

# POLITICAL LAW

## PART I

### CONSTITUTIONAL LAW

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#### I

#### JUDICIAL REVIEW, POLITICAL QUESTIONS, AND CONSTITUENT POWER

*Javellana v. Executive Secretary*<sup>1</sup> is not only a landmark case; the decision is a top rank political document of the Government of the Republic. The issues dealt with touch the very foundations of constitutional government, and the nature of the judiciary's role or function in the determination of the fundamental law. The inherent complexity of such issues is compounded by the varied approaches taken by the members of the Supreme Court, each of whom wrote a separate opinion. All these considerations argue for a more extended discussion than is usual in the survey of current decisions.

#### A. *Framework of Analysis*

For clarity of discussion, we begin with the framework of principles and concepts as well as observations, in terms of which the decision will be analyzed:

1. In every political society, sovereign power is organized, that is, exercised through particular organs. In absolute monarchies, the sovereign organ was the king or emperor; in aristocracies, this was a council or other elitist body; in early democracies, this was an ecclesia or other popular assembly of citizens.

2. A constitution defines the organization of the State, that is, it identifies the various organs of government. These are the sovereign organs, and the organs subordinate to them. Together, they are called constitutional or legal organs.

3. In constitutional republics, such as the Philippines, sovereign power pertains to the people, but the same is exercised by them or in their behalf through specific organs. There are two sets: the *popular*

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<sup>1</sup> G.R. Nos. L-36142, 36164, 36165, 36236, 36283, March 31, 1973, 50 SCRA 30 (1973).

organs of Government, in which substantial numbers of the people participate, and the *representative* organs of Government, consisting of officials directly or indirectly chosen by the people and acting in their behalf.

4. Ideally, the popular organs should correspond to the entire body of adult citizens. Through qualifications and disqualifications, actual membership and participation is usually less. First of the popular organs is the *electoral* organ. This consists of the entire body of electors as defined by the constitution and by law. It elects the officials in the representative departments of the Government. The second popular organ is the constituent organ. This organ enacts constitutional changes, in the form of amendments or in the form of a new constitution to replace an existing one. In most constitutions, this organ is composite, with the component parts taking charge of the different stages of constitutional enactment. Thus, a representative body (legislature or convention) usually proposes the changes, which are then submitted to the electoral organ in an election for ratification. An exception is provided by the federal states, where the entire process may be participated in only by representative organs.

5. Constituent power is sovereign power to make or change a political constitution. In the case of societies without enacted or adopted constitutions, this is exercised, in the case of the adoption of the first constitution, by the sovereign organ. In monarchies, this may be the king or emperor. Limited monarchies are generally the result of constitutions adopted or prescribed by the ruling monarch. In a society that has undergone a political revolution, the constituent power is exercised by *ad hoc* popular organs, *i.e.*, conventions called by the revolutionary government, and electoral organs consisting of qualified citizens.

6. In the case of societies operating under an existing constitution, constituent power (a) is lodged with the constituent organ, (b) to be exercised according to a prescribed procedure. In the case of the Philippine Constitution, there are three distinct stages: (1) framing and adoption of proposals by the duly authorized representative organs (convention or legislature), (2) submission of the proposals to the electoral organ at an election and (3) ratification of such proposals by majority vote of the electoral organ.

7. In constitutional republics, such as the Philippines, the representative organs of Government are the traditional branches: the executive, the legislature, and the judiciary. Often, special matters are assigned to constitutional commissions. Within the sphere of its jurisdiction, each branch (and each commission as well) exercises sovereign power in a representative capacity, that is, in behalf of the sovereign people.

8. A political constitution does not merely define the organization of the State. It limits State power *vis-a-vis* the citizenry through a bill of rights. State power as thus limited is then distributed among the

popular organs and the representative organs. Each organ is to exercise its assigned powers subject to specified limitations. The over-all thrust of such constitutional limitations is a government of limited powers, that is, a limited government.

9. The idea of limited government, which is constitutional government, is operationalized through the concept of Rule of Law, or Supremacy of the Constitution. Rule of Law obtains where governmental power or authority is not only expressed through law (statutes, orders, decisions) but is exercised in accordance with law (Constitution, statutes, decisions). Law is thus both expression, as well as foundation, of authority. Every official act must be based on law and performed conformably to the law. Law is thus the measure of the validity of official acts. In constitutional terms, every official act, to be valid, must ultimately be traceable to authority provided for by the Constitution, and in accordance with its mandates. Where any such act is not authorized directly or indirectly by the Constitution, or even if so authorized, where it contravenes some substantive limitations, such act may be pronounced null and void.

10. Rule of Law or Supremacy of the Constitution operates through the institution of Judicial Review. This is both power and duty derived from judicial power. It is power to inquire into the validity of official acts, upon appropriate challenge to its constitutionality. It is the duty to apply the mandates of the Constitution whenever necessary to the decision of actual cases or controversies.

11. The incidence of Judicial Review, that is to say, the occasion for its exercise is defined by two conceptual operators. The first is "appropriate case or controversy", which summarizes the procedural requirements. The other is Justiciability, which means that a substantive issue or question of validity is appropriate for judicial determination. The general standards flowing from these concepts provide the Supreme Court with a broad discretion in declining or in undertaking judicial review.

12. Such discretion is limited theoretically by the Political Question doctrine. Where an act of a political branch is challenged on ground of unconstitutionality, there must be a *prima facie* showing of probable invalidity. This means that either there was no power to perform the act, or if there was, some substantive limitations were infringed, rendering the act invalid. Where there is undoubted power to perform such act, based on an express grant, and there are no limiting conditions or restrictions on the power which may affect the validity of the act, the doing or non-doing of such act, or its performance in a certain way, is entrusted to the discretion of the political authority as a Political Question, which the courts may not inquire into. Political Questions are thus within the exclusive domain of the political department, hence, beyond the domain of judicial review, pursuant to the principle of Separation of Powers.

13. Subject to the above requirements and limitations, the judiciary must welcome the invocation of judicial review. This flows from its duty

to preserve and defend the Constitution, by applying its limitations in every proper case. Judicial power is conferred, not so it can be hoarded and doled out with niggardly reluctance, but so that it can be exercised. The constitutional intent is an ever-developing equilibrium. Activism in the political branches must be matched by activism of the judiciary, if the latter is to be a countervailing force in maintaining constitutional balance. Whenever the tempo of governmental activity increases, the appropriate judicial response should be a propensity to review.

14. In the exercise of Judicial Review, the central issue is validity of official action. The test of such validity is observance of, compliance or conformity with, the Constitution. Necessarily, this involves a comparison of what was actually *done* with what the Constitution *prescribes*, in terms of requirements, conditions, and limitations. Whenever pertinent, the language of the Constitution must provide the measure or standard. Its concepts and precepts, supplemented by settled doctrines, must yield the major premise in any reasoning leading towards a conclusion of validity or invalidity. Any principle or standard, no matter how cogent or plausible, not expressly provided for in the Constitution or manifestly implied from its express provisions, is an extra-constitutional premise. It may afford a test of validity, but it would be validity of another kind. It would not be validity under the Constitution. It may be validity under a different moral, political or social order. This is not the same as legal validity under the Philippine Constitution. Judicial duty embraces the duty to apply the Constitution, as the source of premises in judicial reasoning. This is the rock-bottom meaning of judicial fidelity to the Constitution. Any other course of conduct would imply judicial power to disregard the Constitution, and authority to substitute extra-constitutional precepts in place of constitutional mandates.

15. The judiciary is the third of the traditional representative organs exercising sovereign power for and in behalf of the people. Within its sphere, the Supreme Court as the highest judicial organ is supreme. In the realm of the legal order, this supremacy is more than theoretical. For the power of the Court to annul official acts extends to any and all acts taken under the Constitution but which are found to contravene its provisions. To this corrective power, all organs of Government, including the sovereign organs, are amenable or subject with respect to acts contrary to the Constitution. Thus, the high Court has annulled acts of submission in exercise of constituent power, legislative measures, and executive acts, notwithstanding the *sovereign* or *political* character of the powers entrusted to these departments.

#### B. *Relation of 1935 Constitution to 1973 Constitution*

The central substantive issue is whether or not the 1973 Constitution was valid and existing as of the date the petitions were filed. From the

opinions and the records discussed therein, there were three theories sustaining its validity:

- (a) that it was ratified in accordance with the amendatory procedure prescribed in the Constitution of 1935.
- (b) that although it was not ratified pursuant to the amendatory procedure prescribed in the Constitution of 1935, the ratification described in Presidential Proclamation No. 1102 validated the 1973 Constitution, bringing it into existence and putting it into operation and in effect.
- (c) that although not ratified, it has become valid because it is effective, which results from its acceptance by the Government and its officials and by the acquiescence of the people.

The various opinions dealt with the issues in terms of the different frameworks of these theories. As will be discussed below, some opinions discussed the issues within one framework, such as that of the Chief Justice and Justices Zaldivar and Teehankee, but the rest discussed the issues within the framework of at least two theories.

#### 1. LEGAL VALIDITY

The first theory is based on the concept of *legal* validity, in that the 1973 Constitution was ratified by the popular organ exercising constituent power under the 1935 Constitution. Hence, the 1973 Constitution, under this theory, derives its validity and its force from the 1935 Constitution.

It was within the framework of this theory that (1) the Government through the Solicitor General principally submitted its case, (2) the petitioners made their challenge, and (3) Chief Justice Concepcion and Justices Zaldivar, Fernando, and Teehankee gave their opinions.

Applying the requirements of Article XV of the 1935 Constitution to the alleged ratification of the 1973 Constitution, six Justices (Concepcion, Makalintal, Castro, Fernando, Zaldivar and Teehankee) concluded that there was no valid ratification.

Against this collective view, Justice Makasiar advanced, as an alternative to the third theory which he pressed vigorously, the opinion that there was a valid ratification based (a) on the *presumption of validity* accorded to official acts and (b) on *substantial compliance* with the constitutional requisites.

As intimated in the aforecited cases, even the courts, which affirm the proposition that the question as to whether a constitutional amendment or the revised or new Constitution has been validly submitted to the people for ratification in accordance with the procedure prescribed by the existing Constitution, is a justiciable question, *accord all the presumption of validity to the constitutional amendment or the revised or new Constitution after the government officials or the people have adopted or ratified or acquiesced in the new Constitution or amend-*

ment, although there was an illegal or irregular or no submission at all to the people.<sup>2</sup> As late as 1971, the courts stressed that the constitutional amendment or the new Constitution should not be condemned "unless in our judgment its nullity is manifest beyond reasonable doubt."<sup>3</sup>

Justice Antonio advanced a modification of the first theory. In his view, Article XV of the 1935 Constitution applied only to amendments but *not to a revision* thereof. In the case of revision, where the existing Constitution is to be replaced by an entirely new Constitution, the procedure of adoption is "reserved to the people". In overwhelmingly approving the 1973 Constitution through the Citizens' Assemblies, the people exercised such power reserved to them under the 1935 Constitution. Hence, the 1973 Constitution was ratified pursuant to the 1935 Constitution, acquiring thereby *legal validity*.

Upon the other hand, since our fundamental charter has not provided the method or procedure for the *revision* or complete change of the Constitution, it is evident that the people have reserved such power in themselves. They decided to exercise it not through their legislature, but through a Convention expressly chosen for that purpose. The Convention as an independent and sovereign body has drafted not an amendment but a completely new Constitution, which decided to submit to the people for approval, not through an act of Congress, but by means of decrees to be promulgated by the President. In view of the inability of Congress to act, it was within the constitutional powers of the President, either as agent of the Constitutional Convention, or under his authority under martial law, to promulgate the necessary measures for the ratification of the proposed new Constitution. The adoption of the new Charter was considered as a necessary basis for all the reforms set in motion under the new society, to root out the causes of unrest. The imperatives of the emergency underscored the urgency of its adoption. The people in accepting such procedure and in voting overwhelmingly for the approval of the new Constitution have, in effect, ratified the method and procedure taken. "When the people adopt a completely revised or new Constitution," said the Court in *Wheeler v. Board of Trustees*,<sup>4</sup> "the framing or submission of the instrument is not what gives it binding force and effect. The fiat of the people, and only the fiat of the people, can breathe life into a constitution."

<sup>2</sup> *Collier v. Gray*, 11 Fla. 845, 157 S. 40 (1934); *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479, 482-83 (1911); *People v. Sours*, 31 Colo. 369, 74 P. 167 (1903) 102 Am. St. Rep. 34 (1903); *Thompson v. Winneth*, 78 Neb. 379, 110 N.W. 1113 (1907) 10 L.R.A. (N.S.) 149 (1907); *State v. Laylin*, 69 Ohio St. Rep. 1, 68 N.E. 574 (1903); *Weston v. Ryan*, 70 Neb. 211, 97 N.W. 347 (1903); *Combs v. State*, 81 Ga. 780, 8 S.E. 318 (1888); *Woodard v. State*, 103 Ga. 496, 30 S.E. 522 (1898); *Corry v. Cooney*, 70 Mont. 355, 225 P. 1007, 1009 (1924).

<sup>3</sup> *Moore v. Shanahan*, 207 Kan. 1, 645, 486 P. 2d 506 (1971) and the 1956 case of *Tipton v. Smith*.

<sup>4</sup> *Wheeler v. Board of Trustees of Fargo Consol. School Dist., Ga.*, 37 S.E. 2d 322, 326-30 (1946).

This has to be so because, in our political system, all political power is inherent in the people and, free governments are founded on their authority and instituted for their benefit. Thus Section 1 of Article II of the 1935 Constitution declares that: "Sovereignty resides in the people and all government authority emanates from them." Evidently the term *people* refers to the entire *citizenry* and not merely to the *electorate*, for the latter is only a fraction of the people and is only an organ of government for the election of government officials.

## 2. POLITICAL VALIDITY

The concept underlying the second and third theories is that of *political* validity. In the second theory, the act of the people through the Citizens' Assemblies in expressing their *approval* of the 1973 Constitution, although not ratification under the 1935 Constitution, was ratification in a political sense. Such popular approval was *constitutive* of the validity of the 1973 Constitution, in the sense that the people may act in a sovereign capacity, even independently of the framework of an existing constitution. Their approval was a *political decision* because it was an assertion of the sovereign prerogative.

In the third theory, the fact constitutive of the validity of the 1973 Constitution is its *effectiveness*, evidenced by (a) acceptance by the Citizens' Assemblies, (b) acceptance by the Government and its officials, and (c) acquiescence of the people. The underlying idea is that effectiveness of the 1973 Constitution presupposes a collective *political* decision accepting said constitution.

In both these theories, the 1935 Constitution was not the source or foundation of the validity of the 1973 Constitution. Rather, the 1973 Constitution came into existence and took effect, independently of the 1935 Constitution, which ceased to take effect by virtue of actual supersession and by express provision of the 1973 Constitution.

The second theory was advanced and well articulated in the opinion of Justice Barredo:

4. Viewed from the strictly legal angle and in the light of judicial methods of ascertainment, I cannot agree with the Solicitor General that in the legal sense, there has been at least substantial compliance with Article XV of the 1935 Constitution, but what I can see is that in a political sense, the answers to the referendum questions were not given by the people as legal conclusions. I take it that when they answered that by their signified approval of the New Constitution, they do not consider it necessary to hold a plebiscite, they could not have had in mind any intent to do what was constitutionally improper. Basically accustomed to proceed along constitutional channels, they must have acted in the honest conviction that what was being done was in conformity with prevailing constitutional standards. We are not to assume that the sovereign people were indulging in a futile exercise of their supreme political right to choose the fundamental charter by which their lives, their liberties and their fortunes shall

be safeguarded. In other words, we must perforce infer that they meant their decision to count, and it behooves this Court to render judgment herein in that context. It is my considered opinion that viewed understandingly and realistically, there is more than sufficient ground to hold that, judged by such intent and, particularly, from the political standpoint, the ratification of the 1973 Constitution declared in Proclamation 1102 complies substantially with Article XV of the 1935 Charter, specially when it is considered that the most important element of the ratification therein contemplated is not in the word "election", which conceivably can be in many feasible and manageable forms but in the word "approved" which may be said to constitute the substantiality of the whole article, so long as such approval is reasonably ascertained. In the last analysis, therefore, it can be rightly said, even if only in a broad sense, that the ratification here in question was constitutionally justified and justifiable.

5. Finally, if any doubt should still linger as to the legitimacy of the New Constitution on legal grounds, the same should be dispelled by viewing the situation in the manner suggested by Counsel Tolentino and by the writer of this opinion in his separate opinion, oft-referred to above, in the Plebiscite Cases — that is, as an extraconstitutional exercise by the people, under the leadership of President Marcos, of their inalienable right to change their fundamental charter by any means they may deem appropriate, the moment they are convinced that the existing one is no longer responsive to their fundamental, political and social needs nor conducive to the timely attainment of their national destiny. This is not only the teaching of the American Declaration of Independence but is indeed, a truth that is self-evident. More, it should be regarded as implied in every constitution that regardless of the language of its amending clause, once the people have given their sanction to a new charter, the latter may be deemed as constitutionally permissible even from the point of view of the preceding constitution. Those who may feel restrained to consider this view out of respect to the import of Tolentino vs. Comelec, supra, would be well advised to bear in mind that that case was decided in the context of submission, not of accomplished ratification.

The second theory was likewise discussed by Justices Makalintal and Castro, but without positively advancing the same as a ground for the validity of the 1973 Constitution:

Heretofore, constitutional disputes which have come before this Court for adjudication proceeded on the assumption, conceded by all, that the Constitution was in full force and effect, with the power and authority of the entire Government behind it; and the task of this Court was simply to determine whether or not the particular act or statute that was being challenged contravened some rule or mandate of that Constitution. The process employed was one of interpretation and synthesis. In the cases at bar there is no such assumption: the Constitution (1935) has been derogated and its continued existence as well as the validity of the act of derogation is the issue. The legal problem posed by the situation is aggravated by the fact that the political arms of the Government — the Executive Depart-

ments and the two Houses of Congress — have accepted the new Constitution as effective: the former by organizing themselves and discharging their functions under it, and the latter by not convening on January 22, 1973 or at any time thereafter, as ordained by the 1935 Constitution, and in the case of a majority of the members by expressing their option to serve in the Interim National Assembly in accordance with Article XVII, Section 2, of the 1973 Constitution.<sup>5</sup>

The theory advanced by Senator Tolentino, as counsel for respondents Puyat and Roy, may be taken up and restated at some length if only because it would constitute, if sustained, the most convenient ground for the invocation of the political-question doctrine. In support of his theory, Senator Tolentino contends that after President Marcos declared martial law on September 21, 1972,<sup>6</sup> (Proclamation No. 1081) he established a revolutionary government when he issued General Order No. 1 the next day, wherein he proclaimed "that I shall govern the nation and direct the operation of the entire government, including all its agencies and instrumentalities, in my capacity, and shall exercise all the powers and prerogatives appurtenant and incident to my position as such Commander-in-Chief of all the Armed Forces of the Philippines." By this order, it is pointed out, the Commander-in-Chief of the Armed Forces assumed all the powers of government — executive, legislative, and judicial; and thereafter proceeded to exercise such powers by a series of Orders and Decrees which amounted to legislative enactments not justified under martial law and, in some instances, trenched upon the domain of the judiciary, by removing from its jurisdiction certain classes of cases, such as "those involving the validity, legality, or constitutionality of Proclamation No. 1081, or of any decree, order or act issued, promulgated or performed by me or by my duly designated representative pursuant thereto."<sup>7</sup> The ratification by the Citizens Assemblies, it is averred, was the culminating act of the revolution, which thereupon converted the government into a *de jure* one under the 1973 Constitution.

If indeed it be accepted that the Citizens Assemblies had ratified the 1973 Constitution and that such ratification as well as the establishment of the government thereunder formed part of a revolution, albeit peaceful, then the issue of whether or not that Constitution has become effective and, as a necessary corollary, whether or not the government legitimately functions under it instead of under the 1935 Constitution, is political and therefore non-judicial in nature. Under such a postulate what the people did in the Citizens Assemblies should be taken as an exercise of the ultimate sovereign power. If they had risen up in arms and by force deposed the then existing government and set up a new government in its place, there could not be the least doubt that their act would be political and not subject to judicial review but only to the judgment of the same body politic that is the people. This concept of what is a political act, in the context

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<sup>5</sup> According to the Solicitor General, 92 Congressmen and 15 Senators (both numbers constituting majorities) have expressed their option.

<sup>6</sup> Proclamation No. 1081 (1972), 68 O.G. 7624 (Sept., 1972).

<sup>7</sup> General Order No. 3 as amended by General Order No. 3-A, dated September 24, 1972.

just set forth, is based on realities. If a new government gains authority and dominance through force, it can be effectively challenged only by a stronger force; no judicial dictum can prevail against it. We do not see that the situation would be any different, as far as the doctrine of judicial review is concerned, if no force had been resorted to and the people, in defiance of the existing Constitution but peacefully because of the absence of any appreciable opposition, ordained a new Constitution and succeeded in having the government operate under it. Against such a reality there can be no adequate judicial relief; and so courts forbear to take cognizance of the question but leave it to be decided through political means.

The third theory was advanced by Justices Makasiar, Esguerra, and Antonio.

According to Justice Makasiar:

Article XV of the 1935 Constitution provides: "Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for ratification." Under Article XV of the 1935 Constitution, the power to propose constitutional amendments is vested in Congress or in a constitutional convention; while the power to ratify or reject such proposed amendments or new Constitution is reserved by the sovereign people. The nullification of Proclamation No. 1102 would inevitably render inoperative the 1973 Constitution, which is in fact the express prayer of the petitioners in G.R. No. L-36164. Regardless of the modality of submission or ratification or adoption — even if it deviates from or violates the procedure delineated therefor by the old Constitution — once the new Constitution is ratified, adopted and/or acquiesced in by the people or ratified even by a body or agency not duly authorized therefor but is subsequently adopted or recognized by the people and by the other official organs and functionaries of the government established under such a new Constitution, this Court is precluded from inquiring into the validity of such ratification, adoption or acquiescence and of the consequent effectivity of the new Constitution. This is as it should be in a democracy, for the people are the repository of all sovereign powers as well as the source of all governmental authority.<sup>8</sup> This basic democratic concept is expressly restated in Section 1 of Article II of the Declaration of Principles of the 1935 and 1973 Constitutions, thus: "Sovereignty resides in the people and all government authority emanates from them."

According to Justice Esguerra:

But looking through the veneer of judicial conformity with which the petitions have been adroitly contrived, what is sought to be invalidated is the new Constitution itself — the very framework of the present Government since January 17, 1973. The reason is obvious. The Presidential decrees set up the means for the ratification and acceptance of the new Constitution and Proclamation No. 1102 simply

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<sup>8</sup> Pope v. Gray, 104 So. 2d 501, 841 (1958).

announced the result of the referendum or plebiscite by the people through the Citizens Assemblies. The Government under the new Constitution has been running on its tracks normally and apparently without obstruction in the form of organized resistance capable of jeopardizing its existence and disrupting its operation. Ultimately the issue is whether the new Constitution may be set aside by this Court. But has it the power and authority to assume such a stupendous task when the result of such invalidation would be to subject this nation to divisive controversies that may totally destroy the social order which the Government under the new Constitution has been admirably protecting and promoting under Martial Law? That the new Constitution has taken deep root and the people are happy and contented with it is a living reality which the most articulate critics of the new order cannot deny. 95 out of 108 members of the House of Representatives have opted to serve in the interim National Assembly provided for under the new Constitution. 15 out of 24 Senators have done likewise. The members of the Congress did not meet anymore last January 22, 1973, not because they were really prevented from so doing but because of no serious effort on their parts to assert their offices under the 1935 Constitution. In brief the Legislative Department under the 1935 Constitution is a thing of the past. The Executive Department has been fully reorganized; new appointments of key executive officers including those of the Armed Forces were extended and they took an oath to support and defend the new Constitution. The courts, except the Supreme Court by reason of these cases, have administered justice under the new Constitution. All government offices have dealt with the public and performed their functions according to the new Constitution and laws promulgated thereunder.

If the real purpose of the petitions is to set aside the new Constitution, how can this Court justify its assumption of jurisdiction when no power has x x x conferred upon it the jurisdiction to declare the Constitution or any part thereof null and void? It is the height of absurdity and impudence for a court to wage open war against the organic act to which it owes its existence. The situation in which this Court finds itself does not permit it to pass upon the question whether or not the new Constitution has entered into force and has superseded the 1935 Constitution. If it declares that the present Constitution has not been validly ratified, it has to uphold the 1935 Constitution as still the prevailing organic law. The result would be too anomalous to describe, for then this Court would have to declare that it is governed by one Constitution or the 1935 Constitution, and the legislative and executive branches by another or the 1972 Constitution.

If it declares that the 1972 Constitution is now operative, how can it exercise judicial discretion in these cases when it would have no other choice but to uphold the new Constitution as against any other one? In the circumstances it would be bereft of judicial attributes as the matter would then be not meet for judicial determination, but one addressed to the sovereign power of the people who have already spoken and delivered their mandate by accepting the funda-

mental law on which the government of this Republic is now functioning. To deny that the new Constitution has been accepted and actually is in operation would be flying in the face of reason and pounding one's bare head against a veritable stone wall or a heavily reinforced concrete, or simply "kicking the deadly pricks" with one's bare foot in an effort to eliminate the lethal points.

When a Constitution has been in operation for sometime, (sic) even popular ratification at that, submission of the people thereto by the organization of the government provided therein and observance of its prescriptions by public officers chosen thereunder, is indicative of approval. Courts should be slow in nullifying a Constitution claimed to have been adopted not in accordance with constitutional or statutory directives.<sup>9</sup>

According to Justice Antonio:

The more compelling question, however is: Has this Court the authority to nullify an entire Constitution that is already effective as it has been accepted and acquiesced in by the people as shown by their compliance with the decree promulgated thereunder, their cooperation in its implementation, and is now maintained by the Government that is in undisputed authority and dominance?

Of course it is argued that acquiescence by the people cannot be deduced from their acts of conformity, because under a regime of martial law the people are bound to obey and act in conformity with the orders of the President, and have absolutely no other choice. The flaw of this argument lies in its application of a mere theoretical assumption based on the experiences of other nations on an entirely different factual setting. Such an assumption founders on the rock of reality. It is true that as a general rule martial law is the use of military forces to perform the functions of civil government. Some courts have viewed it as a military regime which can be imposed in emergency situations. In other words, martial rule exists when the military rises superior to the civil power in the exercise of some or all the functions of government. Such is not the case in this country. The government functions thru its civilian officials. The supremacy of the civil over the military authority is manifest. Except for the imposition of curfew hours and other restrictions required for the security of the State, the people are free to pursue their ordinary concerns.

### 3. DIFFERENT THEORETICAL APPROACHES

Thus, in dealing with the central substantive issue, which was the validity of the 1973 Constitution, the Justices did not have a common frame of reference or theoretical framework, but instead utilized varying and mutually inconsistent theoretical approaches. This was an extraordinary,

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<sup>9</sup> *Miller v. Johnson*, 92 Ky. 589, 18 S.W. 522 (1892); *Taylor v. Commonwealth*, 101 Va. 829, 44 S.E. 754 (1903); *Smith v. Good*, 34 F. 204, 207 (1888); *Weston v. Ryan*, *supra*, note 2.

if not unique, departure from the pattern established by several decades of constitutional litigation, which was that constitutional issues were to be resolved according to one framework and one framework only and this was the framework of constitutional validity, *i.e.*, compatibility with the Constitution and applicable doctrines. The use of varying approaches naturally could have only one result: The Court in doctrinal disarray. Even on the issue of justiciability, where the Justices could have agreed or disagreed with greater clarity, there was no true meeting of the minds; the conclusions, although using the correct constitutional terminology, were disparate simply because they proceeded from disparate and inconsistent premises. *Each was correct, in relation to the theoretical framework on which it was based.* The disharmony of theoretical premises was not a development in the course of the case; it was present from the very beginning. This was so because the very questions that the Court framed for its own consideration already *presupposed* the different theories of validity that later emerged in the opinions.

1. Was the issue of the validity of Proclamation No. 1102 a justiciable, or political, and therefore non-justiciable, question?

2. Had the Constitution proposed by the 1971 Constitutional Convention been ratified validly (with substantial, if not strict, compliance) conformably to the applicable constitutional and statutory provisions?

3. Had the aforementioned proposed Constitution been acquiesced in (with or without valid ratification) by the people?

4. Were petitioners entitled to relief? and

5. Was the aforementioned proposed Constitution in force?

The situation then was as though the Court, by common consent, had agreed to disagree by discussing the issues in *differing contexts*. Analogous situations may be readily imagined: different segments of an orchestra playing three different scores at the same time, or three different games being played on the same field. The result was discordance—not the disagreement which may follow common adherence to the same premises.

In terms of the factual situation confronting the Court, the theoretical cleavages were natural and understandable, and perhaps even inevitable. Judicial interpretation is interpretation of experience—but the *frame* of interpretation chosen and used by the individual mind conditions and even pre-ordains the result. For the frame chosen determines the elements of experience that are considered significant or relevant, and the selection of such *elements* will vary according to the requirements of each frame. Because *differing frames* were used in assessing and evaluating the situation confronting the Court, it was inevitable that different views and conclusions were presented.

On the basis of the dominant characteristic of the theoretical frameworks utilized by members of the Court, there were two groups, broadly

speaking. One group stressed *legality* as the proper judicial perspective in determining validity; hence, they may be called "legalists" in the classical sense. This was led by the Chief Justice, and their basic orientation was to interpret the factual situation before the Court in terms of the requirements of the 1935 Constitution. Their basic position was that, if as represented by the Government, the 1973 Constitution had been ratified in accordance with the 1935 Constitution, the validity of the new charter must be tested in terms of the precepts of the old, and that if this test or criterion of legality was not met, the new charter was not valid, notwithstanding that there was popular acceptance of its provisions, or that it had become effective through the action of the Government and its officials.

The other group stressed the *political realities* of the situation as the basis for *indirect* affirmance by the Court of the validity of the 1973 Constitution; hence, they may be called "*realists*" in the pragmatic sense. Their basic orientation was respect for the contemporaneous popular or general will in its various manifestations, even though expressed through extra-constitutional forms. Their basic position may be stated thus: A constitution is fundamentally a guide for the Government in the interest of the people. Where the Government has proposed a new charter to the people, and the people approve it, not only through affirmative acts of acceptance but by acquiescence as well, such new Constitution is valid by force of the supreme political will, which is that of the people. Their sovereign will is the ultimate test of validity. Such will may not be fettered by constitutional restraints which are prescribed for the Government. It is political power that determines the fundamental law, and not the fundamental law that determines political power. Once the people have expressed their preference for a new Constitution over the old, the Court is without power to pass upon the validity of the new charter, in opposition to the people in behalf of whom they are supposed to act.

To understand the over-all result, including the voting on the specific issues framed by the Court, it must be borne in mind that only some members of the Court consistently stuck to one and only one theoretical framework. Most of the Justices discussed the case within the framework of at least *two* theories. Generally, these theories were utilized, either concurrently or alternatively, to justify the validity, or invalidity, of the new Charter.

#### 4. SINGLE-THEORY APPROACH

If we take their separate and individual opinions as truly expressive of their stand on the case, we find that, in terms of theoretical premise, the two most consistent Justices were Justice Teehankee and Justice Esguerra. Justice Teehankee stood for *strict legality* in resolving the case before the Court, and rigorously adhered to the constitutional precepts concerning ratification as the controlling premise in the resolution of the

case. He was unequivocal in his emphatic rejection of what he called the "liberal stand" of some of his colleagues and he ignored entirely the opposing theory of political validity.

The first choice of a strict stand, as applied to the cases at bar, signifies that the Constitution may be amended *in toto* or otherwise *exclusively* "by approval by a majority of the votes cast in an election at which the amendments are submitted to the people for their ratification", participated in *only* by *qualified* and *duly registered* voters *twenty-one years* of age or over and *duly supervised* by the Commission on Elections, in accordance with the cited mandatory constitutional requirements.

The alternative choice of a liberal stand would permit a *disregard* of said requirements on the theory urged by respondents that "the procedure outlined in Article XV was *not* intended to be *exclusive* of other procedures especially one which contemplates popular and direct participation of the citizenry", that the constitutional age and literacy requirements and other statutory safeguards for ascertaining the will of the majority of the people may likewise be changed as "suggested, if not prescribed, by the people (through the Citizens Assemblies) themselves", and that the Comelec is constitutionally "mandated to oversee . . . elections (of public officers) and *not* plebiscites."

To paraphrase U.S. Chief Justice John Marshall who first declared in the historic 1803 case of *Marbury vs. Madison* the U.S. Supreme Court's power of judicial review and to declare void laws repugnant to the Constitution, there is no middle ground between these two alternatives. As Marshall expounded it: "(T)he Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law; if the latter part be true, then written constitutions are absurd attempts on the part of a people, to limit a power, in its own nature, illimitable."

\* \* \* \*

3. Sound constitutional policy and the sheer necessity of adequate safeguards as ordained by the Constitution and implementing statutes to ascertain and record the will of the people in free, orderly and honest elections supervised by the Comelec make it imperative that there be strict adherence to the constitutional requirements laid down for the process of amending *in toto* or in part the supreme law of the land.

For the opposing view, Justice Esguerra represented the "pure" approach. For him, the decisive fact was the effectivity of the new Constitution resulting from popular acceptance and/or acquiescence. Since it was in actual operation, the issue of "validity should be foreclosed."

The pivotal question in these cases is whether the issue raised is highly political and, therefore, not justiciable. I maintain that this Court should abstain from assuming jurisdiction, but, instead,

as an act of judicial statesmanship, should dismiss the petitions. In resolving whether or not the question presented is political, joint discussion of issues Nos. 1, 3 and 4 is necessary so as to arrive at a logical conclusion. For after the acceptance of a new Constitution and acquiescence therein by the people by putting it into practical operation, any question regarding its validity should be foreclosed and all debates on whether it was duly or lawfully ushered into existence as the organic law of the state become political and not judicial in character.

\* \* \* \*

The people have accepted and submitted to a new Constitution to replace the 1935 Constitution. The new organic law is now in the plenitude of its efficacy and vigor. We are now living under its aegis and protection and only the cynics will deny this. This Court should not in the least attempt to act as a super-legislature or a super-board of canvassers and sow confusion and discord among our people by pontificating that there was no valid ratification of the new Constitution. The sober realization of its proper role and delicate function and its consciousness of the limitations on its competence, especially in situations like this, are more in keeping with the preservation of our democratic tradition than the blatant declamations of those who wish the Court to engage in their brand of activism and would not mind plunging it into the whirlpool of passion and emotion in an effort to capture the intoxicating applause of the multitude.

##### 5. DUAL-THEORY APPROACH: THE LEGALISTS

All the other Justices presented their stand on the basis of the two theoretical frameworks, *i.e.*, that of legal validity, and that of political validity. At this point, for clarity of discussion, we must establish categories. There were three groups: (1) the legalists (2) the realists, and (3) those who, strangely enough, agreed with both. First, the legalists. Apart from Justice Teehankee, the legalists evaluated the situation primarily from the standpoint of legal validity, and secondarily from the standpoint of political validity resulting from popular acceptance and/or acquiescence. The typical approach was that of the Chief Justice. He examined the situation in terms of the constitutional requisites for ratification and finding them not satisfied, held that there was no valid ratification. He then proceeded to evaluate the situation in terms of political validity based on popular acceptance and/or acquiescence, and, found *no factual basis* for concluding "that the people have impliedly or expressly indicated their conformity to the proposed Constitution". In his latter conclusion, his grounds were: (1) there was insufficient evidence of positive and overt behavior signifying such acceptance or acquiescence, and (2) the evidentiary value of the observable popular behavior as expressive of political assent was greatly diminished or reduced by the prevailing regime of Martial Law with its effects of "compulsion and intimidation".

No matter how good the intention behind these statements may have been, the idea implied therein was too clear *ad ominus* for

any member of Congress who thought of organizing, holding or taking part in a session of Congress, not to get the impression that he could hardly do so without inviting or risking the application of Martial Law to him. Under these conditions, I do not feel justified in holding that the failure of the members of Congress to meet since January 22, 1973, was due to their recognition, acquiescence in or conformity with the provisions of the aforementioned Constitution, or its alleged ratification.

For the same reasons, especially because of Proclamation No. 1081, placing the entire Philippines under Martial Law, neither am I prepared to declare that the people's inaction as regards Proclamation No. 1102, and their compliance with a number of Presidential orders, decrees and/or instructions—some or many of which have admittedly had salutary effects—issued subsequently thereto amounts, constitutes or attests to a ratification, adoption or approval of said Proclamation No. 1102. In the words of the Chief Executive, "martial law connotes *power of the gun*, meant *coercion* by the military, and *compulsion and intimidation*." The failure to use the gun against those who *comply* with the orders of the party wielding the weapon does not detract from the intimidation that Martial Law necessarily connotes. It may reflect the good, reasonable and wholesome attitude of the person who has the gun, either pointed at others, without pulling the trigger, or merely kept in its holster, but not without warning that he may or would use it if he deemed it necessary. Still, the intimidation is there, and inaction or obedience of the people, under these conditions, is not necessarily an act of conformity or acquiescence. \* \* \*

The approach of the Chief Justice was closely followed by Justices Zaldivar and Fernando. In rejecting the alleged ratification, these two Justices both found an absence of compliance with the constitutional requisites.

According to Justice Fernando:

3. That brings me to the issue of the validity of the ratification. The crucial point that had to be met is whether Proclamation No. 1102 manifests fidelity to the explicit terms of Article XV. There is, of course, the view not offensive to reason that a sense of the realities should temper the rigidity of devotion to the strict letter of the text to allow deference to its spirit to control. With due recognition of its force in constitutional litigation, if my reading of the events and the process that led to such proclamation, so clearly set forth in the opinion of the Chief Justice, is not inaccurate, then it cannot be confidently asserted that there was such compliance. It would be to rely on conjectural assumptions that did founder on the rock of the undisputed facts. Any other conclusion would, for me, require an interpretation that borders on the strained. So it has to be if one does not lose sight of how the article on amendments is phrased. A word, to paraphrase Justice Holmes may not be a crystal, transparent and unchanged, but it is not, to borrow from Learned Hand, that eminent jurist, a rubber band either. It would be unwarranted

in my view then to assert that the requirements of the 1935 Constitution have been met. \* \* \*

According to Justice Zaldivar:

It is clear, therefore, that the ratification or any amendment to the 1935 Constitution could only be done by holding an election, as the term "election" was understood, and practiced, when the 1935 Constitution was drafted. The alleged referendum in the citizens assemblies — participated in by persons aged 15 years or more, regardless of whether they were qualified voters or not, voting by raising their hands, and the results of the voting reported by the barrio or ward captain to the municipal mayor, who in turn submitted the report to the Provincial Governor, and the latter forwarding the reports to the Department of Local Governments, all without the intervention of the Commission on Elections which is the constitutional body which has exclusive charge of the enforcement and administration of all laws relative to the conduct of elections — was not only a non-substantial compliance with the provisions of Section 1 of Article XV of the 1935 Constitution but a downright violation of said constitutional provision. It would be indulging in sophistry to maintain that the voting in the citizens assemblies amounted to a substantial compliance with the requirements prescribed in Section 1 of Article XV of the 1935 Constitution.

Concerning the alternative framework of political validity resulting from popular acceptance and/or acquiescence, both Justices were somewhat equivocal. Justice Zaldivar seemed to say that popular acceptance and/or acquiescence was not a safe basis for inferring validity of the new Constitution, but assuming it was an adequate basis, the observable acceptance or acquiescence could not be such a basis, because of the constraining effect of martial law.

Neither can it be said that the people have accepted the new Constitution. I cannot, in conscience, accept the reported affirmative votes in the citizens assemblies as a true and correct expression by the people of their approval, or acceptance, of the proposed Constitution. I have my serious doubts regarding the freedom of the people to express their views regarding the proposed Constitution during the voting in the citizens assemblies, and I have also my serious doubts regarding the truthfulness and accuracy of the reports of the voting in the citizens assemblies. This doubt has been engendered in my mind after a careful examination and study of the records of these cases, particularly with respect to the reports of the voting in the citizens assemblies. Perhaps, it may be said that the people, or the inhabitants of this country, have acquiesced to the new Constitution, in the sense that they have continued to live peacefully and orderly under the government that has been existing since January 17, 1973 when it was proclaimed that the new Constitution came into effect. But what could the people do? In the same way that the people have

lived under martial law since September 23, 1972, they also have to live under the government as it now exists, and as it has existed since the declaration of martial law on September 21, 1972, regardless of what Constitution is operative — whether it is the 1935 Constitution or the new Constitution. Indeed, there is nothing that the people can do under the circumstances actually prevailing in our country today — circumstances, known to all, and which I do not consider necessary to state in this opinion. I cannot agree, therefore, with my worthy colleagues in the Court who hold the view that the people have accepted the new Constitution, and that because the people have accepted it, the new Constitution should be considered as in force, regardless of the fact that it was not ratified in accordance with the provisions of Section 1 of Article XV of the 1935 Constitution.

Justice Fernando acknowledged the existence of the doctrine of political validity resulting from popular acceptance and/or acquiescence. From his language, however, it is difficult to say whether, apart from recognizing its existence as a minority doctrine, he adhered to it in the sense of feeling bound to apply it. All he seemed to say was that there was such a doctrine, that it may be deemed applicable in certain situations, but that assuming it was applicable in the situation before the Court, there was no adequate factual basis for it to be controlling, since “as yet sufficient time has not elapsed to be really certain”, and martial law operated as a “barrier to liberty of choice”.

It cannot be plausibly asserted then that premises valid in law are lacking for the claim that the revised Constitution has been accepted by the Filipino people. What is more, so it has been argued, it is not merely a case of its being implied. Through the Citizens Assemblies, there was a plebiscite with the result as indicated in Proclamation No. 1102. From the standpoint of respondents then, they could allege that there was more than just mere acquiescence by the sovereign people. Its will was thus expressed formally and unmistakably. It may be added that there was nothing inherently objectionable in the informal method followed in ascertaining its preference. Nor is the fact that Filipinos of both sexes above the age of fifteen were given the opportunity to vote to be deplored. The greater the base of mass participation, the more there is fealty to the democratic concept. It does logically follow likewise that all such circumstances being conceded, then no justiciable question may be raised. This Court is to respect what had thus received the people's sanction. That is not for me though the whole of it. Further scrutiny even then is not entirely foreclosed. There is still an aspect that is judicial, an inquiry may be had as to whether such indeed was the result. This is no more than what the courts do in election cases. There are other factors to bear in mind. The fact that the President so certified is well-nigh conclusive. There is in addition the evidence flowing from the conditions of peace and stability. There thus appears to be conformity to the existing order of things. The daily course of events yields such a conclusion. What is more, the officials under

the 1935 Constitution, including practically all Representatives and a majority of the Senators, have signified their assent to it. The thought persists, however, that as yet sufficient time has not elapsed to be really certain.

Nor is this all. There is for me an obstacle to the petitions being dismissed for such ascertainment of popular will did take place during a period of martial law. It would have been different had there been that freedom of debate with the least interference, thus allowing a free market of ideas. If it were thus, it could be truly said that there was no barrier to liberty of choice. It would be a clear-cut decision either way. One could be certain as to the fact of the acceptance of the new or of adherence to the old. This is not to deny that votes are cast by individuals with their personal concerns uppermost in mind, worried about their immediate needs and captive to their existing moods. That is inherent in any human institution, much more so in a democratic polity. Nor is it open to any valid objection because in the final analysis the state exists for the individuals who in their collectivity compose it. Whatever be their views, they are entitled to respect. It is difficult for me, however, at this stage to feel secure in the conviction that they did utilize the occasion afforded to give the expression to what was really in their hearts. This is not to imply that such doubt could not be dispelled by evidence to the contrary. If the petitions be dismissed however, then such opportunity is forever lost.

#### 6. DUAL-THEORY APPROACH: THE REALISTS

Using the same two theoretical frameworks, the realists reached the opposite conclusion, holding the new Constitution validated, primarily by effectivity resulting from popular acceptance and/or acquiescence, and secondarily by its ratification through substantial compliance with the requisites prescribed in the 1935 Constitution.

Justice Makasiar exemplified this approach. He submitted two separate opinions, the first of which utilized the framework of political validity and the second utilized the framework of legal validity through ratification in accordance with the 1935 Constitution. In the first opinion, after considering the precedents on validation through popular acceptance and/or acquiescence, he found adequate factual basis for inferring effectivity and actual operation of the new Constitution.

Even prior to the election in November, 1970 of delegates to the Constitutional Convention and during the deliberations of the Constitutional Convention from June 1, 1971 until martial law was proclaimed on Sept. 21, 1972, the salient reforms contained in the 1973 Constitution which have long been desired by the people, had been thoroughly discussed in the various committees of the Constitutional Convention, on the floor of the Convention itself, in civic forums and in all the media of information. Many of the decrees promulgated by the Chief Executive from Sept. 22, 1972 to Jan. 17,

1973 implement some of the reforms and had been ratified in Sec. 3 (2) of Article XVII of the 1973 Constitution.

Petitioners cannot safely state that during martial law the majority of the people cannot freely vote for these reforms and are not complying with the implementing decrees promulgated by the President.

Free election is not inevitably incompatible with martial law. We had free elections in 1951 and 1971 when the opposition won six out of eight senatorial seats despite the suspension of the privileges of the writ of habeas corpus,<sup>10</sup> which suspension implies constraint on individual freedom as the proclamation of martial law. In both situations, there is no total blackout of human rights and civil liberties.

All the local governments, dominated either by Nacionalistas or Liberals, as well as officials of the Legislative and Executive branches of the government elected and/or appointed under the 1935 Constitution have either recognized or are now functioning under the 1973 Constitution, aside from the facts of its ratification by the sovereign people through the Citizens' Assemblies. Ninety-five (95) of a total of one hundred ten (110) members of the House of Representatives including the Speaker and the Speaker ProTempore as well as about eleven (11) Congressmen who belong to the Liberal Party and fifteen (15) of a total of twenty-four (24) senators including Liberal senators Edgar U. Ilarde and John Osmeña opted to serve in the Interim Assembly, according to the certification of the Commission on Elections dated February 19, 1973 (Annex Rejoinder-3 to Consolidated Rejoinder of petitioners in L-36165). Only the five (5) petitioners in L-36165 close their eyes to a *fait accompli*. All other functionaries recognize the new government and are performing their duties and exercising their powers under the 1973 Constitution, including the lower courts. The civil courts, military tribunals and quasi-judicial bodies created by presidential decrees have decided some criminal, civil and administrative cases pursuant to such decrees. The foreign ambassadors who were accredited to the Republic of the Philippines before martial law continue to serve as such in our country; while two new ambassadors have been accepted by the Philippines after the ratification of the 1973 Constitution on January 17, 1973. Copies of the 1973 Constitution had been furnished the United Nations Organization and practically all the other countries with which the Philippines has diplomatic relations. No adverse reaction from the United Nations or from the foreign states has been manifested. On the contrary, our permanent delegate to the United Nations Organization and our diplomatic representatives abroad appointed before martial law continue to remain in their posts and are performing their functions as such under the 1973 Constitution.

In his second opinion, Justice Makasiar maintained as a concurrent theory the ratification of the 1973 Constitution in accordance with requisites of the 1935 Constitution. Unquestionably, in the light of the recitals of

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<sup>10</sup> See *Lansang v. Garcia*, G.R. Nos. L-33964-65, 33973, 33982, 34004, 34013, 34039, 34265, 34339, December 11, 1971, 42 SCRA 448 (1971).

Proclamation No. 1102, he argued for a liberal approach in the application of the constitutional requisites, which he saw as merely *general standards*.

(1) Article XV of the 1935 Constitution simply provides that "such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for ratification."

But petitioners construe the aforesaid provision to read: "Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election *called by Congress* at which the amendments are submitted for ratification by the *qualified electors defined in Article V hereof, supervised by the Commission on Elections in accordance with the existing election law and after such amendments shall have been published in all the newspapers of general circulation for at least four months prior to such election.*"

This position certainly imposes limitation on the sovereign people, who have the sole power of ratification, which imposition by the Court is never justified.<sup>11</sup>

In effect, petitioners and their counsels are amending by a strained and tortured construction Article XV of the 1935 Constitution. This is a clear case of usurpation of sovereign power; they do not possess—through some kind of escamotage. This Court should not commit such a grave error in the guise of judicial interpretation.

In all the cases where the court held that illegal or irregular submission, due to absence of substantial compliance with the procedure prescribed by the Constitution and/or the law, nullifies the proposed amendment or the new Constitution, the procedure prescribed by the state Constitution is so detailed that it specifies that the submission should be at a general or special election, or at the election for members of the State legislature only or of all state officials only or of local officials only, or of both state and local officials; fixes the date of the election or plebiscite; limits the submission to only electors or qualified electors; prescribes the publication of the proposed amendment or a new Constitution for specific period prior to the election or plebiscite; and designates the officer to conduct the plebiscite, to canvass and to certify the results, including the form of the ballot which should so state the substance of the proposed amendments to enable the voter to vote on each amendment separately; or authorizes expressly the Constitutional Convention or the legislature to determine the procedure or certain details thereof.<sup>12</sup>

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Article XV of the 1935 Constitution does not require a specific procedure, much less a detailed procedure for submission or ratification. As heretofore stated, it does not specify what kind of election

<sup>11</sup> *Wheeler v. Board of Trustees, supra*, note 4.

<sup>12</sup> See the State Constitutions of Alabama (1901); Arizona (1912); Arkansas (1874); Colorado (1876); Connecticut (1818); Florida (1887); Georgia (1945); Illinois (1870); Indiana (1851); Iowa (1857); Kansas (1861); Kentucky (1891); Louisiana (1921); Maryland (1867); Massachusetts (1790); Michigan (1909); Minnesota (1857); Mississippi (1890), and Missouri (1945).

at which the new Constitution shall be submitted; nor does it designate the Commission on Elections to supervise the plebiscite. Neither does it limit the ratification to the qualified electors as defined in Article V of the 1935 Constitution. Much less does it require the publication of the proposed Constitution for any specific period before the plebiscite nor does it even insinuate that the plebiscite should be supervised in accordance with the existing election law.

He likewise rejected the contention that martial law was a barrier to the freedom of choice of the citizenry.

It is also claimed or urged that there can be no free choice during martial law which inevitably generates fear in the individual. Even without martial law, the penal, civil or administrative sanction provided for the violation of the law ordinarily engenders fear in the individual which fear persuades the individual to comply with or obey the law. But before martial law was proclaimed, many individuals did not fear such sanctions of the law because of lack of effective or equal enforcement or implementation thereof—in brief, compartmentalized justice and extraneous pressures and influences frustrated the firm and just enforcement of the laws. The fear that is generated by martial law is merely the fear of immediate execution and swift enforcement of the law and therefore immediate infliction of the punishment or sanction prescribed by the law whenever it is transgressed during the period of martial law. This is not the fear that affects the voters' freedom of choice or freedom to vote for or against the 1973 Constitution. Those who cringe in fear are the criminals or the law violators. Surely, petitioners do not come under such category.

As earlier pointed out, Justice Antonio adopted a unique approach. The approval by the Citizens Assemblies in his view was a valid ratification of the new Constitution, not because such approval conformed to the requisites specified in the 1935 Charter, but because the 1935 Constitution regulated only amendment, but not *revision* or adoption of a new Constitution; hence the requisites did not apply. The silence of the old Constitution on the mode or method of revision or adoption of a new Constitution was taken to mean that the people were therefore free to express their political will in any form; since the old Constitution did not prohibit in express terms ratification of the new Charter through the approval of the Citizens Assemblies, such ratification was consistent with the old Constitution, hence, valid in relation to it.

Since the 1935 Constitution does not specifically provide for the method or procedure for the *revision* or for the approval of a new Constitution, should it now be held that the people have placed such restrictions on themselves that they are now disabled from exercising their right as the ultimate source of political power from changing the old constitution which, in their view, was not responsive to their needs and in adopting a new charter of government to enable them to rid themselves from the shackles of traditional norms and to pursue

with a new dynamism the realization of their true longings and aspirations, except in the manner and form provided by Congress for previous plebiscites? Was not the expansion of the base of political participation, by the inclusion of the youth in the process of ratification who after all constitute the preponderant majority more in accord with the spirit and philosophy of the constitution that political power is inherent in the people collectively? As clearly expounded by Justice Makasiar in his opinion, in all the cases cited where the Court held that the submission of the proposed amendment was illegal due to the absence of substantial compliance with the procedure prescribed by the Constitution, the procedure prescribed by the State Constitution, is so detailed, that it specified the *manner* in which such submission shall be made, the *person qualified to vote* for the same, the *date* of election and other definite standards, from which the court could safely ascertain whether or not the submission was in accordance with the Constitution. Thus the case of *In re McConaughy*<sup>13</sup> relied upon in one of the dissenting opinions involved the application of the provisions of the state Constitution of Minnesota which clearly prescribed in detail the procedure under which the Constitution may be amended or revised. This is not true with our Constitution. In the case of *revision* there are no "standards meet for judicial judgment".

The framers of our Constitution were free to provide in the Constitution the method or procedure for the revision or rewriting of the entire constitution, and if such was their intention, they could and should have so provided. Precedents were not wanting. The constitutions of the various states of the American Union did provide for procedures for their *amendment*, and methods for their *revisions*.

Certainly We cannot, under the guise of interpretation, modify, revise, amend, remodel or rewrite the 1935 Charter. To declare what the law is, or has been, is a judicial power, but to declare what the law shall be is not within Our Judicial competence and authority.

The result was that the approval of the new Constitution by the Citizens Assemblies satisfied not only the criterion of political validity, but also the criterion of legal validity or constitutionality, *i.e.*, consistency with the old Constitution. For Justice Antonio, the crucial consideration was the actual effectiveness of the new Constitution.

The more compelling question, however is: Has this Court the authority to nullify an entire Constitution that is already *effective* as it has been accepted and acquiesced in by the people as shown by their compliance with the decree promulgated thereunder, their *cooperation* in its implementation, and is now maintained by the Government that is in undisputed authority and dominance?

Of course it is argued that acquiescence by the people cannot be deduced from their acts of conformity, because under a regime of *martial law* the people are bound to obey and act in conformity with

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<sup>13</sup> *In re McConaughy*, 106 Minn. 392, 119 N.W. 408 (1909).

the orders of the President, and have absolutely no other choice. The flaw of this argument lies in its application of a mere theoretical assumption based on the experiences of other nations on an entirely different factual setting. Such an assumption flounders on the rock of reality.

It is true that as a general rule martial law is the use of military forces to perform the functions of civil government. Some courts have viewed it as a military regime which can be imposed in emergency situations. In other words, martial rule exists when the military rises superior to the civil power in exercise of some or all the functions of government. Such is not the case in this country. The government functions thru its civilian officials. The supremacy of the civil over the military authority is manifest. Except for the imposition of curfew hours and other restrictions required for the security of the State, the people are free to pursue their ordinary concerns.

### C. Views Under the Early Plebiscite Case

At this juncture, it is useful to consider the respective positions taken in connection with the proposed holding of the plebiscite which was challenged in *Planas v. Comelec*<sup>14</sup> and its companion cases. In these cases, the basic approaches that were utilized as above discussed in the *Javellana* case, were already discernible.

Based on their opinions, the Justices advanced views or propositions that may be classified as follows:

1. The criterion of legal validity adhered to by Chief Justice Concepcion, Justice Teehankee, Justice Fernando and Justice Zaldivar;
2. The Criterion of Political Validity adhered to by Justice Antonio; and
3. The *Eclectic* Approach adhered to by Justice Barredo.

#### 1. CRITERION OF STRICT LEGALITY

The representative views of this approach were expressed by Justices Teehankee, Fernando and Zaldivar. Justice Teehankee flatly asserted that the constitutional requisites for ratification were not met by the recitals of facts in Presidential Proclamation No. 1102.

Under the circumstances of record from which it appears that no election (or plebiscite) for the purpose has been called and held, it would be premature for now to hold that the averred ratification of the Constitution proposed by the 1971 Constitutional Convention has met the requirements of Article XV of the Constitution that "(S)uch amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification" or of section

<sup>14</sup> G.R. No. L-35925, January 22, 1973, 49 SCRA 105 (1973).

16 of Article XVII of the proposed Constitution itself that "(T)his Constitution shall take effect immediately upon its ratification by a majority of the votes cast in a plebiscite called for the purpose."

Justice Fernando considered as essential to the validity of the ratification process that condition of political freedom that may be absent under the regime of martial law.

Nonetheless, were it not for the fact that the matter had become moot and academic, I am for granting the petitions in view of what, for me, is the repugnancy between an election contemplated under Article XV of the Constitution wherein the voters can freely register their will, whether it be for approval or disapproval, and the existence of martial law, with its connotation that dissent may be fraught with unpleasant consequences. While it is to be admitted that the Administration has done its best to alleviate such a state of mind, I cannot in all honesty say, although I am prepared to concede that I may labor under a sense of undue pessimism, that the momentum of fear necessarily incident to such a regime has been reduced to a minimum. I fail to see then the existence of that indispensable condition of freedom that would validate the ratification process as contemplated by the Constitution. As to the validity of Proclamation No. 1102, adherence to what for me are fundamental concepts of judicial review precludes at this stage the expression of any opinion. It would, at the very least, be premature.

Justice Zaldivar made plain his view that ratification described in Proclamation No. 1102 did not satisfy the requirements of the 1935 Constitution.

It is very plain from the very wordings of Proclamation No. 1102 that the provisions of Section 1 of Article XV of the Constitution of 1935 was (sic) not complied with. It is not necessary that evidence be produced before this Court to show that no elections were held in accordance with the provisions of the Election Code. Proclamation No. 1102 unequivocally states that the proposed Constitution of 1972 was voted upon by the barangays. It is very clear, therefore, that the voting held in these barangays is not the election contemplated in the provisions of Section 1, Article XV, of the 1935 Constitution. The election contemplated in said constitutional provision is an election held in accordance with the provisions of the election law, where only the qualified and registered voters of the country would cast their votes, where official ballots prepared for the purpose are used, where the voters would prepare their ballots in secret inside the voting booths in the polling places established in the different election precincts throughout the country, where the election is conducted by election inspectors duly appointed in accordance with the election law, where the votes are canvassed and reported in a manner provided for in the election law. It was this kind of election that was held on May 14, 1935, when the Constitution of 1935 was ratified; on April

30, 1937, when the amendment to the Constitution providing for Women's Suffrage was ratified; on June 18, 1940, when the 1940 Amendments to the Constitution were ratified; on March 11, 1947 when the Parity Amendment to the Constitution was ratified; and on November 14, 1967 when the amendments to the Constitution to increase the number of Members of the House of Representatives and to allow the Members of Congress to run in the elections for Delegates to the Constitutional Convention of 1971 were rejected.

I cannot see any valid reason why the practice of procedure in the past, in implementing the constitutional provision requiring the holding of an election to ratify or reject an amendment to the Constitution, has not been followed in the case of the Constitution proposed by the 1971 Constitutional Convention.

## 2. CRITERION OF POLITICAL VALIDITY

The realist approach, utilizing the criterion of political validity, was most evident in the opinions of Justices Esguerra and Antonio. Justice Esguerra considered the 1973 Constitution duly ratified as set forth in Presidential Proclamation No. 1102 and flatly declared that the court had no business inquiring into the validity of its ratification.

At this stage, whether or not there was a valid ratification of the 1972 Constitution cannot be resolved without raising the question of legality of the government under which we are now operating as of January 17, 1973. Hence We would be confronted with a political question which is beyond the jurisdiction of this Court to settle. I accept as a *fait accompli* that the Constitution adopted on November 30, 1972, has been duly ratified, and I consider that any assault against it as well as the manner of its ratification has become innocuous. Having been invested with full force and effect by the approval of an overwhelming majority of the people, to mount an attack against it now would be nothing less than fighting the windmills in Don Quijote fashion. I do not wish to emulate that unique literary character and I prefer to take things in the light of the stark realities of the present. I have always adhered to the idea that the practical approach to any question yields the happiest solution, instead of soaring in flights of fantasies and losing one's self in idle metaphysical adventures.

Justice Antonio considered the ratification of the new Constitution as an existing fact in the light of its recognition by the political organ and the commencement of its implementation. He rejected the proposition that the existence of martial law was incompatible with the political freedom of the people to adopt a Constitution.

If the ratification of the new Constitution and the new government erected thereon, is not what it is represented to be, the expression of the will of the majority or the people are dissatisfied, they have ample remedy. The instrument itself provides amendment and

change. For the only proper way in which it should be remedied, is the people acting as a body politic. These questions relate to matters not to be settled on strict legal principles. For the new Constitution has been promulgated and great interests have already arisen under it. The political organ in the government has recognized it and has commenced the implementation of its provisions. Under such circumstances the Court should therefore refrain from precipitating impossible situations which might otherwise rip the delicate social and political fabric.

The theory of presumptive collective duress under martial rule is perhaps valid in any other clime. In the case at bar, it flies against (sic) the stark reality of the factual setting. To insist upon it is to ignore the historical facts that culminated in the national referendum. The people wanted a revolutionary change. They were aware of the manifold problems of the nation — its poverty, corruption, injustice, subversion and insurgency and criminality. The sweeping and dramatic reforms during the last few months buoyed up the hopes of the people that thru the instrumentality of a new charter these gains of the commonwealth may (sic) be conserved and further enlarged. In the ambience of such a historical setting, it would have been presumptuous to assume that the qualified voters in the reportedly more than fourteen million Filipinos who voted for the new charter, did so not with freedom but from fear. Such a posture, I cannot accept, for that would demean the courage, integrity and wisdom of the people themselves.

### 3. THE ECLECTIC APPROACH

The stand of Justice Barredo in the *Javellana* Case was foreshadowed by the view expressed on the purported ratification as recited under Presidential Decree No. 1102. On the one hand he considered the evidence recited as accomplished in said proclamation as not complying with the requisites in Article XV of the 1935 Constitution. On the other hand, he agreed with the factual assertion that the people had approved the purported Constitution and would consider the same already ratified by them. The new Constitution was therefore valid since the will of the people is the supreme law.

Coming now to No. (2), it is evident that under the theory above-referred to that as agent of the Convention, (sic) the President could devise other forms of plebiscite to determine the will of the majority of the people vis-a-vis the ratification of the proposed Constitution. I believe that the establishment of the Citizens Assemblies as a mode of such plebiscite cannot be said to be clearly beyond the contemplation of Article XV of the Constitution of 1935. It must be observed, however, that under Article X of the same Constitution, it is the Commission on Elections that is supposed to "have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections\* \* \*" and this function cannot be removed from the Commission whether by Congress or by the President. This consti-

tutional point seems to have been overlooked in the proceedings in the Assemblies, since it does not appear from any of the official documents relative thereto that the same have been undertaken or held under the charge of the Commission.

Besides, I feel I cannot bear evidence to history and the future generations of our people that in fact, the answering of the questions and the canvassing and reporting of the referendum in the Assemblies throughout the country were done exactly in the manner and form that they should have been done, in the light of traditional concepts related to plebiscites as we know them. Otherwise stated, I am not satisfied that Article XV of the 1935 Constitution has been fully complied with. By this, I do not mean that it was not right to use the Assemblies; what I am saying is that, on the basis of facts I am taking judicial notice of, the procedure of answering, canvassing and reporting adopted, which, by the way, was far from being uniform in all the Assemblies, was not up to standard in many places, judged on the basis of the requirements of the prevailing election laws.

On the other hand, in spite of these considerations I do not find myself in a position to deny the factual assertion in Proclamation 1102 that more than 14 million Filipinos have manifested approval of the proposed Constitution and would consider the same as already ratified by them. I understand that this number was determined on the basis of sworn reports of the respective heads of the Assemblies. Such being the case, I am faced with proof which I have no way of duly controverting that our people have spoken. I consider it undemocratic, impractical and unrealistic to close my eyes to that vital fact. And since in a democracy the will of the people is the supreme law, I hold that it would be improper for the Court to enjoin any act done or to be done pursuant to the proclamation in dispute. I believe that whatever legal flaws there might have been in the procedure pursued leading to the issuance of said proclamation may be deemed already cured by the apparent will of the people however imperfectly, under legal and technical standards, the same has been expressed. To grant the prayer of petitioners now would be tantamount to defying the very sovereign people by whom and for whom the Constitution has been ordained, absent any demonstrated facts showing that they prefer the *status quo*, which the Convention was precisely called to change meaningfully, to the wide-range reforms everybody can see are being effected in practically all levels of the government and all sectors of society. Withal, to issue any such injunctive writ at this stage of denouement of national events is to court consequences too horrible to imagine.

#### D. *Eclectic Approach: Sic et Non*

Finally, we have the eclectic approach, which adopted and utilized both the frame of legal validity and the frame of political validity in reaching opposing or contradictory conclusions.

Mr. Justice Barredo exemplified this approach. He asserted that from the standard of strict legality, the new Constitution was not ratified, but

on the other hand, "from a *political* standpoint", the ratification was constitutionally justified and justifiable.

4. Viewed from the strictly legal angle and in the light of judicial methods of ascertainment, I cannot agree with the Solicitor General that in the legal sense, there has been at least substantial compliance with Article XV of the 1935 Constitution, but what I can see is that in a political sense, the answers to the referendum questions were not given by the people as legal conclusions. I take it that when they answered that by their signified approval of the New Constitution, they do not consider it necessary to hold a plebiscite, they could not have had in mind any intent to do what was constitutionally improper. Basically accustomed to proceed along constitutional channels, they must have acted in the honest conviction that what was being done was in conformity with prevailing constitutional standards. We are not to assume that the sovereign people were indulging in a futile exercise of their supreme political right to choose the fundamental charter by which their lives, their liberties and their fortunes shall be safeguarded. In other words, we must perforce infer that they meant their decision to count, and it behooves this Court to render judgment herein in that context. It is my considered opinion that viewed understandingly and realistically, there is more than sufficient ground to hold that, judged by such intent and, particularly, from the political standpoint, the ratification of the 1973 Constitution declared in Proclamation 1102 complies substantially with Article XV of the 1935 Charter, specially when it is considered that the most important element of the ratification therein contemplated is not in the word "election", which conceivably can be in many feasible and manageable forms but in the word "approved" which may be said to constitute the substantiality of the whole article, so long as such approval is reasonably ascertained. In the last analysis, therefore, it can be rightly said, even if only in a broad sense, that the ratification here in question was constitutionally justified and justifiable.

Then Mr. Justice Makalintal and Mr. Justice Castro were equally clear that the 1973 Constitution was not ratified in accordance with the 1935 Constitution.

There should be no serious dispute as to the fact that the manner in which the voting was conducted in the Citizens Assemblies, assuming that such voting was held, was not within the intendment of Article XV, Section 1, of the 1935 Constitution nor in accordance with the Election Code of 1971. The referendum can by no means be considered as the *plebiscite* contemplated in Section 2 of said Code and in Article XVII, Section 16, of the draft Constitution itself, or as the *election* intended by Congress when it passed Resolution No. 2 on March 16, 1967 calling a Convention for the revision of the 1935 Constitution. The Citizens Assemblies were not limited to qualified, let alone registered, voters, but included all citizens from the age of fifteen, and regardless of whether or not they were illiterates, feeble-minded, or ex-convicts — these being the classes of persons

expressly disqualified from voting by Section 102 of the Election Code. In short, the constitutional and statutory qualifications were not considered in the determination of who should participate. No official ballots were used in the voting; it was done mostly by acclamation or open show of hands. Secrecy, which is one of the essential features of the election process, was not therefore observed. No set of rules for counting the votes or tabulating them and reporting the figures was prescribed or followed. The Commission on Elections, which is the constitutional body charged with the enforcement and administration of all laws relative to the conduct of elections, took no part at all, either by way of supervision or in the assessment of the results.

It has been suggested that since according to Proclamation No. 1102 the overwhelming majority of all the members of the Citizens Assemblies had voted for the adoption of the proposed Constitution there was a substantial compliance with Article XV, Section 1, of the 1935 Constitution and with the Election Code of 1971. The suggestion misses the point entirely. It is of the essence of a valid exercise of the right of suffrage that not only must a majority or plurality of the voters carry the day but that the same must be duly ascertained in accordance with the procedure prescribed by law. In other words the very existence of such majority or plurality depends upon the manner of its ascertainment, and to conclude that it exists even if it has not been ascertained according to law is simply to beg the issue, or to assume the very fact to be established. Otherwise no election or plebiscite could be questioned for non-compliance with the provisions of the Election Law as long as it is certified that a majority of the citizens had voted favorably or adversely on whatever it was that was submitted to them to vote upon.

On the other hand, both Justices felt that, although not ratified according to the 1935 Charter, the 1973 Constitution could acquire independent validity as a political act of the sovereign people.

If indeed it be accepted that the Citizens Assemblies had ratified the 1973 Constitution and that such ratification as well as the establishment of the government thereunder formed part of a revolution, albeit peaceful, then the issue of whether or not that Constitution has become effective and, as a necessary corollary, whether or not the government legitimately functions under it instead of under the 1935 Constitution, is political and therefore non-judicial in nature. Under such a postulate what the people did in the Citizens Assemblies should be taken as an exercise of the ultimate sovereign power. If they had risen up in arms and by force deposed the then existing government and set up a new government in its place, there could not be the least doubt that their act would be political and not subject to judicial review but only to the judgment of the same body politic that is the people. This concept of what is a political act, in the context just set forth, is based on realities. If a new government gains authority and dominance through force, it can be effectively challenged only by a stronger force; no judicial dictum can prevail against it. We do not see that the situation would be any different, as far as the doctrine of judicial review is concerned, if

no force had been resorted to and the people, in defiance of the existing Constitution but peacefully because of the absence of any appreciable opposition, ordained a new Constitution and succeeded in having the government operate under it. Against such a reality there can be no adequate judicial relief; and so courts forbear to take cognizance of the question but leave it to be decided through political means.

A pivotal concern of Justices Makalintal and Castro was whether or not the Government still operated according to the principle of legality. Underlying this concern was the doubt that the Government would adhere to the Court's decision, if it took a clear stand strictly according to the standards of constitutional law.

In positing the problem within an identifiable frame of reference we find no need to consider whether or not the regime established by President Marcos since he declared martial law and under which the new Constitution was submitted to the Citizens Assemblies was a revolutionary one. The pivotal question is rather whether or not the effectivity of the said Constitution by virtue of Presidential Proclamation No. 1102, upon the recommendation of the *Katipunan ng mga Barangay*, was intended to be definite and irrevocable, regardless of non-compliance with the pertinent constitutional and statutory provisions prescribing the procedure for ratification. We must confess that after considering all the available evidence and all the relevant circumstances we have found no reasonably reliable answer to the question. \* \* \*

\* \* \* \* \*

On the same occasion of the signing of Proclamation No. 1102 the President made pointed reference to "the demand of some of our citizens . . . that when all other measures should fail, that the President be directed to organize and establish a Revolutionary Government," but in the next breath added: ". . . if we do ratify the Constitution, how can we speak of a Revolutionary Government? They cannot be compatible. . ." "(I)t is my feeling," he said, "that the Citizens' Assemblies which submitted this recommendation merely sought to articulate their impatience with the *status quo* that has brought about anarchy, confusion and misery to the masses . . ." The only alternatives which the President clearly implied by the foregoing statements were the ratification of the new Constitution and the establishment of a revolutionary government, the latter being unnecessary, in his opinion, because precisely the Constitution had been ratified. The third obvious alternative was entirely ruled out, namely, a return to the 1935 Constitution, for it was the *status quo* under that Constitution that had caused "anarchy, confusion and misery." The message seems clear: rather than return to such *status quo*, he would heed the recommendation of the Citizens' Assemblies to establish a revolutionary government, because that would be the only other way to carry out the reforms he had envisioned and initiated — reforms which, in all fairness and honesty, must be given credit for the

improved quality of life in its many aspects, except only in the field of civil liberties.

If there is any significance, both explicit and implicit, and certainly unmistakable, in the foregoing pronouncements, it is that the step taken in connection with the ratification of the Constitution was meant to be irreversible, and that nothing anyone could say would make the least difference. And if this is a correct and accurate assessment of the situation, then we would say that since it has been brought about by political action and is now maintained by the government that is in undisputed authority and dominance, the matter lies beyond the power of judicial review.

\* \* \* \*

In the light of this seeming ambivalence, the choice of what course of action to pursue belongs to the President. We have earlier made reference to subjective factors on which this Court, to our mind, is in no position to pass judgment. Among them is the President's own assessment of the will of the people as expressed through the Citizens Assemblies and of the importance of the 1973 Constitution to the successful implementation of the social and economic reforms he has started or envisioned. If he should decide that there is no turning back, that what the people recommended through the Citizens Assemblies, as they were reported to him, demanded that the action he took pursuant thereto be final and irrevocable, then judicial review is out of the question.

In articulating our view that the procedure of ratification that was followed was not in accordance with the 1935 Constitution and related statutes, we have discharged our sworn duty as we conceive it to be. The President should now perhaps decide, if he has not already decided, whether adherence to such procedure is weighty enough a consideration, if only to dispel any cloud of doubt that may now and in the future shroud the nation's Charter.

The eclectic approach is riddled with profound difficulties. On the one hand, the criterion of legal validity imposes a number of presuppositions. There must be two constitutions; one must be prior and the other subsequent in time; and the validity, that is to say, the legal existence of the later constitution is controlled by or dependent upon conditions prescribed in the earlier. Thus, the *sine qua non* for inquiry into legal validity is the existence and effectiveness of the prior constitution. It is the validity of the second that is putative, hence open to, and the subject of, inquiry.

It is precisely presuppositions that are challenged by the criterion of political validity, which assumes, first, direct action of the political sovereign without reference to any prior or existing legal framework, and second, that an original constitution is enacted and validated by such direct action.

Comparing these assumptions or presuppositions, the difficulties become obvious. While it is assumed, under the criterion of legal validity, that the 1935 Constitution is existing and effective, it is, on the other

hand presupposed, under the criterion on political validity, that it is no longer existing and effective; on the contrary, it is the 1973 Constitution that is now existing and effective. While it is assumed, under the criterion of legal validity that the validity of the 1973 Constitution must emanate from the prior Constitution of 1935, it is also assumed, under the criterion of political validity, that the validity of the 1973 Constitution flows from the direct action of approval by the political sovereign. While it is assumed, under the criterion of legal validity that the 1935 and 1973 Constitutions are parts of one and the same constitutional system, in that the latter derives validity from, and succeeds, the earlier, it is assumed, under the criterion of political validity that the 1973 Constitution, being an original creation, is independent of and bears no relationship to the 1935 Constitution, hence, by itself the starting point of a new constitutional system, and not a continuation of the pre-existing constitutional system.

It was these difficulties in the eclectic approach that were responsible for the somewhat apparent inconsistencies in the stand of its adherents upon the various issues presented for opinion or resolution. Mr. Justice Barredo was clear in his view that, in the strict legal sense, the 1973 Constitution was not validly ratified (implying the existence and effectivity of the 1935 Constitution), while, in the political sense, the act of approval by the Citizens Assemblies made the 1973 Constitution effective and existing. Justices Makalintal and Castro likewise held that the 1973 Constitution was not validly ratified, clearly implying in strict legality that the 1935 Constitution was still existing and effective. However, both Justices were willing to consider the 1973 Constitution in existence and in effect "since it has been brought about by political action and is now maintained by the government that is in undisputed authority and dominance", through the expediency of abstaining from review, which is an acknowledged method of indirect validation.

## II

### GENERAL STANDARDS

#### A. *Procedural Due Process*

In a number of cases, the Court applied the well established rule that denial of procedural due process constitutes a grave jurisdictional defect. In *Aducayen v. Flores*,<sup>15</sup> the municipal court set a case for pre-trial, after an answer to a complaint for a sum of money had been duly filed. Defendants were not notified of such pre-trial. Plaintiff's lawyer appeared and presented evidence. Thereafter, the municipal court rendered judgment for the plaintiff, finding defendant in default for non-appearance. Defendant then filed a petition for *certiorari* with the Court of First Instance. After finding that the defendant was deprived of a hearing in the municipal

<sup>15</sup> G.R. No. L-30370, May 25, 1973, 51 SCRA 78 (1973).

court, the CFI Judge dismissed the petition. *Held*: The dismissal was erroneous; the lower court should have granted the writ of *certiorari*.

There was no denial of procedural due process where on the record the petitioner was duly notified of the ejectment proceedings against him and had incurred default without just and sufficient excuse. In *Carandang v. Cabatuando*,<sup>16</sup> petitioner was sought to be ejected from a coconut landholding where he was a caretaker on the ground of gross violation of the terms and conditions of the tenancy contract. Petitioner was duly served with summons and copy of the complaint but he failed to file his answer within the reglementary period. He was declared in default. He then filed a verified motion to set aside the order of default alleging mistake or excusable neglect but this motion was denied for lack of merit. He was then ordered ejected and sentenced to pay damages.

After judgment had become final and steps to execute the same had been taken, the petitioner instituted a special civil action in the Supreme Court alleging that he had been denied his day in court. In dismissing the petition, the Court observed:

It cannot be seriously urged that the trial court abused its discretion when after having declared petitioner in default, it proceeded to receive respondent's evidence and render judgment granting him such relief as the complaint and the facts proven warranted. The trial court simply acted in accordance with the provisions of the rules of court.

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[I]t is apparent that herein petitioner was given notice and opportunity to be heard before judgment was rendered. \* \* \* Due process contemplates notice and opportunity to be heard before judgment is rendered affecting one's person or property.<sup>17</sup>

In *Vda. de Bacaling v. Laguda*,<sup>18</sup> the lessee of a lot was ejected for non-payment of lease rentals. The family of the late lessee was sought to be ejected. After judgment was duly rendered and in the process of execution, the demolition was sought to be stopped through *certiorari* proceedings. One of the grounds was denial of due process due to the failure of the lessor to give notice of the motion for execution to the guardian *ad litem* of the minor children of the deceased lessee.

In dismissing the petition, the high court noted that this claim was without support in the record:

A perusal of the pleadings yields the conclusion that petitioner failed to meet the burden of demonstrating that there was denial of

<sup>16</sup> G.R. No. L-25384, October 26, 1973, 53 SCRA 383 (1973).

<sup>17</sup> *Macabingkil v. Yatco*, G.R. No. L-23174, September 18, 1967, 21 SCRA 150, 157 (1967); *Batangas Laguna Tayabas Bus Co. v. Cadiao*, G.R. No. L-28725, March 12, 1968, 22 SCRA 987 (1968); *Bermejo v. Barrios*, G.R. No. L-23614, February 27, 1970, 31 SCRA 764 (1970).

<sup>18</sup> G.R. No. L-26694, December 18, 1973, 54 SCRA 243 (1973).

due process. On the contrary, there is evidence to show that the Acting Fiscal Alfonso Illeberger, guardian *ad litem* of the minor children of the late Ramon Bacaling, has been duly apprised of the issuance of the assailed special order to demolish, as shown by the certification of the counsel for petitioner at the foot of his opposition dated August 4, 1966 filed with the Court of First Instance of Iloilo, and as also shown by the certification of private respondent's counsel at the foot of his opposition dated September 15, 1966, likewise filed with the same Court.

Consonant with the rights of the party aggrieved thereby, such party may not directly resort to the Court for redress, and his duty to exhaust administrative remedies is not excused by an unsupported claim that he had been denied due process.<sup>19</sup>

In *Monticines v. Court of Appeals*,<sup>20</sup> there was denial of due process where an appeal was dismissed for failure of appellants to file their brief, notwithstanding a clear attribution of such failure to force majeure. The facts recited before respondent court showed that there was a sufficient excuse for failure to file the brief on time and the appellants appeared to have a meritorious case on the merits. The circumstances found by the court as providing sufficient excuse were as follows:

1. It cannot be denied that during the months of July and August, 1972, a series of typhoons did visit the Philippines, bringing in its wake disastrous floods. Nor is it disputed that counsel for defendants-appellants had to attend to the properties left by his deceased father in the provinces of Laguna and Quezon to ascertain the extent of the damage thus caused. As a consequence of which, so it was alleged, and again it was not questioned, he suffered from acute rheumatism and slight cardiac trouble, necessitating, in the opinion of his physician, complete physical and mental rest. That was the cause of his failure to "finalize, polish and type" in time the draft of the brief he had prepared for his clients. In his motion for reconsideration, however, of October 16, 1972, he did submit such printed brief which, on its face, did bear the signs of a thorough preparation, the questions raised therein of fraud and the remedy sought, namely, reconveyance, hardly open to the charge of being devoid of significance. Certainly then, here is a case that falls squarely within the concept of *caso fortuito* or *force majeure*. Moreover, defendants-appellants cited our decision in *Salvador v. Reyes*, where, in a criminal case, respondent Court, while admittedly having discretion to dismiss an appeal *motu proprio*, was required to have a notice of such dismissal served upon appellant. While not strictly in point, such a ruling reflects a principle that is more in keeping with the due process requirement, for thereby a statutory right to appeal is not frustrated by a failure to file a brief which, under certain

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<sup>19</sup> *Quintos, Jr. v. National Stud Farm*, G.R. No. L-37052, November 29, 1973, 54 SCRA 210 (1973).

<sup>20</sup> G.R. No. L-35913, September 4, 1973, 53 SCRA 14 (1973).

occasions, and this is one of them, could be traceable to *force majeure*. It would appear, therefore, that justice in this instance would have been served had no such dismissal of the appeal been ordered, especially so as the brief had been submitted to respondent Court as far back as October 16, 1972. It could even be said with some degree of assurance that had there been a reconsideration of such an order perhaps by this time this litigation could have been ready for adjudication by respondent Court.

Procedural due process includes the rights to be heard with respect to one's claim. In *Minlay v. Sandoval*,<sup>21</sup> the petitioner was a homesteader. He discovered that in an application for the registration of certain parcels of land, his homestead was included. Meantime, without his knowing it, the Court rendered a decision declaring the applicants to be owners of the parcels of land including his homestead. The petitioner filed a verified petition for relief from judgment. The lower court dismissed this petition without affording the petitioner any hearing despite the claim that the applicants had committed actual fraud in including in their application for registration the homestead lot of the petitioner. Holding that there was a denial of due process and, therefore, the petition should be heard, the Supreme Court observed:

3. The right to a hearing embraced in the due process guarantee calls for the utmost respect — especially so in this case. If it were not thus, and the order of dismissal were not set aside, it could happen that the Torrens system would lend itself as an instrument for fraud. So many of the decisions of this Court stand as a warning against such a deplorable consequence. The latest one is *Philippine Commercial and Industrial Bank v. Villalva*, where it was explicitly affirmed: "Deceit is not to be countenanced; duplicity is not to be rewarded." As early as 1919, in the leading case of *Cabanos v. Register of Deeds*, Justice Torres did categorically state: "The registration of [land] cannot serve as a protecting mantle to cover and shelter bad faith \* \* \*." There is no any aspect from which this case can then be viewed which does not inescapably yield the conclusion that the lower court ought to have granted the opportunity to petitioner to prove his claim in accordance with the due process clause.

In *G.A. Machineries, Inc. v. Januto*,<sup>22</sup> the judgment of the trial court was sought to be impugned on the ground of denial of due process. The gist of the appeal was that he was never served personally a copy of the notice of trial of the case in the lower court. It was undisputed, however, that the appellant was represented by counsel; and that notice of the trial was given to his counsel although such counsel filed a motion to withdraw from the case five (5) days prior to the hearing. On the basis

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<sup>21</sup> G.R. No. L-28901, September 4, 1973, 53 SCRA 1 (1973).

<sup>22</sup> G.R. No. L-27958, March 31, 1973, 50 SCRA 1 (1973).

of such motion, the counsel of record did not appear at the trial. Consequently, in such trial, the evidence of the plaintiff was received *ex-parte*. In sustaining the original judgment, the court observed:

1. This is not to deny that appellant would be entitled to invoke the protection of due process if he could validly show that he was not given his day in court. Nothing is better settled than that the right to be heard is an indispensable element of such constitutional guarantee. He would predicate such a grievance on the lack of personal notification as to the date of trial of the original action as a result of which came the decision which was the basis of the first writ of execution only partially satisfied. It is not unknown to him that once a party is represented by counsel, there is no need that he be personally informed of the proceedings in court. It is the lawyer retained by him, whose appearance is duly noted, to whom such notice is sent. That is equally indisputable. \* \* \*

In *Shell Company of the Phil., Ltd. v. Enage*,<sup>23</sup> *certiorari* proceedings to set aside decisions of the trial court were instituted on the ground of violation of procedural due process. Petitioners were defendants in an action for damages. One of them was the Shell Company of the Philippines. Within the reglementary period, said company filed its Answer With Counterclaim through its counsel, Atty. Alfred P. Deen of Cebu City. The other defendants were represented by the law firm of Deen, Mercado and Cataluña of Butuan City. The latter Deen was not the Atty. Alfred P. Deen who appeared as counsel for the company. In all subsequent proceedings, only the law firm of Butuan City was served with court notices. The counsel of record of the company at Cebu City was never notified of all proceedings. In granting *certiorari* with respect to petitioner company, the high court observed:

Respondent Judge failed to have counsel for petitioner Shell Company notified. What is indispensable in law was rendered nugatory in fact. For it would render such a right conspicuously futile if counsel were not given notice of the proceedings to be had. If sanction could therefore be given to what was done by respondent Judge, or, more appropriately, what he failed to do, then this guarantee, insofar as its procedural aspect is concerned, is reduced to a barren form of words. What use is an attorney of record, whose services are precisely sought so that one's interests may receive the protection to which they are entitled under the law, if he is kept ignorant as to when the hearings will be held. Whatever sound advice may be offered will go for naught. Whatever appropriate legal steps he may have in mind cannot be undertaken if he were not present at the trial, not because he did not care to be there but because he did not know as to when it was to be conducted. The most prejudicial testimony against the client, even if contrary to

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<sup>23</sup> G.R. Nos. L-30111-12, February 27, 1973, 49 SCRA 416 (1973).

truth, may be accorded acceptance, as its veracity could not be tested in the crucible of cross-examination. One might as well say, if the respondent Judge were to be upheld, that the right to a hearing, far from being of the every (sic) essence of procedural due process, is just a useless formality. What ought to have been in the mind of the lower court is this succinct summary, from the pen of Justice J.B.L. Reyes, of the importance of the right to counsel: "A party engages an attorney of record precisely because it does not feel competent to deal with the intricacies of law and procedure." In law, as in life, a little common sense does help. Had its promptings been heeded, then there would have been no need for these pleas for certiorari so rightfully invoked by petitioner Shell Company.

## B. Socio-Economic Rights

### 1. ECONOMIC RIGHTS

The constitutional mandate to afford protection to labor is applicable to individual employees so as to entitle them to question acts of their labor organizations that are violative of their fundamental rights. In *Guijarno v. Court of Industrial Relations*,<sup>24</sup> the complainants were expelled from their labor union which had a collective bargaining agreement with the company containing among others a closed-shop provision. The union sought their dismissal from the company by virtue of such provision. The company, believing that it was under the duty to dismiss them, terminated the employees' services. Unfair labor practice charges were filed against the employer and the union.

In holding the dismissal of the complainant employees as constituting unfair labor practice, the High Court stressed the role of a labor organization as an instrument of the workers in furthering their goals, thus;

\* \* \* It is then the individual employee, as a separate, finite human being, with his problems and his needs, who must be attended to. He is the beneficiary of the concern thus made manifest by the fundamental law. The present Constitution is even more explicit on the matter. The principle that the State shall promote social justice is categorically based on the concept of insuring "the dignity, welfare, and security of all the people." Insofar as the provision on the State affording protection to labor is concerned, it is further required to "promote full employment and equality in employment, ensure equal work opportunities regardless of sex, race, or creed, and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work." Where does that leave a labor union, it may be asked. Correctly understood, it is nothing but the means of assuring that such fundamental objectives would be achieved. It is the instrumentality through which an

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<sup>24</sup> G.R. Nos. L-28791-93, August 27, 1973, 52 SCRA 307 (1973).

individual laborer who is helpless as against a powerful employer may, through concerted effort and activity, achieve the goal of economic well-being. That is the philosophy underlying the Industrial Peace Act. For, rightly has it been said that workers unorganized are weak; workers organized are strong. Necessarily then, they join labor unions. To further increase the effectiveness of such organizations, a closed-shop has been allowed. It could happen, though, that such a stipulation which assures further weight to a labor union at the bargaining table could be utilized against minority groups or individual members thereof. There are indications that such a deplorable situation did so manifest itself here. Respondent Court, it would appear, was not sufficiently alert to such a danger. What is worse, it paid no heed to the controlling doctrine which is merely a recognition of a basic fact in life, namely, that power in a collectivity could be the means of crushing opposition and stifling the voices of those who are in dissent. The right to join others of like persuasion is indeed valuable. An individual by himself may feel inadequate to meet the exigencies of life or even to express his personality without the right to association being vitalized. It could happen though that whatever group may be in control of the organization may simply ignore his most-cherished desires and treat him as if he counts for naught. The antagonism between him and the group becomes marked. Dissatisfaction if given expression may be labelled disloyalty. In the labor field, the union under such circumstances may no longer be a haven of refuge, but indeed as much of a potential foe as management itself. Precisely with the Anakan doctrine, such an undesirable eventuality has been sought to be minimized, if not entirely avoided. There is no justification then, both as a matter of precedent and as a matter of principle, for the decision reached by respondent Court.

In consonance with the constitutional mandate of social justice and land reform, a tenant, though ordered ejected by the Court of Agrarian Relations, is entitled to continue the enjoyment of the landholding so long as such order of ejection has not become final and executory.

In *Paulo v. Court of Appeals*,<sup>25</sup> the Court of Agrarian Relations issued a writ of execution ejecting the petitioner-tenant. Motion to set aside said order of execution by the Court of Agrarian Relations was denied by both the Court of Agrarian Relations and the Court of Appeals. Pending appeal of said order, a petition for writs of *certiorari* and prohibition was filed by petitioner. The Supreme Court, in granting the petition, pointed out the constitutional policy on land reform and opined that a tenant's security of tenure under the Land Reform Code prohibiting dispossession of the tenants, unless the judgment was final and executory, was a substantive right which could not be defeated by the procedural rules embodied under Republic Act No. 5434 allowing execution pending appeal.

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<sup>25</sup> G.R. No. L-33845, December 18, 1973, 54 SCRA 253 (1973).

## 2. BILL OF RIGHTS

The tendency towards assimilation of concerted activities in the constitutional freedom of expression is illustrated by a recent case. In connection with a recent dispute, the workers suffered abuses and indignities at the hands of certain municipal policemen. A demonstration was scheduled by the union before Malacañang to protest such acts. The employer was requested to allow the employees to join the demonstration, but the employer refused and instead forbade the workers to take part, under pain of dismissal. When the workers joined the demonstration, nevertheless, the employer responded with lay-offs. It was held that the actuations of the employer were an unconstitutional restraint on the constitutional freedoms of the workers, and constituted interference, restraint and coercion on the exercise by employees of their rights guaranteed under Section 3 of the Industrial Peace Act, among which was the right to engage in concerted activities.<sup>26</sup>

The respondent company was guilty of unfair labor practice. The refusal on the part of the respondent firm to permit all its employees and workers to join the mass demonstration against alleged police abuses and the subsequent separation of eight (8) petitioners from the service constituted an unconstitutional restraint on their freedom of expression, freedom of assembly and freedom to petition for redress of grievances; thus, the respondent firm committed an unfair labor practice defined in Section 4 (a-1) in relation to Section 3 of Republic Act No. 875, otherwise known as the Industrial Peace Act. Section 3 of Republic Act No. 875 guarantees to the employees the right "to engage in concerted activities for x x x mutual aid or protection"; while Section 4 (a-1) regards as an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section Three."

### C. *Rights of the Accused*

#### 1. RIGHT TO BE PRESUMED INNOCENT

Under the Constitution, an accused has the right to be presumed innocent until found guilty beyond reasonable doubt. This right is not nullified by the power of the trial court to decide materials of credibility nor by the doctrine that the trial court's findings on such matter are to be sustained in the absence of facts or circumstances that have been overlooked or the significance of which has been misinterpreted.

In *People v. Macaraeg*,<sup>27</sup> defendants were convicted of murder. The defendants appealed contending that the testimony of the prosecution be-

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<sup>26</sup> *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills*, G.R. No. L-31195, June 5, 1973, 51 SCRA 189, 207 (1973).

<sup>27</sup> G.R. No. L-32806, October 23, 1973, 53 SCRA 285 (1973).

ing discredited by the evidence of record, there was therefore absent that quantum of proof of guilt beyond reasonable doubt; hence they were entitled to an acquittal. The Supreme Court, upon a review of evidence of record, sustained the findings of the lower court as regards the credibility of the prosecution witnesses.

In adhering to the doctrine that, unless the accused is guilty, erroneous rulings of credibility by the Court must not be sustained, the Court through Justice Fernando observed:

\* \* \* Such a principle may without inaccuracy be looked upon likewise as a presumption, one moreover borne out by experience. It is easy to discern that a trial judge is better situated than an appellate court in the appraisal of the testimony offered. The witnesses are there before him. He hears them testify; he observes their demeanor. He can sense the tell-tale signs of prevarication. It is not too difficult for him to distinguish between honest mistakes and deliberate fabrications. Thus a judge, especially one who has had years on the bench and with the training and habitudé in the art, may be trusted to sift the false from the true. It is not likely that he can be easily taken in by the adroitness and skill of counsel or the well rehearsed performance of the individual on the stand. \* \* \*

Consonant with the constitutional policy of the protection of the rights of the accused, the Supreme Court has developed legal standards for the sufficiency of a plea of guilty in capital offenses. These include: (1) the trial court should clearly explain to the accused the meaning and the possible consequence of a plea of guilty in order to preclude any doubt that he enters his plea voluntarily and intelligently. (2) The Court must receive evidence showing proof of guilt beyond reasonable doubt. Where the record of the criminal case is bereft of a clear and possible evidence establishing the guilt of the accused, the constitutional presumption of innocence commands his acquittal.

In *People v. Bacong*,<sup>28</sup> the accused was charged with a capital offense. When he was arraigned on August 19, 1972, he was duly assisted by counsel *de oficio*. He was then asked whether he pleaded guilty or not guilty. He was informed in Tagalog that if he pleaded guilty the possible penalty was death. Despite this warning, the accused pleaded guilty and emphasized that he was ready to accept the penalty. On the other hand, it appeared that the accused was ignorant and an illiterate person. He was a new sight in the national penitentiary. Also, he was fully conversant with his native dialect which was Visayan.

The record did not show that the lower court explained the meaning or import of the accusation against him, particularly the allegations of "treachery and evident premeditation". There was likewise no evidence on

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<sup>28</sup> G.R. No. L-36161, December 19, 1973, 54 SCRA 288 (1973).

the record showing that the trial court explained to the accused the meaning and the far-reaching effect of a plea of guilty. In the case at bar, upon arraignment, the accused emphasized that he had no intention to commit so grave a wrong, so that after the incident, he became remorseful and surrendered to the prison authorities.

Furthermore, the trial court accepted the plea of guilty of the accused and rendered a decision based on the plea of guilty alone requiring no presentation of evidence. It was only after 2 months from rendition of the judgment that the trial court ordered a hearing for the reception of evidence on the guilt of the accused. On the above facts, the Supreme Court ruled that the applicable legal standard relative to acceptance of the plea of guilty had been violated.

In *People v. Zamora*,<sup>29</sup> 3 were charged as conspirators in the commission of murder. The lower court, after the trial, found 2 of the co-accused guilty and acquitted the 3rd, there being no evidence of a conspiracy as well as evidence showing him guilty of the facts charged. The Solicitor General moved for a reversal of the conviction of said third defendant, Inigo Malapitan, on the ground that there was no evidence to support his conviction. On review of the record, the High Court noted that there was nothing in the testimony of the witnesses that specifically pointed to the guilt of Malapitan; hence, a reversal of his conviction was in order.

In *People v. Andaya*,<sup>30</sup> the death sentence was reversed where the record of the case established that the judgment of conviction was based on the plea of guilty that did not conform to the standards prescribed by the Court. The record did not show that the accused was properly apprised of the consequence of his plea.

In *Garcia v. Domingo*,<sup>31</sup> the trial of criminal actions was held, with the conformity of the accused, in the chamber of the trial judge. The hearing took more than 14 days and thereafter, the counsel was permitted to file a memorandum. Thereafter, a petition for *certiorari* was filed alleging jurisdictional defects and violation of the constitutional right of the accused to a public trial in that the trial was conducted in the chamber of the City judge. In granting the petition and finding no transgression of the constitutional right, the Supreme Court observed:

2. The crucial question of the meaning to be attached this provision remains. The Constitution guarantees an accused the right to a public trial. What does it signify? Offhand it does seem fairly obvious that there is an instance where language is to be given a literal application. There is no ambiguity in the words employed. The trial

<sup>29</sup> G.R. No. L-34090, November 26, 1973, 54 SCRA 47 (1973).

<sup>30</sup> G.R. No. L-29644, July 25, 1973, 52 SCRA 137 (1973).

<sup>31</sup> G.R. No. L-30104, July 25, 1973, 52 SCRA 143 (1973).

must be public. It possesses that character when anyone interested in observing the manner a judge conducts the proceedings in his courtroom may do so. There is to be no ban on such attendance. His being a stranger to the litigants is of no moment. No relationship to the parties need be shown. The thought that lies behind this safeguard is the belief that thereby the accused is afforded further protection, that his trial is likely to be conducted with regularity and not tainted with any impropriety. It is not amiss to recall that Delegate Laurel in his terse summation of the importance of this right singled out its being a deterrence to arbitrariness. It is thus understandable why such a right is deemed embraced in procedural due process. Where a trial takes place, as is quite usual, in the courtroom and a calendar of what cases are to be heard is posted, no problem arises. It is the usual course of events that individuals desirous of being present are free to do so. There is the well recognized exception though that warrants the exclusion of the public where the evidence may be characterized as "offensive to decency or public morals."

What did occasion difficulty in this suit was that for the convenience of the parties, and of the city court Judge, it was in the latter's air-conditioned chambers that the trial was held. Did that suffice to vitiate the proceedings as violative of this right? The answer must be in the negative. There is no showing that the public was thereby excluded. It is to be admitted that the size of the room allotted the Judge would reduce the number of those who could be present. Such a fact though is not indicative of any transgression of this right. Courtrooms are not of uniform dimensions. Some are smaller than others. Moreover, as admitted by Justice Black in his masterly *In re Oliver* opinion, it suffices to satisfy the requirement of a trial being public if the accused could "have his friends, relatives and counsel present, no matter with what offense he may be charged."

Then, too, reference may also be made to the undisputed fact that at least fourteen hearings had been held in chambers of the city court Judge, without objection on the part of respondent policemen. What was said by former Chief Justice Moran should erase any doubt as to the weight to be accorded, more appropriately the lack of weight, to any such objection now raised. Thus: "In one case, the trial of the accused was held in Bilibid prison. The accused, invoking his right to a public trial, assigned the procedure thus taken as error. The Supreme Court held that as it affirmatively appears on the record that the accused offered no objection to the trial of his case in the place where it was held, his right is deemed waived." The decision referred to, *United States vs. Mercado*, was handed down sixty-eight years ago, in 1905.

In *People v. Palacpac*,<sup>32</sup> convictions for murder with life sentences were overturned, where the same were based chiefly on confessions ex-

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<sup>32</sup> G.R. No. L-27822, February 28, 1973, 49 SCRA 440 (1973)

tracted from the accused. In finding that confessions can afford no basis for moral certainty, the court made the following observations:

\* \* \* Instead of viewing them askance, with the three appellants testifying to the usual method by which they were obtained, frowned upon by law and conscience, he gave them credence. He appeared to have ignored the circumstances indicative of their being extorted by force and thus devoid of any probative value. This Court, in *People v. Urro*, through Justice Teehanke, spelled out what is expected of lower courts: "In any case, the most painstaking scrutiny must be resorted to by the trial courts in weighing evidence relating to alleged voluntary confessions of the accused, and the courts should be slow to accept such confessions unless they are corroborated by other testimony." Precisely here, the corroboration was lacking. The trial judge in the previous excerpt cited expressly conceded the unsatisfactory character of the testimony. The repudiation of involuntary confession is equally a dearly cherished principle of English and American law. It would seem then that the trial judge had a different norm. \* \* \*