

## **JUDICIAL ACTIVISM AND CIVIL DISORDER : THE PHILIPPINE EXPERIENCE IN RETROSPECT**

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### **I Introduction**

Conflict between the executive and judicial organs of government during times of acute civil strife is no new phenomenon. Yet the frequency of incidence and the degree of intensity of such conflict in many regions of Asia during the last decade warrant reflection. Malaysia is in the throes of a crisis aggravated by the firm resolve of the executive branch of government to secure the removal of the head of the judiciary. In India, throughout the emergency declared by former Prime Minister Indira Gandhi, the supreme Court had its collective conscience subjected to the severest strain. In Sri Lanka nine judges of the Supreme Court were irreconcilably divided on the question of constitutionality of legislation purporting to establish Provincial Councils, as an instrument for the conferment of a substantial measure of regional autonomy on the heartland of the Tamil minority, in partial implementation of the Accord signed with India in July 1987.

Contemporary constitutional law is a field in which judicial activism, no longer discreetly disguised, is acknowledged with disarming candour. An eminent Indian jurist has aptly remarked : "To accept jurisprudential adulthood the question is not any longer whether or not judges make law. Rather the questions are : what kind of law, how much of it and in what manner."<sup>1</sup> There are explicable reasons why trends which are only implicit in other areas of the legal system surface unequivocally in constitutional law. A judge of the Supreme Court of the Philippines, conceding that the court has long since shed the role of a mere interpreter and exercises instead true creative power in the moulding of policy, has commented : "It has always been recognised that in the large and undefined field of constitutional law, adjudication partakes of the quality of state craft."<sup>2</sup> Philippine judges have attributed this primarily to "the imponderables and the intangibles"<sup>3</sup> which ever represent a brooding presence in this field.

The experience of the apex judicial tribunal of the Philippines during the harshest days of the Marcos era offers valuable insights into a range of problems which are increasingly becoming commonplace. In 1972, at the height of the insurrection which had by then spread across almost the whole of the archipelago, President Marcos declared martial law, and the protection of the writ of *habeas corpus* was no longer fully available. Military tribunals were established, with purportedly unimpeachable jurisdiction to try civilians. The President sought, and obtained, a mandate from the Filipino people to remain in-office beyond the period stipulated in the constitution. The convening of the legislative assembly was postponed by Presidential order for as long a period as seven years, and for the whole of this period the President claimed the power not only to legislate directly but to initiate far-reaching constitutional changes. His prominent opponents were

incarcerated, and it was sought to withhold judicial remedies from them. These dramatic events form the backdrop to a series of landmark judicial decisions. The judicial responses discussed in this article continued right up to the overthrow of the Marcos regime in 1986.

Now that the dust has settled with the inauguration of a new epoch in the history of the Republic, it is worthwhile to stand back and probe dispassionately the critical issues which confronted the Supreme Court of the Philippines during its time of testing from 1973 until 1986. The conflict between order and liberty, between the security of the community and the freedom of the individual, was at the core of the harrowing events of the period. In a setting dominated by the collapse of inherited value systems, in public affairs no less than in other walks of life, the comfort of traditional modes of thought and evaluation sometimes yielded the cynicism and expediency nurtured by divisive forces. The dilemma of Philippine judges was an excruciatingly difficult one. When political ideology and constitutional doctrine were cast adrift from conventional moorings, it was to be expected that subjective judicial response and assessment would play a more vibrant role in forging approaches to the resolution of constitutional crises. As is clearly indicated by the trauma of development which unfolded in the Philippines, each judge tends to invoke as his guide his own hierarchy of values anchored in subjective considerations and his own perception of competing priorities in a context overwhelmed by ruthless onslaught on constitutional fundamentals.

The Philippine experience during these turbulent years typifies a significant pattern. Torn between the acknowledged need to fortify the executive in its resistance of subversion and the commitment to forestall the total eclipse of freedom by acquiescence in the blanket suppression of political dissent, the Supreme Court adopted strikingly discordant - and often provocative - postures. Judges who regarded the collective security and well-being of the community as the paramount consideration amidst the vicissitudes of the period, resorted to a variety of conceptual levers to buttress their reasoning. Implacably opposed to the attitudes of this group of judges, however, were several of their colleagues who were unyielding in their choice of the preservation of freedom as the overriding constitutional objective.

These contrasting reactions, against the background of a disintegrating social and political fabric, have an interest and importance far transcending national frontiers. They serve as a catalyst of the strengths and weaknesses of the judicial role in the domain of constitutional adjudication.

## II The declaration of Martial Law

The Philippine Constitution of 1973 reposed in the President, and Commander-in-Chief of the forces, the power to proclaim martial law in case of actual invasion, insurrection, rebellion and even "imminent danger" thereof.<sup>4</sup> Martial law was declared and maintained by President Marcos for over a decade. Its incidence

affected, at vital points, issues involving human dignity and freedom as well as a vigour of democratic institutions. The legitimate scope of judicial superintendence over executive action in this regard has been canvassed, and the rulings signify a remarkable spectrum of judicial opinion.

The school of thought opting for comparative detachment has had a pervasive influence on political events.<sup>5</sup> Typical of this approach are the judgments of the majority in *Aquino V. Enrile*.<sup>5</sup>

It has been readily recognised that, in the same manner that the power conferred on the executive by the Constitution is completed so also, the judicial power vested in the Supreme Court and in inferior courts is the whole of that power, without any abridgment or qualification. Indeed, Barredo J. has declared that "The judicial power of the courts being unlimited and unqualified, it extends over all situations that call for the ascertainment and protection of the rights of any party allegedly violated, even when the alleged violator is the highest official of the land or the government itself."<sup>6</sup> However, the salient feature of the reasoning by Barredo J. in this case where the most powerful among the opponents of President Marcos challenged the validity of the declaration of martial law by the President, consisted of a series of steps by which he all but negated the vitality of the seemingly interventionist principle with which the judgment is prefaced.

While asserting uncompromisingly that the court's jurisdiction to review the action of the executive in declaring martial law is total and incontrovertible, Barredo J. advocated a policy of judicial self restraint in this area. On the theoretical plane, the "political question" doctrine was invoked in support of the posture of withdrawal.<sup>7</sup> Characterized as in every sense a rule of law rather than a matter of convenience or expediency, the "political question" concept, developed in Philippine jurisprudence of the period as a resilient check on judicial activism, was postulated in terms of a salutary lever controlling the allocation of functions. Its value was said to be empirical, in that it facilitated the distribution of functions among the organs of the State in accordance with the pragmatic criterion of capability to discharge the allotted function with optimal effectiveness. The comment was made in unrepentant tones that just as, in law, judicial decisions rendered within the ambit of the courts' authority deserve the respect of the people, by the same token, the people's verdict on what is inherently theirs to decide, either directly or through governmental functionaries, must be accorded due deference by the judiciary.<sup>8</sup> From this standpoint, the "political question" doctrine was presented as a positive constitutional virtue which upheld the initiative and independence of the executive within its proper sphere and enhanced the esteem in which the judiciary was held, by discouraging involvement in partisan political issues. In sum, the doctrine was construed as requiring the absolute foreclosure of judicial investigation of matters encompassed by its scope, in recognition of the respect appropriately due to or coeval and independent branch of the government.<sup>9</sup>

These elements of policy have been reinforced, in judgments recommending voluntary restraint, by reference to a miscellany of factors which purport to demonstrate the manifest futility of the judicial role in these contexts. Each of the variants on this approach focuses upon the unavailability to judges of the means of discharging a supervisory function *vis-a-vis* in the relevant setting, with even moderate success.

While the prudence or the desirability of placing the Philippines or any part of the archipelago under martial law was admittedly a matter within the exclusive purview of the President,<sup>10</sup> there has been advertence to a vestigial responsibility on the part of the courts in examining objectively the sufficiency of the material adduced as the foundation of a rational judgment regarding the existence of unusual peril.<sup>11</sup> However, even this peripheral judicial supervision has seemed uncongenial to many judges. Esguerra J., expressing this mood of inhibition, has pointed out that the efficacy of the supervisory role must perforce depend on access to detailed information on the basis of which an independent appraisal of the existing circumstances could be arrived at by the court.<sup>12</sup> It was precisely the lack of reliable intelligence pertaining to a complex and rapidly changing military situation which stultified the court even if it were minded to embark on the task, in evaluating for itself the cogency of the grounds on which action by the executive was predicated. Accordingly, the court, should it carve out for itself a distinct role in this area, could not but lean helplessly on the executive for the benefit of factual material designed to test the validity of the executive's own contentions.

The objection has been persuasively urged that this spectacle of impotence can reflect no credit on the court. The supportive argument, used in this connection, was that the rules of pleading, practice and evidence established no stable procedure capable of constructive exploitation in the proposed inquiry.<sup>13</sup> Recourse to judicial notice, moreover, entailed the danger of undermining, at least potentially, the objectivity and impartiality of the judiciary.<sup>14</sup>

Consequently, emphasis has been placed on the exclusivity of Presidential responsibility, deriving from the paramount law, for the safety and continuity of the Republic in times of unmitigated peril. Amplitude of Presidential power, conferred as a matter of deliberate constitutional policy, has been professedly inferred from an appeal to rules of construction. Thus, the inclusion of "imminent danger" to the Republic as a permissible ground for the declaration of martial law<sup>15</sup> - a point of contrast with prevailing American doctrine - has been seized upon as an indication of legislative intent to invest the President with virtually open-ended discretion.<sup>16</sup> On this basis, among others, American judicial trends which aim at circumscribing the ambit of Presidential discretion in this regard have been strenuously distinguished.

In particular, the "open court" theory which has the effect that martial law has a cogent justification only in circumstances where actual and present danger closes the courts and deposes the civil administration, has been rejected as altogether

inept to contend with the intensity and scale of contemporary subversion. The fact that the courts were open could not be conclusive, it was suggested, since they might well be open and undisturbed in their regular functions and yet be wholly incompetent to avert the threatened danger.<sup>17</sup> The argument that while armed hostilities were in progress in several provinces in Mindanao, there was tranquillity in other regions except in isolated pockets in Luzon, and that consequently the maintenance of martial law throughout the archipelago was unwarranted, was given short shrift as showing insensitivity to the sophisticated character and ramifications of rebellion in the modern setting.<sup>18</sup>

Contemporary constitutional developments were invoked as the bulwark for obviating *in toto* any element of judicial control in regard to the declaration of martial law, with the full gamut of its consequences. The proclamation of martial law by President Marcos in 1972 under the aegis of the Constitution of 1935 was expressly incorporated in the Constitution of 1973 and made apparently impregnable in relation to any curial challenge. The transitory provisions embodied in the Constitution of 1973 were not content to make all proclamations, orders and decrees issued by the President "part of the law of the land."<sup>19</sup> Had the constitutional provision gone no further, there would have been scope for the argument that Presidential proclamations had been accorded merely the status of legislative instruments, amenable to constitutional challenge. However, the provision went further in declaring that the proclamations should "remain valid and legal in the manner stipulated,"<sup>20</sup> and therefore suggested, so it was argued, that no judicial intervention may be countenanced in the light of entrenchment of the impugned Presidential decrees as an integral part of the constitutional documents.<sup>21</sup> The contention, at bottom, appealed to the fact of incorporation and explicit ratification in a manner which precluded constitutional vulnerability.

This line of argument has been further fortified by insistence that the President's power of declaring and implementing martial law had secured popular endorsement at the referenda held in January and in July 1973. This development was used as the bedrock of an argument predicated on sovereignty. There was emphatic judicial support for the view that, by virtue of the referenda, the legality of the declaration of martial law was removed from the ambit of Presidential power under the Constitution and transferred to the seat of sovereignty - namely, the popular will. The substance of the reasoning was that, whatever may have been the nature of the exercise of that power by the president at the outset - whether or not purely political, and therefore non-justiciable - the court was precluded by the supervening act of the ultimate sovereign from applying judicial criteria to determination of the issue.<sup>22</sup>

Apart from this purported use of the principle of incorporation by reference in a supervening constitution, a wholly disingenuous effort was made to demonstrate that judicial scrutiny in any form would represent definance of legislative intent and constitutional norms. It was suggested, for example, that the Constitutional Convention, being in session at the time of declaration of martial law, had ample

opportunity of intervening if it found the President's actions unacceptable, and that its passive stance justified the assumption that the steps taken by the executive at a time of escalating turmoil were not repugnant to the principles of constitutionalism to which the Convention was committed.<sup>23</sup> This tenuous reference to intent appears all the more implausible in the light of the reality that several delegates found themselves arrested and detained, clearly for reasons connected with the discharge of their constituent functions, at the material time.

Some judges were inclined to set great store by the fact that, textually, the Presidential orders pertaining to the declaration of martial law left virtually intact the fabric of the Constitution except in narrowly demarcated areas affected by the insurrection.<sup>24</sup> This is hardly a convincing argument, underscoring as it does merely the consideration that, as a matter of draftsmanship, the veneer of constitutional morality was preserved, the subsequent executive instruments contriving to operate, albeit with devastating implications, within the interstices of the Constitution. Equally devoid of substance is the judicial reflection that constitutional legitimacy attached to the Presidential proclamation for the reason that it complied in full measure with formal and procedural requirements stipulated by the paramount law.<sup>25</sup> This is an apologist premise hinging on an uninvitingly narrow and unreal dimension of due process postulates. The judiciary, by resorting to such spacious arguments, were plainly clutching at straws.

Pervading these strands of judicial opinion and imparting to them an overall sense of coherence and consistency was the conviction that, in the face of an unprecedented threat to the very survival of the established constitutional order, the overriding priority was to concede to the President, as Commander-in-Chief and principal executive, "a very broad authority and discretion in ascertaining the nature and extent of the danger that confronts the nation and in selecting the measures necessary for the preservation of the safety of the Republic."<sup>26</sup> This concession of plenitude of authority was supported within the conceptual framework of the separation of powers which was construed as connoting the absence of subordination of each department of government to organs of the other departments in relation to the discharge of functions falling intrinsically within its purview.

It is, however, a redeeming feature of the judicial trends of the period that these approaches were by no means regarded as self-evident in their validity. A powerful attack on the strength of these predilections was made by a recalcitrant group of judges committed to a constitutional value system of an altogether different kind. The comments by Fernando J., in *Aquino v. Enrile*<sup>27</sup> give eloquent expression to these values. The gist of his approach is the confident denial that plenary power granted to another department of government under compelling circumstances is an insurmountable obstacle to judicial inquiry. Since a constitutional grant of power is, *ex hypothesis* not unqualified but controlled by the limits set out in, or inferred from the constitutional instrument, the court, he maintained, has the inalienable responsibility to demarcate the frontiers of *vires*. This as a proper and congenial segment of the judicial function, untrammelled by the vagaries of policy subsumed in the "political question" doctrine.<sup>28</sup> Moreover, Fernando J. invoked, in defence of

freedom, the principle that all derived power, irrespective of the stature of its repository, is impliedly curtailed by considerations of purpose and context. The judiciary abdicates its responsibility and denudes society of basic protection against the abuse of political power if it ceases to require, as a condition of the valid exercise of authority, the demonstration of an intelligible nexus between means and ends.<sup>29</sup> Even in times of grave civil turbulence, then the courts retain an indispensable role in reducing to a minimum encroachments upon private rights by the executive, civil or military.

This point of departure, underscoring the fragile quality of freedom in times of political strife, is not open to the reproach of insensitivity to the stubborn realities of a widespread insurgency. Asserting that the core of constitutionalism is a robust concern for individual rights, judges of this persuasion have added the rider that this is not to deny that judicial process does not operate in a social void and that the legality of executive action has to be addressed in the complete environmental context, with full appreciation of the attendant tensions. These judges have proved themselves worthy of their heritage by declining, with all the vehemence at their command, to abandon the essential judicial task of delineating the constitutional boundaries within which the powers of government may lawfully be applied.

### III Habeas Corpus Applications

Nowhere is the spirit of judicial activism, exploited as a shield for liberty, more markedly evident than in the identification of the judicial role in applications for habeas corpus while martial law remains in force.

The conservative stance sought to derive its rationale from the fundamental complexion of martial law and the absolute necessity of extreme measures to ensure the very survival of the "State. The competing interests have been presented by protagonists of this approach in terms of an antithesis between rational survival and the protection of liberty.<sup>30</sup> Martial law, it has been pointed out, is founded upon the principle that the State has the right to protect itself against those who would destroy it; it has consequently attracted the analogy of an individual's right to self-defence.<sup>31</sup> Applied as an ultimate measure, martial law reflects a power inherent in all States as a constituent element of sovereignty.<sup>32</sup> The dispensability of fetters normally governing the exercise of public power is said, in this context, to be warranted by an overriding objective - no less than the defence of societal security and the preservation of the legal order itself.

A corollary, disquieting in its repercussions, has been engrafted on to this analysis. The argument proceeds as follows: Given the validity of the proclamation of martial law, the arrest and detention of those reasonably believed to be engaged in fomenting disorder is necessarily lawful. It has been considered evident, to this extent, that suspension of the writ of habeas corpus is subsumed in a declaration of martial law, since a basic purpose of martial rule is to neutralize effectively - by arrest and continued detention - those who are identified as *participates criminis* in the insurrection. Castro J., has stridently declared: "To deny this postulate is to negate

the very fundamental of martial law. To recognise the imperativeness and reality of martial law and at the same time dissipate its efficacy by withdrawing from its ambit the suspension of the privilege of *habeas corpus* is a proposition I regard as fatuous and therefore repudiate.<sup>33</sup> In similar vein Antonio J., regarded as axiomatic that the declaration of martial law implies suspension of the writ of *habeas corpus* on the ground that the contrary view renders the martial law regime "utterly useless."<sup>34</sup> These judges were content to hold that, by virtue of the implied suspension of the writ, the judiciary is inflexibly debarred from proving the legality of the detention of persons alleged to have been involved in the rebellion.

Happily, however, acquiescence in this degree of latitude for executive action destructive of personal liberty did not pass unchallenged. The conclusion of Esguerra J., that the suspension of *habeas corpus* is an oblique incident of the declaration of martial law, since "the greater power includes the less,"<sup>35</sup> (the former encompassing the power to close the courts if necessary, while the latter takes for granted that the courts are open although they cannot grant the writ) was convincingly assailed by countervailing currents of judicial opinion. This latter response required no tortuous reasoning, since the two situations were accorded discrepant treatment *ex facie* the Constitution. While the Bill of Rights expressly prohibited suspension of the writ of *habeas corpus* except under circumstances referred to in detail by the paramount law, there was no comparable limitation in regard to the imposition of martial law.

Fastening upon this distinction, Munoz-Palma J. denied the very feasibility, as a matter of constitutional propriety, of the implied suspension of the protection of *habeas corpus*. The Bill of Rights embodied in the Constitution of 1935,<sup>36</sup> as well as the Constitution of 1973,<sup>37</sup> forbade in terms the suspension of *habeas corpus* except for causes specified, and the proclamation of martial law was not one of the causes so identified. From this standpoint, the view favouring suspension of the writ upon the declaration of martial law, although seemingly rooted in the exigencies of a national crisis, is difficult to reconcile with the structural framework of the Constitution. Munoz-Palma J., resisted with vigour the suggestion that Presidential authority, countenanced by the Constitution in a particular provision, for resorting to an extraordinary method of containing an insurrectionary situation necessarily extends to, or develops in its ambit, other modes of executive action catered for in distinct settings by the Constitution. Calling out the armed forces to prevent or suppress lawlessness, suspension of the writ of *habeas corpus* or placing the country or a part of it under martial law are the separate modes of executive action in times of emergency provided for by the Constitution.<sup>38</sup> A necessary connection between the declaration of martial law and suspension of *habeas corpus* was denied by Munoz-Palma J., who insisted that the exigencies of a situation may warrant suspension of the writ but not a declaration of martial law, and *vice versa*.<sup>39</sup>

Delinkage of the two situations is plainly in the interest of nurturing freedom in two unpropitious a context. Automatic withholding of the writ of *habeas corpus*, with all that it entails for the health of a democratic system, is a measure which scarcely does justice to the impressive antecedents and the pivotal constitutional significance of this historic remedy which holds at bay any initiative by the administration to deny or restrict personal liberty without lawful justification. There were members of the Supreme Court who, despite the overwhelming pressure of circumstances, showed firm resolve to retain in their hands, under the aegis of the writ, some element of surveillance over the deprivation of individual liberty by executive fiat during the subsistence of a martial law regime.

This residual control on the part of the judiciary was asserted by a diversity of methods so designed as not to stifle legitimate options available to the executive. In the first place, the Supreme Court arrogated to itself authority under the Constitution to examine independently the existence of a factual basis for the issue of a Presidential proclamation suspending the writ of *habeas corpus*, and the Court has made it clear that the constitutional sufficiency of the proclamation would depend upon the result of this judicial appraisal.<sup>40</sup> However, the court administered the *caveat* that its function in this regard was merely to check, rather than to supplant, the executive, and to ascertain whether the President had transgressed the constitutional limits of his power.<sup>41</sup> A sense of balance was meticulously preserved. It was not for the Court to substitute its own discretion for that exercised by the President, or to assess the wisdom of the President's act. In other words, any evaluation of the correctness or desirability of action resorted to by the President was certainly outside the pale of the judicial function. It was restricted, by constitutional necessity, to demarcating the limits of reasonableness and so confining the Presidential power within its allotted domain. So controlled in scope, the supervisory role assumed by the judiciary in regard to fulfilment by the executive of objective *indicia* constitutionally required, does no violence to the separation of powers. On the contrary, it imports under constitutional mandate a system of checks and balances in terms of which the executive is supreme as regards suspension of the writ, but only if it acts *intra vires*, and the authority to determine whether it has done so or not is exerciseable by the judicial department which, in this respect, is in turn constitutionally supreme.

Secondly, quite apart from the limited sphere of judicial superintendence of circumstances giving rise to suspension of the writ, the judiciary has asserted its power and responsibility as the ultimate arbiter of the legality of detention in each specific case. Judges have been reluctant, merely on the ground of declaration of martial law, to depart from the cardinal rule in *habeas corpus* proceedings that the respondent having physical custody of the person on whose behalf the application is made, should discharge the onus of justifying the action taken by him.<sup>42</sup> The President's satisfaction that the detention is necessary for purposes of national security is, of course, a relevant consideration, but it has been characterised as inconclusive.<sup>43</sup> Moreover, the detention of a person may have been warranted at the outset, but if it is continued for an unreasonable length of time, his release may

be sought in *habeas corpus* proceedings for, even in times of stress, it cannot be assumed that the definite restraint of particular individuals as a preventive measure is unavoidable.<sup>44</sup> These safeguards have appeared essential to the courts on the premise that "Individual freedom is too basic, too transcendental and vital in a republican State to be denied upon mere general principles and abstract considerations of public safety."<sup>45</sup>

There is one further point of interest with regard to the conflict of judicial altitudes. The fact that the circumstances justifying suspension of the writ of *habeas corpus* are spelt out in the Constitution while the grounds for the declaration of martial law are not specifically enumerated, was seized upon by Barredo J. in *Aquino v. Enrile*, as the pivot of his conclusion that the court's power to examine the factual bases of Presidential action, even if it were capable of legitimate exercise *vis-a-vis* suspension of the writ, was wholly bereft of constitutional justification with regard to a proclamation of martial law.<sup>46</sup> More courageous was the approach of Manoz Palma J. who was prepared to subordinate inferences from this terminological difference to broader considerations of social policy, compelling in their impact. A state of martial law vests in the President, she stressed, not only the power to call the military to repel any invasion or to suppress an insurrection, whenever public policy requires it, but may be necessary to accomplish the purposes of the proclamation of martial law.<sup>47</sup> If, therefore, the narrower power directed towards the incarceration of particular individuals is subject to judicial surveillance, admittedly in exiguous form, there is apparent force in the contention that the appreciably broader power should, *a fortiore*, be regulated by a similar control mechanism.

#### IV Trial of Civilians by Military Tribunals

The menace of jurisdiction exercised over civilians by military tribunals is epitomized in a reflection of Barredo J. "Truth to tell, the thought or suspicion of prejudice in military justice during martial law is inevitable, for the obvious reason that the concentration of powers in such a situation carries with it inherently the spectacle of the army being the accuser and judge at the same time."<sup>48</sup>

Within a week of the declaration of martial law by President Marcos on 21 September 1972, military tribunals were established to try and decide "cases of military personnel and such other cases as may be referred to them."<sup>49</sup> A few days thereafter military tribunals were purportedly vested with jurisdiction "exclusive of the civil courts" in respect of crimes against public order, contravention of the Anti-Subversion Act, breach of laws relating to firearms and other crimes having a direct bearing upon the interests of national security.<sup>50</sup>

In litigation which frontally attacked the constitutional propriety of subjection of civilians to military tribunals thus constituted and endowed with sweeping powers,<sup>51</sup> the majority of the Supreme Court, adopting a submissive posture, acknowledged that the establishment of military tribunals for the trial of persons alleged to be implicated in offences involving the objectives of martial law is "a natural and logical concomitant of martial rule."<sup>52</sup>

This disenchanting conclusion was predicated upon an assumed correlation between the extreme gravity of the situation with which the military agencies were confronted, and the amplitude of the authority which they professedly required to deal with it. Focussing upon the preservation of the State as the paramount objective, the majority reasoned that, when it is essential for the public safety, regular legal processes can be superseded and military tribunals authorised to exercise the jurisdiction normally vested in courts.<sup>53</sup> The dissenting minority, while not rejecting the substantive proposition, placed squarely on the shoulders of the executive the burden of demonstrating "some overpowering factor"<sup>54</sup> which made recognition of civilians' constitutional rights to due process incompatible with the public safety held that, in the absence of such proof, the suspension of these rights was indefensible.

The majority view, representing as it does an unmitigated capitulation to the executive in crucial areas, rests on a singularly uninspiring conception of due process requirements. The majority, denying that due process implied a guarantee of trial by any particular form of tribunal in criminal cases, insisted that a military tribunal of competent jurisdiction, satisfying the requirements of accusation in due form, notice of charges and opportunity to proffer evidence in rebuttal amply fulfilled the due process postulate. An especially unedifying feature of the judgments embodying the majority view is the facile assumption that a variety of attributes, uniformly looked upon as prerequisites of a fair trial, enjoyed recognition exclusively under the aegis of distinct statutory regimes beyond the confines of which they were incapable of invocation as residual characteristics of due process forming part of the constitutional entitlement to justice.

The majority upheld the view, in keeping with this premise, that the taking of depositions of witnesses for the prosecution in the absence of the accused or his counsel amounted to no infraction of the Basic Law, since due process embraced no assurance of the accused's immediate presence during the reception of incriminating testimony. Denial of the opportunity to cross-examine hostile witnesses presented in the preliminary investigation was held to entail no erosion of constitutional rights, this being simply a matter of exercise of discretion by the judge or investigating officer. Elimination of the preliminary investigation procedure itself, for that matter, failed to impress the majority as a phenomenon repugnant to justice, notwithstanding the central role of such investigation in preventing the accused from being taken unawares at his trial with regard to the nature of the charge brought against him and also in ensuring the interposition of a judicial mind as arbiter in determining whether the circumstances warrant exposure of the accused to the strain and jeopardy of trial. This strand of opinion considered it "rather elementary"<sup>55</sup> that the right of appeal, unless guaranteed expressly by the Constitution, was merely statutory in complexion and could, therefore, be properly modified or even withdrawn by legislative action at any time. Even an appeal to an intermediate collegiate appeal court or to the Supreme Court, in their Lordships' opinion, was not a right emanating from the Constitution unless an unequivocal guarantee to that effect was discoverable in its provisions.

It is heartening that the Bench did contain members who felt able to participate and uphold a view marked by far greater consonance with intuitive perceptions of injustice. It is possible to isolate three major considerations on which the dissenting opinions were based.

The first of these concerned the lack of ostensible detachment and objectivity on the part of military tribunals. This consideration assumes heightened relevance against the backdrop of the litigation in *Aquino v. Military Commission, No.2*.<sup>56</sup> The petitioner complained that the tribunal, having been created by the President's order and remaining subject to his control and direction, could not but be influenced, at least obliquely, by the President's prior description of the evidence against the accused as "not only strong but overwhelming." In these circumstances the dissenting judges, whilst studiously refraining from questioning the military tribunal's capacity to reach its conclusions on the basis of empirical evidence, stressed the constitutional imperative of guarding against not merely the reality but even the appearance of partiality.<sup>57</sup> The gravamen of the due process requirement, that the defendant in criminal proceedings is entitled to nothing less than the cold neutrality of an impartial judge<sup>58</sup> was, to their minds, sufficient reason to have the petitioner's trial on an indictment which could attract the capital penalty, transferred to a court of civil jurisdiction.

Secondly, the due process requirement was interpreted by the minority as connoting, by its very nature, a complex of elements, wholesome and interrelated. These components were viewed as indivisible, and any truncation of their scope was resisted as leading to emasculation of the substantive right itself. The panorama of rights ensured by the due process criterion included, according to their approach, the right to a preliminary investigation in non-summary cases, the right to counsel and to cross-examination of witnesses presented against the accused, the right to trial by regular civilian courts presided over by permanent judges with tenure and functioning in keeping with the entirety of the specific safeguards embedded in the judicial process and the right in capital cases to appeal to the Supreme Court where a majority of ten affirmative votes is required for affirmation of the death penalty.<sup>59</sup>

Thirdly, the minority relied on the principle that denial by subsequent decree of several of the accused's concomitant rights to judicial process at his trial and to review of the verdict - rights conferred for his protection and available to him at the time of commission of the alleged offences - infringed the constitutional injunction against the enactment of *ex post facto* laws which rendered conviction of the accused easier than it was in terms of the governing law as it existed when the delinquency charged was said to have been perpetuated.<sup>60</sup>

The attitude of the majority is underpinned by a conception of due process so devitalized in spirit and so impoverished in content that only the shell remains. This decade lends itself to manipulation, with the most pernicious consequences, while the deceptive semblance of constitutional propriety is preserved. Unabashed, the majority maintained that, in times of grave civil disorder, due process in criminal trials could encompass not only judicial process but also executive process and,

indeed, in appropriate cases, even legislative process.<sup>61</sup> The fundamentally distressing feature of the majority's reasoning is the cavalier fashion in which so drastic an inroad into the core of freedom was sanctioned.

By contrast, Teehankee J., went so far in the opposite direction as to maintain that judicial process involves, of necessity, the exercise of judicial power residing exclusively in the established courts, in the sense that these courts alone are invested with constitutional authority to adjudicate upon matters effecting the life, liberty and property of a citizen.<sup>62</sup> On a more cautious note, Munoz-Palma J., found unacceptable the purported power of military tribunals to render verdicts on civilians for offences alleged to have been committed even before the commencement of martial rule, notwithstanding that civil authority was supreme and civil courts functioned without impediment under the Constitution.<sup>63</sup> These approaches refreshingly strengthen the substance of due process elements which continued to be part of the Constitution of the Philippines at the most difficult of times.

## V Exercise of Legislative Power by the President

The transitory provisions incorporated in the Constitution of 1973 envisaged the convening of the then existing interim National Assembly which was to continue functioning until fresh elections were held.<sup>64</sup> However, at the national referendum held in January 1973, President Marcos obtained endorsement of his proposal that the convening of the interim National Assembly should be postponed for at least seven years. The Constitution of 1973 expressly authorised President Marcos, designated as "the incumbent President", to exercise the powers of President under the Constitution of 1935 and, additionally, to resort to those of President as well as Prime Minister under the Constitution of 1973.

The question arose<sup>65</sup> whether, to make good the *hiatus* brought about by the decision to defer summoning the interim National Assembly, legislative power could validly be exercised by the President. The majority of the Court, in answering this question in the affirmative, fell back on the doctrine analogous to necessity. Munoz-Palma J., asserted the inevitability of recognition of legislative power in the President during the period of transition on the ground that "there will otherwise be a disruption of official functions resulting in a collapse of the government and of the existing social order."<sup>66</sup> Barredo J., accepted that, since laws and regulations are needed to maintain the government and to provide for the security of the people, the orders of the President must perforce be accorded the sanctity of law.<sup>67</sup> The identical rationale was suggested for conceding to the President the power to appropriate public funds in this situation.<sup>68</sup>

While the acknowledgment of legislative authority seemed unavoidable to all but one of the members of the Bench if anarchy was to be forestalled, several among the judges energetically sought a lever to contain the ambit of legislative power recognised to exist in the President. The inference was drawn from the structural framework of the Constitution that legislative and appropriation powers arising under martial law were confined to the imperative of preservation of the State; and

the qualification was insisted upon that the means thus adopted should invariably be provisional in character, for "permanent laws, whether adopted in regular or irregular times, one for parliaments to enact."<sup>69</sup> According to the minority view, legislative power could with propriety be exercised by the President on this basis only if its substance had an identifiable nexus with the objectives of suppressing rebellion or alleviating its underlying causes, the proclamation governing tenant emancipation being an example of a measure directed towards redress of deep-seated grievances.<sup>70</sup> The characterization of these two purposes as exhaustive demarcated with finality the boundaries of the legislative function entrusted by pressure of circumstances to the President. The minority were unrelenting in their conviction that the concept of martial law could not be expanded, as the main opinion purported to do, to cover other contingencies like "worldwide recession, inflation or economic crisis which presently threatens all nations" as warranting legislative caution by the President in derogation from constitutional assumptions.<sup>71</sup>

Alone among the judges, Teehanke J., had no inhibition about addressing the central constitutional issue, undaunted by the consequences. He was explicit in his ruling that confirmation of the President's decision to postpone the initial convocation of the interim National Assembly, by the result of the referendum held in 1973 was devoid of legal or constitutional significance. He was satisfied that the referendum, being merely consultative, was altogether ineffective to depart from the Constitution or any provisions of it, including the transitory provisions. Teehanke J., was prepared to follow this reasoning to its logical conclusion and to hold that the Basic Law imposed on the President a binding obligation to convene the Assembly and to permit this body to perform its functions as the constitutionally mandated legislative authority.<sup>72</sup>

## VI Amendment of the Constitution by Presidential Decree

The Constitution of 1973 provided that, in times of transition, amendments to the constitution may be proposed by a majority of the members of the interim National Assembly called into special session by the interim Prime Minister. However, since the convening of the National Assembly had been postponed by the President with them People's support at a referendum, the President himself claimed the power to propose constitutional amendments to be placed before the People at a plebiscite conducted under the supervision of the Commission on Elections.

The majority of the Supreme Court<sup>73</sup> was content to uphold the legality of this power. They reasoned as follows: The concentration of governmental power in a democracy faced with emergency conditions is a corrective to "The crisis inefficiencies"<sup>74</sup> inherent in the doctrine of the separation of powers. The more complete the separation of powers may be in a constitutional system, the more difficult and yet the more necessary is their fusion in the throes of a crisis. Just as much as the legislative power fails to be exercised by the President in the face of temporary atrophy of the duly constituted legislative organ, so also, as a means of supplying a *lacuna*, the power of constitutional amendment to deal with unforeseen circum-

stances necessitates initiative on the President's part. In both spheres alike - so the argument runs - the *ultima ratio* of a salutary judicial attitude is the law's intolerance of a vacuum. Moreover, the President, it has been pointed out, merely sets in train a sequence of events which culminates in the acceptance or rejection of the proposals for constitutional change by the People themselves. The constitution of 1973 recognised that, in the Republic of the Philippines, sovereignty adhered to the People and all governmental authority stemmed from them.<sup>75</sup> This power was, by definition, absolute and illimitable. Accordingly, there was no warrant for the court to countenance by implication a limitation on the sovereign power of the People to alter or indeed abolish the existing Constitution. The fact that the governing constitutional provisions revealed a gap with regard to the process of initiating constitutional change in the circumstances contemplated, it was claimed, vindicated this thesis; for there is no more legitimate method of filling the gap than by appealing to the ultimate sovereign.

The minority, however, was able to demonstrate with impressive cogency that this view is flawed in fundamental respects. The intrinsic dichotomy between legislative and constituent powers underpinned the minority's reasoning. It was an anomaly to regard these as overlapping; in fact, had there been no express provision in the Constitution granting the legislative organ the power to propose constitutional amendments, it would have been outside its authority to assume that power.<sup>76</sup> Since the legislature was specifically identified by the Constitution as the organ invested with power to institute action in respect of constitutional change and, what is more, a particular procedure for convening the legislature for this purpose was spelt out by the Basic Law, the purported exercise of this power by the President was held by the minority to constitute a flagrant usurpation in defiance of constitutional norms.

The minority view on this point is, by far, the more convincing. Apart from the conceptual premise relating to allocation of functions under the paramount law, there is the practical reflection that, because of the very nature and incidents of the constituent power, proposals for amendment of the Constitution are better formulated and deliberated upon by an assembly of representatives collectively than by one man.<sup>77</sup> The foundation of the minority view is that the people having mandated in unmistakable terms the methods by which provisions of the fundamental charter may be revised, were bound by these constitutional limitations.<sup>78</sup> While there was certainly no surrender of the people's ultimate authority to amend the Constitution or to adopt a new Constitution in its stead, this right, barring a revolutionally condition in the country, had to be exercised in accordance with established constitutional processes. Far from being symptomatic of any diminution of sovereignty, this ensures orderly change within a framework which owes its binding constitutional force to direct expression of the popular will in sacrosanct form.

## VII The Validity of a Presidential Declaration Relating to Ratification of a New Constitution

The Supreme Court had occasion to consider the question of validity of Presidential Proclamation 1102 announcing the ratification of the proposed Constitution of 1973 by the Filipino people.<sup>79</sup>

Some of the judgments typify approaches which are manifestly vulnerable from the standpoint of principle. Barredo J. was content to observe that, whatever may have been the position regarding compliance or lack of it with constitutional requirements for ratification of a proposed new charter by the People, this issue could no longer be addressed usefully by the court in the light of evidence that the people, by their subsequent consistent conduct, had acquired in the new constitutional order.<sup>80</sup> Makasias J. declined jurisdiction on the ground that the issues sought to be canvassed before the court were inextricably linked with controverted political matters and were therefore beyond the pale of curial jurisdiction.<sup>81</sup> Esquerra J. was of opinion that, having regard to the overall environment in which the disputed matters were submitted to the court for adjudication, discretion was the better part of valour, and the court should distance itself from the litigation.<sup>82</sup>

The court's commitment to constitutional principle is redeemed by values shining through the opinions handed down by other members of the Bench. Zaldivar J. laid healthy stress on predominance of the principle of legality in constitutional law: every officer functioning under a constitutional government must act according to law and subject to restrictions imposed by the law. The role of the judiciary in this area is inalienable, for the judiciary is the department charged with exclusive responsibility for determining the restraints which the law places upon all official actions.<sup>83</sup>

Zaldiver J. emphatically abjured an apologist stance. He reminded his brethren that the People act not only through the legislative and the executive branches of government but through the judiciary as well. It is inherent in any coherent theory of modern constitutionalism that governmental action is subject to the controlling power of the People acting through the instrumentality of the judiciary.<sup>84</sup>

Teehankee J. pointed out that, since these fetters were spelt out elaborately by the Constitution, it was scarcely conceivable that there should be the total absence of any mechanism by which the course of government could be directed along constitutional channels: were this not so, "the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms."<sup>85</sup> He asserted that the restrictions on the exercise of public power enshrined in the Constitution were "as real as they should be in any living Constitution."<sup>86</sup> This aspiration, if it is not to be vacuous, demands an active judicial role. Nor does the acceptance of this role signify in any sense the implied superiority of the judiciary *vis-a-vis* the other branches of government. The

courts do no more than discharge their irreducible obligation of determining conflicting claims of authority under the Constitution and of establishing for the parties in an actual controversy the rights which the constitutional instrument secures and guarantees to them.<sup>87</sup>

In line with this constitutional duty Concepcion C.J. succinctly identified the grounds on which the court, considering the validity of the purported ratification of the new Constitution as a legal and justiciable issue, could hold without hesitation that mandatory conditions precedent regulating validity had not been fulfilled. Taking as settled principle that the ratification of a constitutional amendment should be considered in relation to procedural requisites embedded in the Constitution in force at the time of the purported ratification (that is to say, in this case, the Constitution of 1935), Concepcion C.J. remarked that the qualifications enumerated in Chapter V of that Constitution for enjoyment of the suffrage had been blatantly violated : persons under 21 years of age had voted, and there was no way of separating their votes from those of qualified voters. The proceedings held in Citizens' Assemblies contravened Article XV of the Constitution which envisaged choices made on ballots and not voting orally or by a show of hands. Secrecy was not observed, and no set of rules for counting the votes or for reporting the results was prescribed or followed. The Commission on Elections, the constitutional body responsible for the administration of all laws governing the conduct of elections, played no part whatever in the supervision of the elections or in the assessment of the result. The opinion of the former Chief Justice accepted without ambiguity that these deficiencies, viewed cumulatively, vitiated the validity of the professed ratification of the Constitution of 1973.

## VIII Application of the Criminal Law

### (a) The Requirement of Prior Publication

The Supreme Court of the Philippines has attached to this principle the greatest importance, sometimes straining the applicable statute law to accomplish purposes connected with the observance of due process postulates.

In *Tanada v. Tuvera*<sup>88</sup> the Supreme Court was concerned with the interpretation of Article 2 of the Civil Code which declares that laws shall take effect 15 days after their publication in the Official Gazette, and article 3 of the Code which embodies the principle *ignorantia iuris hand excusat*. Fernando C.J. was no doubt correct, from a strict constructionist standpoint, to insist that the principle incorporated in Article 2 of the Civil Code could not be elevated to a constitutional norm, since the Code itself was a legislative enactment<sup>89</sup> which lacked "the juridical force of a constitutional command."<sup>90</sup> There remained, accordingly, the possibility that a subsequent legislative instrument, validly made, would bring into operation a different rule. In the light of this consideration, coupled with the lack of any provision in the Constitution that the publication of a law is a prerequisite of its effectiveness, Fernando C.J. and Plana J. were both willing to rule that absence of previous publication, although giving rise to difficulties in regard to compliance with due

process requirements, could not be made use of to assail the validity of the law itself. Viewed in a due process perspective, moreover, the mandatory obligation was that of publication, rather than publication in a particular instrument, the latter being merely a question of convenience.

The focal point of interest about this case consists of the reasoning resorted to by the majority<sup>91</sup> to impart to the element of prior publication an appreciably enhanced significance. The right of the general public to be furnished with adequate notice of the laws which are to regulate their actions as citizens, under threat of punishment for infraction, was held to be so rudimentary as to be subsumed in the ambit of constitutional protection. It was considered a rule of constitutional necessity that before a person was bound by a penal law, he must be officially and specifically informed of its contents.<sup>92</sup>

The court reacted sharply to the injustice of meting out punishment to a citizen for the violation of a law of which he had no notice whatever, even in constructive form. Echoing with emphasis the view of Judge Learned Hand that law as the command of government "must be ascertainable in some form if it is to be enforced at all" and that law enforcement must necessarily degenerate to an exercise in futility if the content of the law is unknown and unknowable,<sup>93</sup> the court stressed the practical exigencies which invested this salutary principle with heightened relevance. Perhaps at no time since the establishment of the Philippine Republic, it was pointed out, has the publication of laws assumed such vital importance as at the time in question, when the people had bestowed upon the President a power enjoyed in the past solely by the legislature. While the people were kept abreast by mass media of the debates in Parliament, no comparable publicity was attendant upon the law making process of the President. Thus, without publication, the people could have no means of knowing that presidential decrees had actually been promulgated, much less a definite method of informing themselves of the substance of such decrees.<sup>94</sup>

It is this reality, impinging on the core of freedom, that conditioned the court's approach. By way of conceptual support for their conclusion, the judges forming the majority called in aid a wide range of levers. Where literal construction of a statutory provision accorded with the result they set themselves to attain, they adopted it without compunction, but where plain words used in other provisions of the same statute appeared to lend support to the competing interpretation, disparate canons of construction were employed with little apparent awareness of the inconsistency. The majority observed that the words "shall be published" imposed on the respondent officials an imperative duty which required stringent enforcement if the constitutional right of the community to be informed of matters of urgent concern was not to be deprived of substance. Similarly, they insisted that, since the law itself contained a comprehensive list of what was required to be published in the government Gazette, the respondents were left with no discretion as to the items which warranted inclusion. On the other hand, in construing the legislative direction that "laws shall take effect after 15 days following the completion of their publication

in the government Gazette, unless it is otherwise provided", the majority was firmly persuaded that the qualifying words could not be interpreted as empowering the legislature to dispense with the requirement of publication. As a matter of policy, departure from the incidents of so sacrosanct a doctrine as that of accessibility of the penal law could properly be sanctioned, in the court's opinion, only in the face of a far less equivocal expression.

Consistently with commitment to its objective, the court opted for a designedly elastic construction of the rules governing *locus standi*. Since the Solicitor-General had entered his appearance for the respondents in the case, the petitioners, *qua* members of the public, were permitted to institute proceedings challenging the validity of penal laws which had not been published. This ruling was supported on the cumulative grounds that, if this right were withheld from the petitioners, it would be difficult to conceive of any other person or group of persons invoking the court's jurisdiction and that, in any event, the right asserted by the petitioners was a public right recognized by the fundamental law, so that a relatively generous degree of latitude was appropriate.

#### (b) Institution of Criminal Proceedings and Pre-Trial Custody

One of the achievements of Philippine courts during this period was their aggressive stand against the use of criminal sanctions in such a way as to stifle freedom. On the whole, judges were acutely aware of the dangers of indiscriminate application of the criminal law in support of the administration's efforts to suppress insurrection. In several dramatic decisions the courts articulated their attitude in inspiring terms.

One such case is *Salonga v. Cruz Pano*.<sup>95</sup> Senator Salonga was charged with criminal conspiracy to overthrow the government of the Philippines. The sole witness against him was one Victor Lovely whose evidence apparently implicated Senator Salonga in a series of bombings.

The prosecution's version was that Senator Salonga was the mastermind of the bombings. The connection between Lovely and Salonga was sought to be established by means of a group photograph taken at a social occasion in Los Angeles where they were both guests. This was, of course, an exceedingly slender foundation for the charge: as the court readily accepted, a national figure of Salonga's stature is accustomed to posing in different groups and places with persons whose conduct he could not possibly vouch for.

Despite the crucial political overtones of the case and the decisive importance which the government attached to Salonga's conviction at a time of alarming escalation of politically oriented violence, the court had no hesitation in holding that not even a *prima facie* case had been made out against the defendant. The court underlined the central constitutional dimensions of the presumption of innocence and principles regulating the burden of proof. It denounced the reception, by the court of first instance, of testimony based on affidavits of third persons plainly

constituting hearsay in the circumstances. The Supreme Court declared that, even though no objection had been taken to the admission of this evidence, the judge presiding at the trial was bound, *ex mero motu*, to exclude the testimony.<sup>96</sup>

The vital part of the judgment is that impugning acceptance of the suggestion in the court *a quo* that an opinion allegedly expressed by the accused about the likelihood of violent struggle in the Philippines if far-reaching reforms were not conscientiously embarked upon, could form the basis of a charge of sedition. The Supreme Court Bench presided over by Teehankee J. characterized the freedom of expression as a "preferred" right, in the sense that, in terms of the hierarchy of constitutional norms, it stands out a level higher than substantive economic and related rights. Their Lordships underscored the primary role of freedom of expression as a cornerstone of the constitutional system of the Philippines and adverted to the lessons of history, legal as well as political, illustrating that freedom of thought and expression represents the essential condition of almost every other freedom. The court confessed to reacting with particular vigour to allegations that restraints had been imposed by devious means upon criticism of government policy by public officials: for political discussion in a spirit of candour is essential for ascertainment of the truth and cannot form the basis of criminal indictments.

At the height of civil order there were judges who demonstrated their solicitude for human rights in such contexts as the illtreatment of persons in custody pending trial with a view to extorting confessions from them. *The People of the Philippines v. Galit*<sup>97</sup> provides a revealing example. Concepcion J. commented on the revolting circumstances of the case before him: "This incident could have happened in a Russian Gulag or in Hitler's Germany. But no, it did not. It happened in the Philippines."<sup>98</sup> Concepcion J. made use of the opportunity to reiterate the full range of rights to which a person subject to arrest is constitutionally entitled. His Lordship attributed to the arresting officer the compulsory duty of ensuring that the detainee is advised clearly of his right to remain silent and to use the services of counsel, and his entitlement to communicate expeditiously with anyone of his choice.

He recognised the illegality of any attempt to commence an investigation while the suspect is in police custody, in the absence of counsel engaged on his behalf. Although the right to counsel may be waived, Concepcion J. minimised the peril accompanying this course by insisting that a purported waiver will not be operative unless it is made after consultation with counsel. Most importantly, from a practical standpoint, he acknowledged in express terms that a statement procured from the suspect in violation of this procedure - whatever its impact, whether exculpatory or inculpatory, in whole or in part - is to be excluded in toto at the trial from the body of judicially receivable evidence.<sup>99</sup>

## IX The Inviolability of Rights Concerning Expression and Association

A conspicuous characteristic of Philippine judicial pronouncements in this area is the impatience with which the courts have typically disposed of technicalities and

procedural refinements resorted to by State authorities as a cloak for securing immunity in respect of deliberate transgressions.

*Burgos v. Chief of Staff, Armed Forces of the Philippines*<sup>100</sup> concerned the search of the offices of a leading newspaper in Manila and the seizure of equipment. Strict procedure required that the petitioners should have taken steps, by filing a motion, to have the search warrants recalled by the court which issued them. However, in the face of irrefutable evidence that the search and seizure operation was wholly capricious and designed to suppress the freedom of the Press, the Supreme Court declined to entertain an objection taken on procedural grounds by the respondents. The Court, invoking its inherent power to suspend its own rules or to exempt a particular case from their operation, had no doubt that the circumstances of this case afforded a proper occasion for the exercise of this dispensing power in the interest of justice.

A further point of interest is the court's construction of the legal requirements pertaining to issue of search warrants, with unyielding strictness in two respects. The first of these consists of rigid application of the principle that, when the search warrant applied for is directed against a newspaper publisher or editor in connection with the publication of subversive material, the application and the affidavits supporting it must contain specific particulars as to the allegedly subversive material. Mere generalization, the court insisted, will not suffice. Moreover, in interpreting the constitutional provision that no warrant shall issue except upon probable cause to be determined by the judge after examination under oath of the complainant or his witnesses, Abad Santos J. was emphatic that the oath required must have reference to the truth of facts within the personal knowledge of the petitioner or his witnesses, since the purpose of the oath is to convince the committing magistrate of the existence of probable cause.<sup>101</sup> Failure to satisfy these requirements led inevitably to quashing of the search warrants.

In *Babst v. National Intelligence Board*<sup>102</sup> a strident dissenting opinion underlined the need for judicial intervention in circumstances where the National Intelligence Board had sought to abridge the freedom of expression and publication of members of the Press who had been critical of the government. Teehankee J.<sup>103</sup> and Abad Santos J.<sup>104</sup> looked upon the Board's action as all the more chilling and odious in their effect because "they were cloaked by a mantle of pseudo-legality." At a time when the country was emerging from martial rule and the suspension of the writ of *habeas corpus* had not been entirely lifted, the editorial staff of a newspaper had received an "invitation" from a powerful group of ranking military officers to come to a military camp for a discussion. In view of the terms in which the "invitation" was couched and the surrounding circumstances, the dissenting judges were convinced that this was a behest which the petitioners could defy only at their peril and that their entitlement to protection at the hands of the judiciary was consequently clear.

In the midst of civil strife of the most serious proportions Philippine judges have shown profound concern for upholding the right to articulate political dissent by lawful means. This is strikingly manifest in the judicial treatment of the granting by mayors and other municipal officials of permits to hold public rallies as turning on the application of "a practically ministerial duty."<sup>105</sup> In *Ruiz v Gordon*<sup>106</sup> the Supreme Court regarded it as essential for the validity of denial of a permit which amounts to previous restraint or censorship that the licensing authority does not rely on its own appraisal of what the public welfare, peace or safety may require; and there was firm insistence that, to justify such a limitation, there must be "proof of such weight and sufficiency to satisfy the clear and present danger test."<sup>107</sup> The court was explicit in its observation that the mere possibility of subversives infiltrating the ranks of the demonstrators was inadequate to justify refusal of the permit.<sup>108</sup> In *Reyes v. Bagatsing*<sup>109</sup> Plana J., uncompromisingly ascribing to the mayor as licensing authority the burden of demonstrating the existence of grave and imminent danger, stressed the vital judicial role in ensuring that instances of disorderly conduct by individual members of a gathering are not seized upon as an excuse for labelling the assembly seditious and so rendering illusory the constitutional right of peaceful assembly.

## X Conclusion

The clash of attitudes at the highest tier of the judicial structure of the Philippines at a time of virtually unmitigated travail brings into sharp relief the central dichotomy between competing value systems. The rationale of authoritarianism, presented as a buffer against anarchy, is well expressed by Martin J.: there are moments in the life of any government when all powers must work together in unanimity of purpose and action, even if this means the temporary union of executive, legislative and judicial power in the hands of one man.<sup>110</sup> The compelling force of such all-encompassing emergency provisions vested in the executive derives from the release of government from "the paralysis of constitutional restraints"<sup>111</sup> with the objection that the crisis may be ended and normal times speedily restored. but the appeal of this reasoning, specious at bottom, has been persuasively resisted by Philippine judges who have had recourse to an armoury of weapons, conceptual as well as pragmatic, in defence of their commitment to freedom. The legacy they have left behind is less a technical achievement, in the sense of an adroit use of legal mechanisms, than a moving demonstration of faith in constitutional ideals. They have looked beyond the immediate crisis to broader values infusing their constitutional role. This spirit is captured admirably by Munoz-Palma J. who was later to preside over the Constitutional Commission appointed by President Corazon Aquino: "Legal precepts which are to protect the basic fundamental rights and liberties of an individual must be laid down not only for the present but for all times and all conditions. The Bill of Rights must remain firm, indestructible and unyielding to all forms of pressure for, like Mount Sinai of Moses, it can be the only refuge of a people in any crucible they may suffer in the course of their destiny."<sup>112</sup> This resolve, which permeates the most courageous judicial pronouncements of the period, augures well for the future of freedom under the law in beleaguered nations of Asia and the Pacific.

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