

POLITICAL LAW—PART I

CONSTITUTIONAL LAW

VICENTE V. MENDOZA*

I. THE COURT AND THE CONSTITUTION: JUDICIAL REVIEW IN OPERATION

1. *Judicial Review of the Suspension of the Privilege of the Writ of Habeas Corpus.* — In the most widely publicized case of the 1971 Terms, the Court in *Lansang v. Garcia*¹ asserted the power of the judiciary to review President Marcos's decision to suspend the privilege of the writ of habeas corpus, but, finding that the President had acted reasonably, in the end upheld the validity of his suspension order.

In the evening of August 21, 1971, a Liberty Party rally in Plaza Miranda in Manila for the presentation of its candidates in the general elections of November 8, 1971, was bombed. As a result, eight persons were killed and scores of others were injured, among them the candidates.

On August 23, President Marcos announced that he had suspended the privilege of the writ of habeas corpus with respect to "persons presently detained, as well as all others who may be hereafter similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed by them in furtherance or on occasion thereof, or incident thereto, or in connection therewith."² The President cited (1) the formation of a conspiracy supported by a foreign power "for the avowed purpose of actually staging, undertaking and waging an armed insurrection and rebellion in order to forcibly seize political power in this country, overthrow the duly constituted government and supplant our existing political, social, economic and legal order with an entirely new one . . . based on the Marxist-Leninist-Maoist teachings and beliefs," (2) the infiltration by the subversives of "almost every segment of our society"; and (3) the resulting state of lawlessness and disorder of which "the dastardly attack" on the Liberal Party rally was the latest manifestation.

The petitioners in these cases were arrested and detained under the presidential proclamation. They filed petitions for writs of habeas corpus in the Supreme Court questioning the validity of the presidential proclamation

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¹ G.R. No. L-33964, December 11, 1971, 42 SCRA 448.

² Proclamation No. 889.

and their detention under it. Made respondents in the various suits were the Secretary of National Defense, the Chief of Staff of the Armed Forces of the Philippines, and the Chief of the Philippine Constabulary.

Obviously in response to criticism that the proclamation did not declare the existence of an actual state of insurrection or rebellion which under the Constitution justifies the suspension of the privilege, the President subsequently amended his proclamation by stating therein that lawless elements had entered into a conspiracy and "*are actually engaged in an armed insurrection and rebellion*"³ against the government.

In time the Solicitor General, representing the respondents, filed answers to the various petitions. On September 1, 1971 the case was argued before the Court and thereafter the parties submitted memoranda. In its resolution, dated October 5, 1971, the Court announced that it had reached a "tentative consensus" to inquire into the existence of the factual bases required by the Constitution for the suspension of the privilege of the writ. Accordingly, the case was heard on reargument on October 8, 1971 on the "precise scope and nature of the inquiry to be made in the premises, even as all of [the Justices] are agreed that the Presidential findings are entitled to great respect." Thereafter the parties submitted their second memoranda to the Court. On October 28 and 29, the Court heard behind closed doors briefings by generals of the Armed Forces of the Philippines, following which the lawyers for both parties who attended the briefings were allowed to file their observations in memoranda.

On December 11, 1971, the Court, in a unanimous decision, sustained the validity of Presidential Proclamation No. 889-A. In the first part of the opinion written by the Chief Justice, the Court said that the argument regarding the formal validity of the President's proclamation had become moot and academic in view of the subsequent amendment of the proclamation. What was more, the "very tenor of the original proclamation and, particularly the circumstances under which it had been issued, clearly suggest the intent to aver that there was and is, actually, a state of rebellion in the Philippines, although the language of said proclamation was hardly a felicitous one, it having, in effect, stressed the actuality of the *intent* to rise in arms, rather than of the factual existence of the rebellion itself."

In the second part of the opinion the Court held that two conditions must concur before the privilege of the writ may be suspended: (a) there must be an "invasion, insurrection or rebellion" or "imminent danger thereof," as section 10(2) of article VII of the Constitution provides, and (b) the

³ Proclamation No. 889-A.

suspension of the privilege of the writ must be required by public safety.⁴ The President, having determined the existence of these conditions, is his determination subject to review? In *Barcelon v. Baker*,⁵ the Court held that the Governor-General's determination of the existence of these conditions was conclusive on the courts. This ruling was reaffirmed in 1952 in *Montenegro v. Castañeda*.⁶

Lansang purported to repudiate the 66-year old rule of *Baker* and asserted the power of the judiciary to pass upon the validity of the suspension of the privilege of the writ. According to the Court, the conditions on which the President may suspend the privilege of the writ, like other constitutional limitations, are judicially enforceable.

As to the scope of such review, the Court adopted the test of validity of legislation formulated in *Nebbia v. New York*:⁷

If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. . . . With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. . . .

With respect to the first condition, the Court noted that "the existence of a rebellion is obvious, so much so that counsel for several petitioners herein have admitted it." As to the requirement of public safety, it took into account recent violent events and the growth of the Communist Party of the Philippines and of Communist front organizations, and concluded that, in light of these circumstances, it was "not prepared to hold that the Executive had acted arbitrarily or gravely abused his discretion" in suspending the privilege of the writ.

Finally, in disposing of the last question, whether there was probable cause for the petitioners' detention, the Court took note of the fact that several petitioners had in the meantime been released and that the six who remained in detention had been charged in the Court of First Instance

⁴ PHIL. CONST. art. III, sec. 1(14):

"The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, or rebellion, when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist."

Id. art. VII, sec. 10(2): "The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus or place the Philippines or any part thereof under martial law."

⁵ 5 Phil. 87 (1905).

⁶ 91 Phil. 882 (1952).

⁷ 291 U.S. 502 (1934).

of Quezon City with violation of the Anti-Subversion Act. In view of this development, the Court decided to leave the determination of probable cause to that court: (1) to obviate a duplication of the proceedings and avoid the delay resulting from the use of the same evidence in the two courts and (2) to afford greater protection to the rights of the petitioners.

"Up to this point," as the Court put it, the Justices were unanimous. It was on the effect of the filing of charges against the detained petitioners that Mr. Justice Fernando dissented. He argued that the subsequent filing of criminal charges against the petitioners had the effect of transferring their custody from the executive officials to the courts, and that consequently they should be released in the meantime that the court was determining the existence of probable cause for their detention by judicial order. Justices Castro and Barredo filed a joint concurring opinion disputing Justice Fernando's position. They contended that except "in a metaphorical sense, the detainee is not delivered or surrendered at all to the judicial authorities." "What the phrase 'delivered to the judicial authorities' simply means," according to them, "is that from the time a person is indicted in court, the latter acquires jurisdiction over the subject matter. [But] the detainee remains in the custody of the detaining officer, under the same authority invoked for the detention, until the court decides whether there is probable cause to order his arrest."

In departing from the rule announced in *Baker* and *Castañeda*, the Court said:

The weight of *Barcelon v. Baker*, as a precedent, is diluted by two (2) factors, namely: (a) it relied heavily upon *Martin v. Mott* involving the U.S. President's power to *call out the militia*, which—he being the commander-in-chief of all the armed forces—may be exercised to suppress or prevent any lawless violence, even without invasion, insurrection or rebellion, or imminent danger thereof, and is, accordingly, much broader than his authority to suspend the privilege of the writ of *habeas corpus*, jeopardizing as the latter does individual liberty; and (b) the privilege had been suspended by the American Governor-General, whose act, as representative of the *Sovereign*, affecting the freedom of its *subjects*, can hardly be equated with that of the President of the Philippines dealing with the freedom of the Filipino people, *in whom sovereignty resides*, and *from whom all government authority emanates*. The pertinent ruling in the Montenegro case was based mainly upon the *Barcelon* case, and, hence, cannot have more weight than the same. . . .

In point of fact, the Act of Congress of 1795 involved in *Martin v. Mott*,⁸ provided that "whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states most convenient to the place of

⁸ 12 Wheat. (25 U.S.) 19 (1827).

danger, or scene of action, as he may judge necessary to repel such invasion and to issue his order for that purpose as he shall think proper." Speaking of this power, the United States Supreme Court said in that case:

It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, By whom is the exigency to be adjudged and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President and his decision is conclusive upon all other persons

Thus, the distinction drawn between the American President's power to call out the militia and the Philippine President's power to suspend the privilege of the writ does not appear to call for a different standard of review. The essential point is that both powers are subject to certain limitations and are exercisable only upon the determination of those conditions. Under the present Constitution both are in fact aspects of the powers of the President as Commander-in-Chief of the Armed Forces. "Lawless violence" may be broader than "invasion, insurrection, or rebellion," but what about "imminent danger" of any of these, which is also a ground for the suspension of the privilege of the writ?

Nor is the Court persuasive in pointing to the position of the Governor-General "as the representative of the *Sovereign*" vis-a-vis the Filipinos who were "its *subjects*." From the point of view of democratic theory, there would seem to be greater reason for deferring to the judgment of the President, who, as the elected representative of the people, presumptively speaks their voice. The political branches of the government, as Mr. Justice Frankfurter put it, are the guardians of the liberties of the people in as great a degree as the courts are.⁹

Actually, there is nothing in *Barcelon* that bars judicial inquiry into questions of arbitrariness. That probably is the reason the *Lansang* case did not expressly overrule it. The "conclusiveness" statement in the cases¹⁰ cited in the opinion of the *Barcelon* Court meant no more than that within the authority given to him by the Constitution, the act of the executive in suspending the privilege of the writ of habeas corpus was binding on the other departments of the government. Thus, in summarizing its holding the Court in *Barcelon* said:

Upon an examination of the law we conclude:

First. That the paragraph of section 5, above quoted, of the act of Congress of July 1, 1902, confers upon the Governor-General and the

⁹ *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267; *United States v. Lovett*, 328 U.S. 303, 318 (1946) (Frankfurter J. concurring).

¹⁰ *E.g.*, *Martin v. Mott*, *supra*, note 8; *Luther v. Borden*, 7 How. 1 (1849).

Philippine Commission the right to suspend the privilege of the writ of habeas corpus under the conditions therein named.

Second. That the Philippine Commission, *acting within the discretion* which such act of Congress confers upon them, did authorize the Governor-General, by its resolution of January 31, 1905, to suspend the privilege of the writ of habeas corpus in the manner and form indicated in the said executive order of the Governor-General of January 31, 1905.

The said resolution of the Philippine Commission has the effect of law for the purposes for which it was enacted. The judicial department of the Government may examine every law enacted by the legislative branch of the Government for the purpose of ascertaining:

(a) Whether or not such law came within the subject-matter upon which the legislative branch of the Government might legislate; and

(b) Whether the provision of such law were *in harmony with the authority given the legislature*.

If the judicial branch of the Government finds—

(a) That the legislative branch of the Government had authority to legislate upon the particular subject; and

(b) That the particular law contained no provisions in *excess* of such department, then that investigation, or that conclusion, *conclusively* terminates the investigation by this department of the Government.¹¹

The question whether courts can intervene in cases where it is claimed that the President has acted in excess of his authority, and therefore arbitrarily, was not considered in *Barcelon*, as indeed there was no claim to that effect. Questions of arbitrariness raise a question of due process and are fit for judicial determination.¹² As the Supreme Court of the United States held in *Sterling v. Constantin*:¹³

By virtue of his duty to "cause the laws to be faithfully executed," the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. *His decision to that effect is conclusivē*. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, "necessarily results from the nature of the power itself, and from the manifest object contemplated." The power "is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." *Martin v. Mott*, 12 Wheat. 19, 29, 30, 6 L. ed. 537, 540, 541. Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. *Luther v. Borden*, 7 How. 1, 45, 12 L. ed. 581, 600; *Moyer v. Peabody*, 212 U.S. 78, 83, 53 L. ed. 410, 415, 29 S. Ct. 235. . . .

¹¹ *Barcelon v. Baker*, 5 Phil. at 97 (1905). (Emphasis added).

¹² The Solicitor General urged in a memorandum that "judicial inquiry into the basis of the questioned proclamation can go no further than to satisfy the Court not that the President's decision is *correct* and that public safety was endangered by the rebellion and justified the suspension of the writ, but that in suspending the writ, the President did not act *arbitrarily*." Memorandum for the Respondents at 22. (Emphasis in original)

¹³ 287 U.S. 378, 399 (1932).

It does not follow from the fact that the Executive has this range of discretion, deemed to be necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.

Having found the suspension order valid the Court in *Lansang* next indicated that it would determine, on the basis of the result of the preliminary investigation by the Court of First Instance, whether the petitioners came within the terms of Proclamation No. 889-A. In so doing, the Court impliedly adopted the dictum in *Ex Parte Milligan*,¹⁴ in which a distinction was drawn between the writ and its privilege.

The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further.

The "writ" is the order to show cause, the order for justification of the detention, not the order to produce the body of the detained person. On the other hand, it has been pointed out that the "privilege" is the further proceeding and the eventual discharge. Thus, it has been argued that even during a suspension the show cause order will issue, the return will be made, and the court will determine on the basis of the return whether the suspension is constitutional and whether the person detained comes within the terms of the suspension. If so, the "privilege of the writ" is denied and he cannot complain of arbitrary detention if he continues to be deprived of personal freedom without any charge filed against him in court.¹⁵

2. *Judicial Review of the Acts of the Constitutional Convention.*—In *Tolentino v. Commission on Elections*,¹⁶ the Supreme Court asserted the power of the judiciary to pass upon the validity of the acts of the Constitutional Convention. "[T]he Constitutional Convention of 1971, as any other convention of the same nature, owes its existence and derives all its authority and power from the existing Constitution of the Philippines. This Convention has not been called by the people directly as in the case of a revolutionary convention which drafts the first Constitution of an entirely new government born of either a war of liberation from a mother country or of a revolution against an existing government or of a bloodless seizure of power *a la coup d'état*. As to such kind of convictions, it is absolutely

¹⁴ 4 Wall 2, 130-131 (1886).

¹⁵ *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1265-6 (1970).

¹⁶ G.R. No. L-34150, October 16, 1971, 41 SCRA 702.

true that the convention is completely without restraint and omnipotent all-wise, ..."

Organic Resolution No. 1 of the Constitutional Convention, approved on September 28, 1971, provided in pertinent parts:

Section 1. Section One of Article V of the Constitution of the Philippines is amended to read as follows:

"Section 1. Suffrage may be exercised by (male) citizens of the Philippines not otherwise disqualified by law, who are (twenty-one) EIGHTEEN years or over and are able to read and write, and who shall have resided in the Philippines for one year and in the municipality wherein they propose to vote for at least six months preceding to the election."

Section 2. This amendment shall be valid as part of the Constitution of the Philippines when approved by a majority of the votes cast in a plebiscite to coincide with the local elections in November 1971.

Section 3. This partial amendment, which refers only to the age qualification for the exercise of suffrage shall be without prejudice to other amendments that will be proposed in the future by the 1971 Constitutional Convention on other portions of the amended Section or on other portions of the entire Constitution.

Petitioner filed an action for prohibition with the Supreme Court to restrain the respondents from undertaking to hold a plebiscite pursuant to the organic resolution. He contended that the calling and holding of a plebiscite was a power vested solely in Congress, as a legislative body, and could not be exercised by the Convention and that, under section 1 of article XV of the Constitution, the proposed amendment could not be presented to the people for ratification apart from other proposals that the Convention might submit to the people. On the other hand, the respondents and intervenors argued that the Convention was "a legislative body of the highest order [and] is sovereign, and as such, its acts impugned by petitioner are beyond the control of the Congress and the courts."

The Court, through Justice Barredo, overruled the respondents and intervenors' objection. In the second part of its opinion, the Court held section 2 of Organic Resolution No. 1 to be unconstitutional:

The ultimate question, . . . boils down to this: Is there any limitation or condition in Section 1 of Article XV of the Constitution which is violated by the act of the Convention of calling a plebiscite on the sole amendment contained in Organic Resolution No. 1? The Court holds that there is, and it is the condition and limitation that all the amendments to be proposed by the same Convention must be submitted to the people in a single "election" or plebiscite. It being indisputable that the amendment now proposed to be submitted to a plebiscite being called for the purpose of submitting the same for ratification of the people on Novem-

ber 8, 1971 is not authorized by Section 1 of Article XV of the Constitution, hence all acts of the Convention and the respondent Comelec in that direction are null and void.

This portion of the opinion drew a sharp rejoinder from Justice Fernando who, in his dissent, said that the majority placed "undue reliance [on the] rules of grammar." He did not find it constitutionally objectionable that the proposed amendment was tentative in the absence of an express prohibition, because "the people, as the principal, can only be limited in the exercise of their sovereign powers by the express terms of the Constitution."

Justices Reyes, Zaldivar, Castro and Makasiar filed a separate concurring opinion in which they argued (a) that the organic resolution did not afford the people sufficient opportunity to be informed of the meaning, nature and effects of the proposed amendment, and (b) that because the holding of the plebiscite was being made to coincide with the elections of 1971 the people "cannot thus weigh in tranquility the need for and the wisdom of the proposed amendment."

Justice Makalintal reserved his vote because of "grave doubts as to the validity of the premises postulated and conclusion reached in support of the dispositive portion of the decision."

In the resolution¹⁷ denying reconsideration, the majority Justices stressed the tentative character of the amendment. According to the Court, "there could be no safe frame of reference for intelligent voting, specially because the particular amendment proposed is subject to many undefined reservations which it is in the power of the Convention to approve at any time before or after the ratification of their final handiwork." This was also the theme of the separate opinions filed by the Chief Justice and by Justice Teehankee. Justice Makalintal, who in the original decision reserved his vote, filed a dissenting opinion in which Justice Fernando concurred.

*Gonzales v. Commission on Elections*¹⁸ held that the powers of Congress, acting as a constituent assembly, are derived from the Constitution and, consequently, are subject to its limitations. *Angara v. Electoral Commission*¹⁹ ruled that the judiciary is the organ of the government called upon to allocate constitutional boundaries. These two decisions became the bridge decisions for the holding in *Tolentino* that the 1971 Constitutional Convention is governed by the existing Constitution and as such its acts are subject to judicial review. The implication of this ruling is that the Convention can only amend, but not substitute, the present Constitution. To be sure the Court said that it was reserving judgment on this question, but its statement that

¹⁷ G.R. No. L-34150, November 4, 1971.

¹⁸ G.R. No. L-28196, November 9, 1967, 21 SCRA 774.

¹⁹ 63 Phil. 139 (1936).

the Convention cannot disregard the Bill of Rights of the present Constitution indicates that in its view radical changes in the form of government are not possible within the framework of the Constitution. It may indeed be that radical changes cannot be obtained save as a result of a revolution or an upheaval. In that sense, the convention is simply the instrument for articulating in the document what the people have already settled in the battlefield.

In its resolution denying reconsideration, the Court appears to have retreated from its original position that the Constitution allows only one submission of proposals to the people because it speaks of "election" rather than "elections." Instead the Court stressed the fact that the amendment was partial and tentative in arguing that the people were not afforded the opportunity to vote intelligently. It would seem therefore that if a proposal is final and complete in itself it may be submitted for ratification ahead of other proposals. This course of action may indeed be desirable, especially if the proposal sought to be submitted is one as to which the Convention needs guidance from the people. It would save the Convention the embarrassment of having other proposals rejected totally.

3. *Sovereign Immunity from Suits.*—In *Ministerio v. Court of First Instance*²⁰ the Court reaffirmed its 1970 ruling²¹ that an action filed against a government official, on the ground that while claiming to act for the state he violated personal and property rights of an individual, is not a suit against the State within the constitutional principle that the State may not be sued without its consent. In 1927 the National Government took petitioner's lot, containing an area of 1,045 square meters, in Cebu City, for the widening of a national road, without paying compensation for it. Despite repeated demands from petitioner, the respondents, Commissioner of Public Highways and Auditor General, refused either to pay just compensation or to return its possession. Petitioner filed an action in the Court of First Instance of Cebu seeking either the restoration of possession or the payment of just compensation, but the court dismissed the action as a suit against the Government without its consent. On appeal the Supreme Court reversed. Through Mr. Justice Fernando, it held that "the doctrine of governmental immunity from suit cannot serve as an instrument for perpetrating an injustice on a citizen."

From the beginning a dilemma has been recognized between the doctrine of sovereign immunity and the idea of constitutional limitation on official power. The ruling in *Bureau of Telecommunications v. Aligaen* and in *Ministerio v. Court of First Instance* embodies an accommodation of the two prin-

²⁰ G.R. No. L-31635, August 31, 1971, 40 SCRA 464.

²¹ *Bureau of Telecommunications v. Aligaen*, G.R. No. L-31135, May 29, 1970, 33 SCRA 368.

ciples. In American constitutional law a distinction is drawn between suits to enforce rights against the state and those to restrain invasions of interests by individuals claiming to act under a legislative authority which could afford no protection because contrary to constitutional limitations.²² Thus, in *Ex parte Young*,²³ the conviction of a state attorney general for contempt in disobeying an injunctive order restraining him from enforcing certain utility commission rate orders alleged to be unconstitutional was upheld. His disobedience consisted in bringing action against a railroad in a state court to compel observance of the rate order. The principle was announced that an officer who interferes with the property rights of the plaintiff is doing an illegal act for which his representative character affords him no protection. The suit is brought to enjoin the individual wrong and is therefore not against the state.²⁴

4. *Effect of the Invalidation of a Statute.*—In *Serrano De Agbayani v. Philippine National Bank*²⁵ the Court reiterated prior rulings²⁶ that the moratorium law²⁷ interrupted the running of the prescriptive period despite the fact that the law was later declared unconstitutional. Plaintiff obtained a loan of ₱450 from the defendant bank in 1939, and executed a real estate mortgage to secure its payment. The loan matured in 1944. In 1959, the bank instituted extrajudicial foreclosure proceedings in the office of the provincial sheriff. The plaintiff filed an action contending that the mortgage had prescribed, fifteen years having elapsed from the date the loan became due. The lower court gave judgment for the plaintiff. On appeal, the Supreme Court reversed. Through Justice Fernando it held that the moratorium law, providing for the suspension of payment of obligations contracted before December 8, 1941 for a period of eight years from and after the settlement of the war damage claim of the debtor by the United States-Philippine War Damage Commission, was a valid measure justified by the emergency caused by the war and the resulting dislocation of the economy. The invalidation of the law in 1953 rested on the Court's finding that the continued operation of the statute became unreasonable and oppressive as creditors had to wait twelve years before they could collect. In the meantime, the Court observed, the debtors did not pay interest.²⁸ The existence of the statute prior

²² 1 P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, *CONSTITUTIONAL LAW, CASES AND OTHER PROBLEMS* 117-118 (3rd ed. 1967).

²³ 209 U.S. 123 (1908).

²⁴ Note, *Sovereign Immunity in Suits to Enjoin the Enforcement of Unconstitutional Legislation*, 50 HARV. L. REV. 956-959 (1937).

²⁵ G.R. No. L-33127, April 29, 1971, 38 SCRA 429 (1971).

²⁶ E.g., *Day v. Court of First Instance*, 94 Phil. 816 (1954); *Montilla v. Pacific Commercial Co.*, 98 Phil. 133 (1955).

²⁷ Rep. Act No. 342.

²⁸ *Rutter v. Esteban*, 93 Phil. 68 (1953).

to its invalidation was an operative fact and produced legal consequences which could not be justly ignored.²⁹

5. *The Effect of Defendant's Flight on His Case in the Supreme Court.*—In *De la Camara v. Enage*³⁰ the trial court fixed the bail of the defendant, who was accused of multiple murder and multiple frustrated murder, at ₱1,195,200. The defendant asked for a reduction of the bail on the ground that it was excessive. When his motion was denied, he filed a petition for certiorari in the Supreme Court. While the case was thus pending, the petitioner escaped from the provincial jail. Through Mr. Justice Fernando the Supreme Court held that while ordinarily the petition should be dismissed, having been rendered moot and academic by petitioner's escape, there was sufficient interest justifying decision of the case. The Court found the bail required by the lower court to be excessive, considering that there were only two cases filed against the petitioner and that the Department of Justice had recommended the reduction of the bail to ₱40,000. The Court said:

There is reason to believe that any person in the position of petitioner would under the circumstances be unable to resist thoughts of escaping from confinement, reduced as he must have been to a state of desperation. In the same breath that he was told he could be bailed out, the excessive amount required could only mean that provisional liberty would be beyond his reach. It would have been more forthright if he were informed categorically that such a right could not be availed of. There would have been no disappointment of expectations then. . . . Petitioner's subsequent escape cannot be condoned. That is why he is not entitled to the relief prayed for. What respondent Judge did, however, does call for repudiation from this Court.

A court ordinarily will not pass upon a constitutional question except in the context of a specific controversy. Departure from this rule was justified in *De la Camara* by what the Court conceived to be the necessity of performing a symbolic function—that of articulating the principles of the Constitution for the guidance of lower court judges. At the same time, by denying in the end any relief to the petitioner, the Court tried to vindicate the principle that one who invokes the jurisdiction of the court must submit to it.

In contrast, in a case raising similar question, the Supreme Court of the United States dismissed the petition for certiorari of a defendant who, while the case was pending in the Supreme Court, jumped bail and fled. In *Eisler v. United States*,³¹ after conviction by the District Court for the

²⁹ *Chicot County Drainage Dist. v. Baxter St. Bank*, 308 U.S. 371, 374 (1940), cited in *Municipality of Malabang v. Benito*, G.R. No. L-28113, March 28, 1969, 27 SCRA 533; *Fernandez v. Cuerva & Co.*, G.R. No. L-21114, November 28, 1967, 21 SCRA 1095; *Manila Motor Co. v. Flores*, 99 Phil. 738 (1956); *Araneta v. Hill*, 93 Phil. 1002 (1953).

³⁰ G.R. Nos. L-32951-2, September 17, 1971, 41 SCRA 1.

³¹ 338 U.S. 189 (1949).

District of Columbia on a charge of refusing to testify before a Congressional committee, an affirmance by the Court of Appeals for the District, a grant of certiorari and the submission of his case on the merits, the defendant jumped bail and fled from the United States. The government moved to dismiss the petition. The Court did not dismiss the case but merely ordered it removed from the docket. Four Justices dissented for varying reasons. Justice Frankfurter, with whom the Chief Justice joined, dissented and argued that the function of the Court was not to give answers to abstract questions of law. According to him the case should be dismissed, because the Court had lost jurisdiction.

On the other hand, Justices Murphy and Jackson contended in separate dissenting opinions that the Court should decide the case and not put off the resolution of the questions raised. The power of Congress and its investigating committee to conduct the hearings, for refusing to attend which the defendant was punished for contempt, was in issue, and it was important that it be decided. Said Justice Jackson:

Decision at this time is not urged as a favor to Eisler. If only his interests were involved, they might well be forfeited by his flight. But it is due to Congress and to future witnesses before its committees that we hand down a final decision. I therefore dissent from an expedient that lends added credence to Eisler's petition, which I think is without legal merit. I do not think we can run away from the case just because Eisler has.

In the end, however, the Frankfurter position prevailed. The government's motion to dismiss was finally granted on November 21, 1949.⁸²

The Court in *De la Camara* must have felt the way Justice Jackson did in *Eisler*: that it could not run away from the decision of the case just because *De la Camara* had. It had a duty to another constituency: the nation. The Justices, in Eugene Rostow's phrase, "are inevitably teachers in a vital national seminar."⁸³

The contrary view has been put by Professor Freund:⁸⁴

The themes I have tried to develop can perhaps be brought together in an encompassing question: Should the Court serve as the "conscience of the country"? Put in this way, as today it often is put, the answer is plain. It would be a morally poor country indeed that was obliged to look to any group of nine wise men for ultimate moral light and leading, much less a group limited to men drawn from one profession, even that of the law.

But there are two narrower senses in which the Court does inevitably serve as a public conscience. The great fundamental guarantees of the

⁸² 338 U.S. 883 (1949).

⁸³ Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).

⁸⁴ P. A. FREUND, ON LAW AND JUSTICE 35-36 (1968); Freund, *Two Cheers for the Supreme Court*, 19 CLEV. ST. L. REV. (1) 8, 11 (1970).

Constitution are, after all, moral standards wrapped in legal commands: due process of law, equal protection of the laws, cruel and unusual punishment, free exercise of religion. When claims are raised in lawsuits that invoke these ethical-legal standards, the opinions of the Court are bound to contribute to our more general thinking about social justice and ethical conduct. Some of our most memorable utterances on these themes we owe to the great Justices who have delivered them *as part of their judgments in concrete cases*: Holmes, Brandeis, Stone, and Hughes, to name only the departed.

There is a second sense in which the Court serves as a public conscience, which paradoxically tends to limit the Court's freedom of utterance on these themes. *The Court has warrant to speak only in the decision of specific litigation and then only as the logic of the case requires these issues to be stirred.* In this sense the Court becomes a conscience by acting to remind us of limitation on power, even judicial power, and the interrelation of good purposes with good means. Morality is not an end dissociated from means. There is a morality of morality, which respects the limitations of office and the fallibility of the human mind. Justice Brandeis used to remind himself and others that self-limitation is the first mark of the master. That, too, is part of the role of conscience.

II. INDIVIDUAL RIGHTS

A. Due Process

Personal Service in Actions in Personam.—Due process of law requires that there be some connection between the defendant and the legal unit where the procedure is conducted—physical presence of the defendant, domicile, citizenship, nationality, or some other minimum contact to the jurisdiction.³⁵ As the Supreme Court of the United States noted, historically the jurisdiction of courts to render judgment in personam was grounded on their de facto power over the defendant's persons. Hence the personal presence of the defendant was required. But since *capias respondendum* has given way to personal service of summons, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."³⁶

In *Citizens' Surety & Insurance Co. v. Melencio-Herrera*³⁷ the judge dismissed an action for the collection of a sum of money representing the unsatisfied balance after a foreclosure sale as the defendant could not be served with summons. On review the Supreme Court said that it agreed

³⁵ 2 P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW, CASES AND OTHER PROBLEMS 1355 (3rd ed. 1967), citing *Blackmer v. United States*, 284 U.S. 421 (1932); *Baker v. Baker, Eccles and Co.*, 242 U.S. 394 (1917).

³⁶ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

³⁷ G.R. No. L-31270, March 31, 1971, 39 SCRA 369.

with the respondent judge that "the action being *in personam* the lower court could not validly acquire jurisdiction on a non-appearing dependant, absent a personal service of summons *within* the forum." The Court reiterated its ruling in a previous case that "Due process of law requires *personal* service to support a *personal* judgment, and, when the proceeding is strictly *in personam* brought to determine the personal rights and obligations of the parties, *personal* service within the state or a voluntary appearance in the case is essential to the acquisition of jurisdiction so as to constitute compliance with the constitutional requirement of due process." Justice Reyes, who wrote the opinion of the Court, suggested that the plaintiff look for real or personal property of the dependant and seek their attachment. This would convert the action into an action *in rem* for which summons by publication would suffice. In the meantime that the plaintiff was looking for property of the defendant the Court directed that the action be merely archived to stop the running of the period of prescription.

B. *The Protection of Equal Laws*

Retroactive Application of Overruling Decisions as a Requirement of Equal Protection.—In *Gumabon v. Director of Prisons*³⁸ the Court ordered the release on a writ of habeas corpus of convicts whose sentences were deemed to have become excessive in light of a new ruling. Petitioners pleaded guilty in the trial court to the charge of having committed the complex crime of rebellion with multiple murders and other common crimes and were sentenced to *reclusion perpetua*. The sentences became final in 1953. Subsequently, in 1956, the Supreme Court held in *People v. Hernandez*³⁹ that the crime of rebellion cannot be "complexed" with other common crimes. The petitioners sued for a writ of habeas corpus, claiming the benefit of the new ruling. The Court granted the petition and ordered the release of the petitioners. Nine Justices voted to grant the petition, although not one of the opinions filed in this case received the support of a majority. Two other members of the Court abstained. The opinion of Justice Fernando was concurred in by Justices Dizon and Zaldivar, with the Chief Justice concurring in the result. Justice Teehankee wrote a separate opinion in which Justices Reyes, Makalintal, and Villamor concurred. Justice Barredo indicated that he was concurring in a separate opinion, but no copy of his opinion appears to have been promulgated. Justices Castro and Makasiar took no part.

In 1960 a similar petition for the extension of the benefits of the *Hernandez* ruling was denied by the Court in *Pomeroy v. Director of Prisons*⁴⁰ on the ground that the prior decision, which had become final, had become the "law of the case." The *Pomeroy* Court ruled that "with reference to

³⁸ G.R. No. L-33026, January 30, 1971, 37 SCRA 420.

³⁹ 99 Phil. 515 (1956).

⁴⁰ 107 Phil. 50 (1960).

persons in custody pursuant to a final judgment, the rule is that the writ of *habeas corpus* can issue only for want of jurisdiction of the sentencing court, and cannot function as a writ of error." In *Gumabon* Mr. Justice Fernando distinguished *Pomeroy* by pointing out that the question of denial of equal protection of the law was not raised in the latter case. Nor was the rule requiring retroactive application of penal statutes favorable to the accused invoked in that case. "[T]hese two grounds carry weight," Justice Fernando said.

The idea of equal protection appears to underlie the decision to issue the writ in *Gumabon*. Resort to article 22 of the Revised Penal Code (providing for retroactive application of favorable penal legislation) was made to implement the idea.⁴¹ Thus, Justice Fernando argued:

The continued incarceration [of the petitioners] after the twelve-year period when such is the maximum length of imprisonment in accordance with our controlling doctrine, when others similarly convicted have been freed, is fraught with implications at war with equal protection. . . . [P]etitioners who were mere followers would be made to languish in jail for perhaps the rest of their natural lives when the leaders had been duly considered as having paid their penalty to society, and freed.

In the same vein, Justice Teehankee pointed out in his separate opinion:

Petitioners here have been convicted for the very same rebellion and under the same law for which their leaders, . . . have been convicted. Yet, while their leaders have since been freed after serving their sentences of ten years of *prision mayor*, petitioners as mere followers are serving out the life sentences imposed on them, notwithstanding their already having served out much more than the maximum penalty of twelve years of *prision mayor* imposable upon them.

The overruling of decisions is an ordinary business of courts and has seldom been thought to raise question of the equal protection of laws. The judicial process does not always guarantee sameness of result. A decision may be wrong in light of a new ruling, but, as long as the court which rendered it had jurisdiction to try the case, the decision can become final and can no longer be reopened.⁴² There is here involved an important pub-

⁴¹ Article 22 of the Revised Penal Code provides:

Retroactive effect of penal laws.—Penal laws shall have a retroactive effect insofar as they favor the person guilty of a felony, who is not a habitual criminal, as this term is defined in rule 5 of article 62 of this Code, although at the time of the publication of such laws a final sentence has been pronounced and the convict is serving the same.

In applying this provision to decisional rules which are favorable to the accused, the Court cited article 8 of the Civil Code which states that "judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."

⁴² See *People v. Olarte*, G.R. No. L-32465, February 28, 1967, 19 SCRA 494 (1967) ("A subsequent reinterpretation of the law may be applied to new cases but certainly not to an old one finally and conclusively determined."); *Pomeroy v. Director of Prisons*, 107 Phil. 50 (1960) ("[T]he rule adopted by this Court [and by the Federal Supreme Court] is that judicial doctrines have only prospective operation and do not apply to cases previously decided.")

lic policy of putting an end to litigation. The decision of the trial court in *Gumabon* was not egregiously wrong so as to oust the court of jurisdiction. At the time it was rendered, as Justice Teehankee observed, opinion was fairly divided on the question it decided, *i.e.*, whether there was a complex crime of rebellion and other crimes. The *Hernandez* Court itself was divided 6-4. What is more, the petitioners in *Gumabon* accepted the judgment of the trial court by not appealing it.

The ruling in this case tempts the inquiry whether any ruling favorable to the defendant is, by the same constitutional and statutory mandates invoked by the Justices, to be given retrospective effect. Suppose that a person was convicted solely on the basis of evidence illegally obtained under the doctrine of *Moncado v. People's Court*.⁴³ Can he later seek release by claiming the benefits of the new ruling in *Stonehill v. Diokno*?⁴⁴ In the United States, the Supreme Court held⁴⁵ that its decision in *Mapp v. Ohio*,⁴⁶ which overruled *Wolf v. Colorado*⁴⁷ and barred from use in a state prosecution illegally seized evidence, would not be applied to upset convictions in other cases which had become final before the decision in *Mapp*. Likewise, the Court in *Tehan v. Shott*^{47a} refused to give retroactive effect to the ruling in *Griffin v. California*,⁴⁸ which overruled *Twining v. New Jersey*⁴⁹ and held that adverse comment by a prosecutor or judge upon a defendant's failure to testify in a state criminal trial violates the privilege against self-incrimination. Finally, it was held that the rule announced in *Escobedo v. Illinois*⁵⁰ and *Miranda v. Arizona*⁵¹ excluding confessions given during in-custody interrogations without the assistance of counsel was not retroactively effective. The new rule applied only to trials began after the date of the decisions in *Escobedo* and *Miranda*. The American Court took into account the purpose of the new rule, the reliance placed on prior decisions and the effect on the administration of justice of a retroactive application of the rule.⁵² As the American Court explained:

We gave retroactive effect to *Jackson v. Denno*, *supra*, because confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature. On the other hand, we denied retroactive application to *Griffin v. California*, *supra*, despite the fact that comment on the failure to testify may sometimes mislead the jury

⁴³ 80 Phil. 1 (1948).

⁴⁴ G.R. No. L-19550, June 19, 1967, 20 SCRA 383.

⁴⁵ *Linkletter v. Walker*, 381 U.S. 618 (1965). For a valuable discussion of Linkletter, see Mishkin, *The Supreme Court, 1964 Term, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

⁴⁶ 367 U.S. 343 (1961).

⁴⁷ 338 U.S. 25 (1949).

^{47a} 382 U.S. 406 (1966).

⁴⁸ 380 U.S. 609 (1965).

⁴⁹ 211 U.S. 78 (1908).

⁵⁰ 378 U.S. 478 (1964).

⁵¹ 384 U.S. 436 (1966).

⁵² *Johnson v. New Jersey*, 384 U.S. 719 (1966).

concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial.

These cases caution against adopting a flat rule of retroactive application of any rule which is favorable to the accused, whether that rule be judge-made or enacted. This is especially so where as in the *Gumabon* case the lower penalty is simply the consequence of a new interpretation and not the direct provision of a new rule.

C. Freedom of Expression

The Employer's Right of Expression and the Employees' Right of Self-Organization—In *Insular Life Assurance Co. Employees Ass'n v. Insular Life Assurance Co.*⁵³ the company, during a strike, sent each striker a letter promising "comfortable cots, free meals. . . free coffee and occasional movies, overtime pay" and many other benefits in an effort to induce the strikers to return to work. This was followed by another letter threatening to replace employees who failed to return to work by June 2, 1958. The union charged the company with unfair labor practice, but the case was dismissed by the Court of Industrial Relations. On review the Supreme Court reversed. Disposing of the respondents' claim that the letters were sent in the exercise of management's freedom of expression, the Court, through Mr. Justice Castro, said:

Moreover, since Exhibit A is a letter containing promises of benefits to the employees in order to entice them to return to work, it is not protected by the free speech provisions of the Constitution (*NLRB v. Clearfield Cheese Co., Inc.*, 213 F.2d 70). The same is true with Exh. B since it contained threats to obtain replacements for the striking employees in the event they did not report for work on June 2, 1958. The free speech protection under the Constitution is inapplicable where the expression of opinion by the employer or his agent contains a promise of benefit or threats, or reprisal. (31 Am. Jur. 544; *NLRB v. Goigy Co.* 211 F.2d 533, 35 ALR 2d 422).

D. The Privilege Against Self-Incrimination

1. *The Right to Counsel During Custodial Interrogation.*—In *People v. Jose*,⁵⁴ the Court rejected application of the *Miranda*⁵⁵ rule in the Philippines and held that a statement given by a defendant during the custodial period of interrogation is admissible in evidence against him even if it was made without the assistance of counsel. Defendant Jaime Jose was arrested

⁵³ G.R. No. L-25291, January 30, 1971, 37 SCRA 244.

⁵⁴ G.R. No. L-28232, February 6, 1971, 37 SCRA 450.

⁵⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

by the police and was identified by the complainant from among a group of persons brought to the police headquarters in Quezon City as one of those who criminally abused her. He executed a statement duly sworn in which he admitted that "he knew about, and was involved in the June 26 incident." He stated among other things that he, Basilio Pineda, Edgardo Aquino and Rogelio Cañal waited for the complainant Maggie de la Riva to come out of a TV studio where she was at the time appearing in a program and that, upon seeing her, his group tried to overtake Miss de la Riva's car. The complainant claimed that she was forced out of her car and taken to a motel. Defendant Jose pointed to Pineda as the one who blindfolded the complainant. He said Pineda and Aquino were the ones who assaulted the complainant. The defendants were accused in the Court of First Instance of Quezon City and were subsequently found guilty of the complex crime of forcible abduction and rape and were each sentenced to death. On appeal the Supreme Court affirmed. In a per curiam opinion, with Justices Teehankee and Barredo taking no part, it was held:

The admissibility of his extrajudicial statements is likewise being questioned by Jose on the other ground that he was not assisted by counsel during the custodial interrogations. He cites the decisions of the Supreme Court of the United States in *Massiah v. U.S.* (377 U.S. 201), *Escobedo v. Illinois* (378 U.S. 478) and *Miranda v. Arizona* (384 U.S. 436).

The provision of the Constitution of the Philippines in point is Article III (Bill of Rights), Section 1, par. 17 of which provides: "In all criminal prosecutions the accused shall . . . enjoy the right to be heard by himself and counsel . . ." While the said provision is identical to that in the Constitution of the United States, in this jurisdiction the term criminal prosecutions was interpreted by this Court, in *U.S. v. Beecham*, 33 Phil., 258 (1912), in connection with a similar provision in the Philippine Bill of Rights (Section 5 of Act of Congress of July 1, 1902) to mean proceedings before the trial court from arraignment to rendition of the judgment. Implementing the said constitutional provision, we have provided in Section 1, Rule 115 of the Rules of Court that "In all criminal prosecutions the defendant shall be entitled . . . (b) to be present and defend in person and by attorney at every stage of the proceedings, *that is from the arraignment to the promulgation of the judgment.*" The only instances where an accused is entitled to counsel before arraignment, if he so requests, are during the second stage of the preliminary investigation. (Rule 112, Section 11) and after the arrest (Rule 113, Section 18). The rule in the United States need not be unquestioningly adhered to in this jurisdiction, not only because it has no binding effect here, but also because in interpreting a provision of the Constitution the meaning attached thereto at the time of the adoption thereof should be considered. And even there the said rule is not yet quite settled, as can be deduced from the absence of unanimity in the voting by the members of the United States Supreme Court in all the three above-cited cases.

In *Massiah v. United States*,⁵⁶ the Supreme Court of the United States reversed a conviction based on incriminating conversation of the defendant which the police obtained by means of a radio transmitter installed under a seat without the defendant's knowledge. The Court relied on its 1959 decision in *Spano v. New York*⁵⁷ in which a conviction based on a confession obtained without the presence of counsel was unanimously reversed. "It is true," the Court in *Massiah* said, "that in the *Spano* case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, *Massiah* was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent. . . ."

Again, in *Escobedo v. Illinois*,⁵⁸ the American Court held that when the police investigation begins to "focus . . . on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

This development in the area of criminal procedure, which gave the Warren Court era its dominant characteristic,⁵⁹ reached its watermark in *Miranda v. Arizona*.⁶⁰ It was held in that case that where a person in custody was not given an opportunity to consult counsel, or counsel was not offered in case of indigency, and there was no waiver of the right to counsel, the confession of the defendant must be excluded.

The constitutional basis of *Miranda* is the Fifth Amendment privilege not to be compelled to be a witness against one's self and not, as the Court in *Jose* thought, the Sixth Amendment right to counsel. The assistance of counsel was required only as one of the means of safeguarding the freedom of the will of the accused in the coercive atmosphere of police interrogation. That is why, as Professor Freund has pointed out, the *Miranda* Court did not invalidate all confessions obtained without the presence of counsel for the defendant.⁶¹ Indeed, in a passage that has not been sufficiently noticed, the United States Supreme Court said that the requirements specified were to be met "unless other fully effective means are devised to inform the accused persons of their right of silence and to assure a continuous opportunity to exercise it,"⁶² It explained that "the Constitution does not require

⁵⁶ 377 U.S. 201 (1964).

⁵⁷ 360 U.S. 315 (1959).

⁵⁸ 378 U.S. 478 (1964).

⁵⁹ See A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS ch. 1 (1970).

⁶⁰ *Supra*, note 55.

⁶¹ P.A. FREUND, ON LAW AND JUSTICE 33 (1968).

⁶² 384 U.S. at 444.

any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.”⁶³

The statement in *Jose* that in this country the provision of article III, section 1 (17) has always been understood to extend only to the trial stage misconceives the basis of the *Miranda* rule: that the atmosphere of custodial interrogation “carries its own badge of intimidation” and is “equally destructive of human dignity” as physical intimidation and, therefore, “unless adequate protective devices are employed to dispel the compulsion inherent in [it], no statement obtained from the defendant can truly be the product of his free choice.”

The Philippine Court was probably right in not following the lead of the American Court, after observing that even in the United States the rule regarding the right to counsel at the stage of custodial interrogation was “not quite settled.” Only a few days after the decision in *Jose*, the United States Supreme Court held on February 24, 1971 (the decision in *Jose* was announced on February 6, 1971), that although the defendant’s prior inconsistent statements, which he did not claim were coerced or involuntary, had been made to the police under circumstances rendering them inadmissible to establish the prosecution’s case in chief under *Miranda v. Arizona*, such statements are nevertheless admissible for the purpose of impeaching the defendant’s credibility.⁶⁴ The decision was 5-4.⁶⁵ The dissenters, through Mr. Justice Brennan, complained: “The Court today tells the police that they may lawfully interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* can’t be used on the State’s direct case, it may be introduced if the defendant has the temerity to testify in his own defense.”

Indeed, the view is generally held that *Harris* has substantially undercut *Miranda*’s premise that the Fifth Amendment guarantee against self-incrimination applies to pretrial custodial interrogation.⁶⁶ But even critics of *Miranda* frankly deplore the logic of *Harris* and its failure to grapple with the central problem raised in the former decision: the inherently coercive atmosphere of custodial interrogation.

This same criticism can be made of the decision in *Jose* rejecting the application of the *Miranda* rule in this jurisdiction. Is the atmosphere of in-

⁶³ *Id.* at 490.

⁶⁴ *Harris v. New York*, 401 U.S. 222 (1971).

⁶⁵ Justices Brennan, Black, Douglas and Marshall dissented.

⁶⁶ See generally, Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L. J. 1198 (1971); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 53-64 (1971).

custody interrogation coercive as the *Miranda* Court found it to be in the United States? Does it overbear the defendant's will? Are there no other devices as fully effective as the presence and advice of counsel to secure the voluntariness of the defendant's confession? These are some questions raised by implication whenever the *Miranda* rule is invoked. The failure to attend to them is a regrettable aspect of the Court's decision in *People v. Jose*.

2. *Involuntary Confessions and the Validity of Convictions Based on Other Evidence.*—In *People v. Bagasala*,⁶⁷ the Court found the extrajudicial confession of the defendant to have been coerced and held it inadmissible in evidence, but, finding that the remaining evidence was competent and sufficient to establish the guilt of the defendant, the Court nevertheless sustained his conviction. The defendant and four others were accused of robbery with homicide in the Court of First Instance of Camarines Sur. During the trial the prosecution introduced the extrajudicial confession of the defendant to corroborate the testimony of a prosecution witness. In that statement the defendant admitted being in the group of five persons who robbed the house of a couple, during which the wife was killed. The defendant claimed that twice during the investigation conducted by the Constabulary, he was beaten up to make him sign the confession. His claim was confirmed by a subsequent examination by the city health officer who said that he found five lesions on the body of the defendant, tenderness on his abdomen, an elongated scar on the left forearm, and a wound on the elbow, and that the defendant was deaf and nervous. When asked what could have caused the tenderness on the abdomen, he replied: "That is trauma. The elongated scar on the lower third might have been produced by a stick; the healing wound circular in form, he might have fallen on a hard object and the sensation of deafness, if you try to hit the two ears with the palm, there is compression of the ear drum, so that the hearing is interfered with. But this will be temporary in nature. Easily nervous, because of fear." The trial court rejected the claim that the confession was involuntary, and convicted the defendant and another one. On appeal, the Supreme Court affirmed.

Writing for the Court, Mr. Justice Fernando said that "if the conviction of the appellant were predicated solely on the confession, he would be entitled to an acquittal, his attack on its involuntary character having support in the evidence on record. There is, however, sufficient basis for the finding of guilt as the testimonial evidence is sufficiently weighty and the defense of alibi utterly unconvincing." The Court observed that the defendant had been sufficiently identified by the husband as one of those who had robbed them.

⁶⁷ G.R. No. L-26182, May 31, 1971, 39 SCRA 236.

The decision in this case is a repudiation of the dictum in two previous cases⁶⁸ that in order to be excluded a confession must be shown not only to have been coerced but also to be false or untrue.⁶⁹ This latter view was said to be compelled by the ruling in *Moncado v. People's Court*⁷⁰ that the admissibility of evidence is not affected by the illegality of the means employed to obtain it. The repudiation of the dictum follows not only from the overruling of the *Moncado* doctrine in *Stonehill v. Diokno*⁷¹ but even more from the fact that there is a difference between confessions which are coerced and documents which are illegally seized. The veracity of papers and documents is independent of the means used in obtaining them. On the other hand, there is an element of question-begging in the requirement that the use of force or violence must be shown to have resulted in a compulsion to tell a falsehood before an involuntary confession may be excluded. A confession is valuable as an admission against self-interest only when it is voluntary.⁷²

Indeed, in the United States, the rule is that the use of involuntary confessions necessitates reversal regardless of how much other evidence remains to support the conviction. This is known as the "rule of automatic reversal."⁷³ In contrast, in the case of illegally-seized evidence, the rule is that conviction will be reversed only when there is a "reasonable possibility that the evidence complained of might have contributed to the conviction."⁷⁴ This is known as the "harmless-error" rule, which seeks to accommodate the desirability of deterring objectionable police conduct against the undesirability of excluding relevant and reliable evidence.⁷⁵

E. Freedom from Unreasonable Searches and Seizures

1. *The Determination of Probable Cause in the Issuance of Search Warrants.*—In *Bache & Co. (Phil.) v. Ruiz*,⁷⁶ the Court held that the determination of probable cause as basis for the issuance of a search warrant

⁶⁸ *People v. De los Santos*, 93 Phil. 83 (1953); *People v. Villanueva*, 98 Phil. 327 (1956).

⁶⁹ "A confession to be repudiated, must not only be proved to have been obtained by force and violence, but also, that it is false or untrue, for the law rejects the confession when, by force or violence or intimidation the accused is compelled against his will to tell a falsehood, not when by such force and violence he is compelled to tell the truth." *People v. De los Santos*, *id.* at 92-93.

⁷⁰ 80 Phil. 1 (1948).

⁷¹ G.R. No. L-19550, June 19, 1967, 20 SCRA 383 (1967).

⁷² *See Stein v. New York*, 346 U.S. 156 (1953).

⁷³ *E.g.*, *Malinsky v. New York*, 324 U.S. 401 (1945) ("Coerced confessions would find a way of corrupting the trial" if their use is sanctioned.); *Rogers v. Richmond*, 365 U.S. 534 (1961) (Convictions following the admission in evidence of coerced confession cannot stand, because such confessions "offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system.").

⁷⁴ *Fahy v. Connecticut*, 375 U.S. 85 (1963).

⁷⁵ *Chapman v. California*, 386 U.S. 18, 42 (1967) (Stewart J. concurring).

⁷⁶ G.R. No. L-32409, February 27, 1971, 37 SCRA 823.

requires personal examination by the judge of the applicant and the witnesses and that this duty cannot be delegated to any other person. An internal revenue agent and a witness applied to the respondent judge for a search warrant against the petitioning company. Attached to the application for a warrant was the agent's affidavit and deposition, together with a draft of a warrant for the signature of the judge. As the judge was hearing a case when the applicant and the witness arrived, the judge directed the deputy clerk of court to take the depositions of the internal revenue agent and the witness. The judge then asked the stenographer to read the notes of the proceedings on the application for a search warrant, after which he administered the oath to the applicant and the witness with a warning that they could be charged with perjury if their deposition was found to be false. The judge afterward signed the application and the deposition and the search warrant. The warrant stated that it was being issued "for violation of sec. 46(a) of the National Internal Revenue Code in relation to all other pertinent provisions thereof particularly Secs. 53, 72, 73, 208 and 209." On the strength of this warrant, the premises of petitioning company were searched and documents were seized. Tax assessments were issued by the Bureau of Internal Revenue on the basis of these documents. Petitioner filed a petition in the Court of First Instance for the dissolution of the warrant, but its petition was dismissed. Petitioner applied for writs of certiorari, prohibition and mandamus in the Supreme Court. The warrant was declared void. The opinion of the Court, written by Justice Villamor, cited three grounds for invalidating the warrant: (a) The failure of the judge to examine the witness and applicant; (b) The issuance of the warrant for more than one offense; and (c) The failure of the warrant to describe the documents to be searched with particularity.

The last two grounds required no more than an application of the doctrine of *Stonehill v. Diokno*.⁷⁷ The warrant issued in *Bache* was no less general than those involved in *Stonehill* (for "violation of Central Bank Laws, Tariff and Customs Laws, Internal Revenue (Code) and Revised Penal Code"), because of reference to specific provisions of the Internal Revenue Code. As Justice Barredo, joined by Justice Reyes, pointed out in his concurring opinion, "By merely saying that a party is being charged with violation of one section of the code in relation to a number of other sections thereof which in truth have no clear or direct bearing with the first is . . . condemnable because it is no less than a shotgun device which trenches on the basic liberties . . . protected by . . . the Constitution and the Rules of Court."

Nor was there an adequate description of the documents authorized to be searched. As the Court pointed out, the warrant authorized the seizure of "all conceivable records of the petitioner corporation."

⁷⁷ G.R. No. L-19550, June 19, 1967, 30 SCRA 383.

It is the first ground that calls for comment. Justice Montemayor pointed out in his dissent in an earlier case⁷⁸ that the phrase "to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce" in article III, section 1(3) was added to the original text adopted from the Jones Law because of widespread abuses in issuing warrants on the basis of affidavits alone. The purpose was to impose on the judge issuing the warrant the duty of determining the existence of probable cause on the basis of his own examination of the applicant and the witnesses.

A search warrant implies the invasion of a man's home which is said to be his castle. Under a search warrant one's privacy is intruded on, his affairs pried into, his secrets discovered, his papers and personal documents may be ransacked and taken to court and later may be used against him in a criminal prosecution. Searches and seizures under a warrant are intimately linked with the fundamental rights of a citizen not to be compelled to testify against himself. A citizen is practically helpless against a search warrant and its effects. . . . This is why, the framers of the Constitution showed so much concern and solicitude in their discussion on the subject of search warrant, and knowing the abuses and excesses that in the past had been committed under it, decided to surround its issuance with constitutional safeguards. Not so with a warrant of arrest. A person illegally or wrongly arrested under a warrant of arrest improvidently issued, has a ready and simple remedy. He can always sue out a writ of habeas corpus to secure his release from arbitrary or illegal detention. . . .⁷⁹

But while the judge is required to personally examine the applicant and the witnesses, neither the Constitution nor the Rules of Court requires that the physical act of typing the affidavits in support of the application for a search warrant be done by or before the judge. The affidavit and the draft of the warrant may be prepared beforehand. It is enough if these documents are subscribed and sworn to before the judge. Nor is it necessary that the warrant be made out in the presence of the judge. "[W]hat the law seeks in requiring the judge to examine the witnesses under oath is to enable him to determine for himself that probable cause exists and this purpose is attained . . . without requiring of the judge the mechanical act of personally typing the affidavits and search warrants."⁸⁰

2. *Waiver of Objection to the Judge's Failure to Examine Witnesses.*—In *De Asis v. Romero*,⁸¹ it was held that objection to the validity of a warrant of arrest on the ground that the judge did not previously examine the witnesses is waived if in the meantime the defendant applies for bail

⁷⁸ *Amarga v. Abbas*, 98 Phil. 739, 744 (1956) (Dissent).

⁷⁹ *Id.* at 752-753.

⁸⁰ *Oca v. Maiquez*, G.R. No. L-20749, July 30, 1965, 14 SCRA 735, *See also* *Luna v. Plaza*, G.R. No. L-27511, November 29, 1968, 26 SCRA 310, holding that there was compliance with the constitutional requirement where the judge adopted the questions asked by the police investigators and the witnesses affirmed the answers they had given to the police.

⁸¹ G.R. No. L-33125, September 30, 1971, 41 SCRA 235.

and pleads to the charge. On complaint filed against the petitioner and two others for kidnapping, the fiscal scheduled a preliminary investigation and issued a subpoena to the petitioner. Although served, the petitioner refused to acknowledge receipt of the subpoena and to attend the investigation, whereupon the investigation proceeded. After the investigation the fiscal filed an information for kidnapping with serious illegal detention against the petitioner, on the basis of which the judge issued an order of arrest. The petitioner applied for bail. He was arraigned and, with the aid of counsel, he pleaded not guilty. The court thereupon denied petitioner's application for bail. The petitioner sued for a writ of habeas corpus contending that the respondent judge issued the order of arrest without having personally examined the complainant and the latter's witnesses, in violation of section 1(3) of article III of the Constitution. The Supreme Court, by a vote of 9-2, denied relief to the petitioner.

In his majority opinion, Mr. Justice Castro said:

One of the most important of these settled rules is that any objection to the procedure followed in the matter of acquisition by a court of jurisdiction over the person of the accused must be opportunely raised before he enters his plea, otherwise the objection is deemed waived.

De Asis could have, right after his arrest, objected to the regularity of the warrant of arrest in question. Instead, he not only filed a petition for bail with the lower court, thereby accepting the court's jurisdiction over his person, but he also pleaded, on arraignment, to the information filed against him.

Justice Fernando, joined by Justice Makasiar, dissented on the ground that the record did not support the majority's finding that the petitioner had waived his objection to the regularity of the order of arrest. He said:

The basis for my inability to view matters in the same light the Court does is the compelling force of the constitutional right to be free from arrest except on the existence of a probable cause, the determination of which under the Constitution is granted solely to a judge, not to any other official, "after examination under oath or affirmation, of the complainant and the witnesses he may produce. . . ."

[T]he time has long been overdue for lower court judges all over the country to realize that when the Constitution requires an examination under oath or affirmation of the complainant and the witnesses he may produce before a valid warrant of arrest may be issued, it means what it says.

The question did not appear quite clear to Justice Barredo. He concurred in the result "with reservations as to the question of whether or not the omission of a preliminary examination conducted personally by the judge as required by the Bill of Rights as distinguished from the preliminary investigation which is not constitutionally provided for, is subject to waiver."

The decision in this case leaves unanswered the much mooted question whether the Constitution requires the judge issuing a warrant of arrest to make a determination of probable by personally examining the complainant and the witnesses, or whether he can simply rely on the certification of the fiscal that he had conducted the preliminary investigation and that he had found probable cause for proceeding against the defendant. The premise of both majority and dissenting Justices seems to be that the Constitution requires examination by the judge issuing the warrant of arrest. On this premise, they discuss the question of waiver.

In the early case of *United States v. Ocampo*,⁸² it was held that while the determination of probable cause is a judicial function "there is no law which prohibits [the judge] from reaching the conclusion that 'probable cause' exists from the statement of the prosecuting attorney alone, or any other person whose statement or affidavit is entitled to credit in the opinion of the judge or magistrate." Despite the fact that the 1935 Constitutional Convention added to the original text of the Jones Law the phrase "to be determined by the judge, after examination under oath or affirmation of the complainant and the witnesses he may produce" the Court nevertheless reiterated in a dictum in the 1956 case of *Amarga v. Abbas*⁸³ that "The Constitution vests such power [to determine the existence of probable cause] in the respondent judge who, however, may rely on the facts stated in the information filed after preliminary investigation by the prosecuting attorney."

Indeed, the practice of relying on the fiscal's certification that he has conducted a preliminary investigation and, impliedly, that he has found probable cause for the defendant's arrest is one that antedates the adoption of the Constitution. As earlier noted, Mr. Justice Montemayor's dissent in *Amarga* demonstrated that the addition of the phrase "to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce" was intended to curb abuses in the issuance of search warrants but that it had no application to the issuance of warrants of arrests. The phrase was taken from sections 97 and 98 of General Order No. 58 regarding search warrant and was meant to apply to search warrants only. According to Justice Montemayor, the seizure of persons in the phrase "and particularly describing the place to be searched and the persons or things to be seized" has reference to the seizure of persons in whose possession the goods or articles to be searched are found but not to the arrest of that person.⁸⁴ Indeed, the Rules of Court provides in Rule 112, section 6 that "If the judge be satisfied from the preliminary examination conducted by him or by the investigating officer that the offense complained of has been committed and that there is reasonable ground to

⁸² 18 Phil. 1 (1910).

⁸³ 98 Phil. 739, 742 (1956).

⁸⁴ *Id.* at 744-763.

believe that the accused has committed it, he must issue a warrant or order for his arrest." The phrase "or by the investigating officer" was not in the original Rule 109, section 7, of the former Rules but was added in 1964, when the Rules were revised. The amendment appears to be an adoption of Justice Montemayor's position in *Amarga* and is likely to be persuasive in any future determination of the question.

At any rate the *De Asis* Court should have resolved the question directly. If in its view the issuance of warrants of arrest can be based on the fiscal's certification, then dismissal of the action could be more firmly grounded on waiver, as the records showed that the defendant had been notified of the preliminary investigation but did not appear. On the other hand, if the Court's view is that the requirement applies as well to warrants of arrest, it is doubtful whether the filing of a bond by the defendant implied a waiver of objection based on a violation of a constitutional right. It may well be that the defendant applied for bail because of the "sheer necessity of not remaining in detention," as the Court said in another case.⁸⁵

F. The Protection Against Double Jeopardy

1. *Prosecution Based on the Same Facts on Which Previous Conviction Was Based*—In *People v. Yorac*,⁸⁶ the Court reiterated its ruling in *People v. Buling*⁸⁷ that where a new medical examination discloses more serious injuries suffered by the offended party than was earlier found, the prosecution cannot file a second action based on the new finding after the defendant is convicted or acquitted or the first case filed against him is otherwise terminated. In *Yorac*, the defendant pleaded guilty to a charge of having committed the crime of slight physical injuries and was sentenced to suffer ten days of *arresto menor*. Ten days later, after serving sentence, another information for frustrated murder was filed against him on the basis of new medical examination which showed that the offended party suffered injuries greater than was at first ascertained. The trial court sustained the plea of double jeopardy. On appeal the Supreme Court affirmed. Through Justice Fernando, it held that there was no supervening fact such as would justify the filing of the second information. There was only a new finding based on a new medical examination which "apparently, was much more thorough than the second time." Justice Fernando wrote:

[T]he right against being twice put in jeopardy is considered as possessing many features in common with the rule of finality in civil cases. For the accused is given assurance that the matter is closed, enabling him to plan his future accordingly, protecting him from continued distress, not to mention saving both him and the state from the expenses incited to redun-

⁸⁵ *People v. Red*, 55 Phil. 706, 711 (1931).

⁸⁶ G.R. No. L-29270, November 23, 1971, 42 SCRA 230.

⁸⁷ 107 Phil. 712 (1960).

dant litigation. There is likewise the observation that this constitutional guarantee helps to equalize the adversary capabilities of two grossly mismatched litigants, a poor and impecunious defendant hardly in a position to keep on shouldering the costs of a suit.

2. *Dismissal of Criminal Action with the Consent of the Defendant.*—In *People v. Catolico*⁸⁸ and *Republic v. Agoncillo*⁸⁹ the Supreme Court reiterated the rule that a defendant who seeks or agrees to, the provisional dismissal of a criminal action is estopped to invoke the protection against being placed in double jeopardy. In *Catolico* the judge dismissed “without prejudice” five criminal cases on the ground that as the hearing had been adjourned for more than three months, the court lost the power to proceed with the trial unless authority was given by the Chief Justice of the Supreme Court. He cited in support of his order the following provisions of Rule 22 of the Rules of Court:

SEC. 3. *Adjournment and postponements.*—A court may adjourn a trial from day to day, and to any stated time, as the expeditious and convenient transaction of business may require, but shall have no power to adjourn a trial for a longer period than one month for each adjournment, nor more than three months in all, except when authorized in writing by the Chief Justice of the Supreme Court.

At the time the cases were dismissed the prosecution had rested and only the defense had to present evidence. The fiscal secured the required authority from the Chief Justice, but the judge refused to reinstate the cases on the ground that, as the cases had been dismissed, there was no continuance to speak of.

On certiorari to the Supreme Court the judge was ordered to reinstate the cases and hear them until the trial was terminated. The Court ordered a copy of its decision to be given the Secretary of Justice for appropriate action as the judge’s “rash and improper actuations, . . . could have resulted in a serious miscarriage of justice.” Through Mr. Justice Teehankee the Court said:

Respondents-accused had not set up the defense of jeopardy in the cases below and there is no record or showing their having objected, to respondent judge’s consideration of the People’s motion for reconsideration. . . .

Respondents-accused having obtained upon their motion dismissal of the cases below, not on the merits but on the sole ground of alleged lack of authority of respondent judge to continue with the cases in the absence of written authority from the Chief Justice, are deemed to have given their express consent to the dismissal “without prejudice” and to have waived their right to plead jeopardy.

⁸⁸ G.R. Nos. L-31261-5, April 20, 1971, 38 SCRA 389.

⁸⁹ G.R. No. L-27257, August 31, 1971, 40 SCRA 579; See also *Baesa v. Provincial Fiscal*, G.R. No. L-30363, January 30, 1971, 37 SCRA 437.

In the second case, *Republic v. Agoncillo*, the trial court dismissed an action for forfeiture of unexplained wealth brought under Republic Act No. 1379, to enable the Solicitor handling the prosecution to study the case more thoroughly. When the case was refiled, the defendants moved to dismiss the complainant on the ground that the refiled case placed them in double jeopardy of being punished for the same offense for which they had previously been indicted. The motion was granted. On appeal the Supreme Court reversed. Through Mr. Justice Fernando the Court said:

It is true jeopardy had attached with a valid complaint having been filed in a court of competent jurisdiction and defendants having been thereafter arraigned and pleaded. It had not terminated, though. There was neither conviction nor acquittal. There was thereafter a dismissal without prejudice. Defendants knew or ought to have known, that the complaint could thus be filed again. They could have objected; they did not. Had they stood fast on what they conceived to be their rights as defendants, things might have been different. Matters could have definitely ended then and there. The jeopardy clause could have been thereafter appropriately invoked. The dismissal would have been unconditional in character. That is not however how things developed. What transpired instead was a dismissal clearly without prejudice. At the very least, defendants were in estoppel.

III. THE DOCTRINE OF SEPARATION OF POWERS

No Non-Judicial Function for Judges.—The Supreme Court cannot be made to sit as a board of arbitrators to decide on the reasonableness of compensation to be paid for the use of a private right of way.⁹⁰ Nor can it be charged with the investigation of administrative charges against executive officials.⁹¹ Under the scheme of separation of powers the judiciary is independent of the other branches of the government, and on this ground the validity of a law abolishing the position of judges at large was upheld.⁹²

But a provision of the Administrative Code of 1917, subversive of this principle, has remained in the statute books. By virtue of section 83 the Secretary of Justice exercises administrative supervision over judges of courts below the Court of Appeals. The set up is not ideal for the maintenance of the independence of the judiciary, but efforts in Congress to repeal this grant of power have proved futile. Together with the executive power to appoint inferior court judges, the power of supervision has become a source of political influence.

In *Garcia v. Macaraig*,⁹³ the Court in a dictum expressed disapproval of the practice which it noted was "of long standing," of detailing judges in the Department of Justice to assist the Secretary in the performance of

⁹⁰ *Manila Electric Co. v. Pasay Trans. Co.*, 57 Phil. 600 (1932).

⁹¹ *Noblejas v. Teehankee*, G.R. No. L-28590, April 29, 1968, 33 SCRA 405.

⁹² *Ocampo v. Secretary of Justice*, 51 O.G. 147 (1955).

⁹³ Adm. Case No. 198-J, May 31, 1971, 39 SCRA 106.

what is admittedly an executive function. The expression of disapproval was made in connection with an administrative case filed against the respondent for alleged dishonesty in collecting the salary of a judge when he had not entered upon the discharge of his office. The respondent was formerly chief of the Technical Staff of the Department of Justice. He was appointed judge of the Court of First Instance of Laguna to fill a newly created branch of that court. Because of lack of funds he could not be immediately given office space and facilities with the result that he could not begin discharging his function. While waiting to be given a courtroom the respondent applied for leave, but the Secretary of Justice prevailed on him to forego his leave and instead assist him. The respondent's experience in the Department of Justice fitted him for the assignment.

The Court, through Justice Barredo, cleared the respondent of the charge of dishonesty. "[R]espondent had a perfect right to earn the salary of a judge even in the extreme supposition that he did not perform any judicial function for he could, while preparing himself for his new job or for any good reason, take a leave, as in fact he had planned to do, were it not for the request of the Secretary of Justice for him to forego the idea and, instead, help the Department in whatever way possible which would not, it may be presumed, impair his position as a judge." But the Court added:

Of course, none of these is to be taken as meaning that this Court looks with favor at the practice of long standing, to be sure, of judges being detailed in the Department of Justice to assist the Secretary even if it were only in connection with his work of exercising administrative authority over the courts. The line between what a judge may do and what he may not do in collaborating or working with other offices or officers under the other great departments of the government, must always be kept clear and jealously observed, lest the principle of separation of powers on which our government rests by mandate of the people thru the Constitution be gradually eroded by practices purportedly motivated by good intention in the interest of the public service. The fundamental advantages and the necessity of the independence of said three departments from each other, limited only by the specific constitutional precepts on check and balance between and among them, have long been acknowledged as more paramount than the serving of any temporary or passing governmental conveniences or exigencies. It is thus of grave importance to the judiciary under our present constitutional scheme of government that no judge of even the lowest court in this Republic should place himself in a position where his actuations on matters submitted to him for action or resolution would be subject to review and prior approval and, worst still, reversal, before they can have legal effect, by any authority other than the Court of Appeals or this Supreme Court, as the case may be. Needless to say, this Court feels very strongly that it is best that this practice is discontinued.

Justice Fernando, joined by Justice Makasiar, wrote a separate opinion. He considered the situation "anomalous" and expressed the hope that the

Constitutional Convention would amend the Constitution so that the judiciary would be "totally freed from any supervisory authority of an executive department."

IV. THE CIVIL SERVICE

The ban on Double Compensation.—Article XII, section 3 of the Constitution provides that "No officer or employee of the Government shall receive additional or double compensation unless specifically authorized by law." In *Peralta v. Mathay*,⁹⁴ the Auditor General disallowed certain amounts representing allowances and bonuses from the retirement gratuity paid to a former member of the Board of Trustees of the Government Service Insurance System on the ground that the items partook of the nature of additional compensation not authorized to be paid by law. On appeal the Supreme Court affirmed. Through Mr. Justice Fernando the Court held that the living allowance granted by the GSIS was not reimbursement for expenses incurred in carrying out their official duties but was actually additional compensation. As for the incentive and Christmas bonuses given, it was "quite obvious" to the Court that by their very nature they were given as additional compensation. Under the GSIS Act⁹⁵ a member of the Board of Trustee is entitled to a per diem of ₱25 for each day of actual attendance. The term per diem was construed by the Court to mean compensation or remuneration, although this was not ordinarily the meaning attached to it. As the law did not authorize any other compensation it was held that payment of living allowances and bonuses in the amount of ₱7,032.26 was unconstitutional.

⁹⁴ G.R. No. L-26508, March 31, 1971, 38 SCRA 256.

⁹⁵ Com. Act No. 186, sec. 16.