus, to be a genuine democracy, the system must in fact protect human rights.²³

This notion of *substantive* democracy is trapped within infinite regress. Democracy is celebrated as the bulwark of human rights, but in order to be democratically qualified, the system of government must uphold human rights *a priori* – a chicken or egg paradox that but begs the question.

CONCLUSION

Despite the lack of a universally accepted definition of democracy,²⁴ that system of government has been forwarded to be the ideal form of governance. Unfortunately, however, the latter is far from the reality. History shows that democracies around the world have failed to uphold human rights, and at times celebrate its violation. Though it may be questioned whether such governments are (substantively) democratic at all, such a critique would only beg the question.

What is more, perhaps it is the wrong question asked. There is an apparent incongruity in hinging rules of governance on systems of government. The Nuremberg Tribunal judgment famously pronounced that violations of “international law are committed by men, not abstract entities [.]” yet the *Democracy-as-Necessity* approach does the opposite; looking to the abstract entity (i.e. the governmental system) rather than the *Hintermann* to safeguard the rule of law (i.e. human rights).

The better theory is to understand the right to democracy as entitlement to a quality of governance rather than a form of government. After all, no governmental system can serve as a panacea for the ills of human rights. Democracy, Monarchy, Communism, Dictatorship—What’s in a name? That which we call a rose by any other word would smell as sweet, and good governance by any other name would be just as sought.

²³ Plattner, p. 84.

²⁴ Jure Vidmar, *Multiparty Democracy: International and European Human Rights Law Perspectives*, *Leiden Journal of International Law*, 23.1, 240 (2010).