THE SUPREME COURT RECORD ON HUMAN RIGHTS UNDER MARTIAL LAW

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I place in your hands, . . . this
message . . . from one whose
only authority is a firm conviction
and a lifetime experience, and who in his
declining years, still loves to plant trees
knowing that he will never sit in their
shade, happy in the thought with
Tasio, the philosopher, that some day, in a
distant future, one may say of him and
the nationalists of his generation:
"THERE WERE THOSE WHO KEPT VIGIL IN
THE NIGHT OF OUR FOREFATHERS."*

I. *RIGHT TO AVAIL OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS*

The writ of *habeas corpus,* characterized by Justice Malcolm as *"the best and only sufficient defense of personal freedom,"*[1] is the most important right cherished and guaranteed to the citizenry and used as a defense against tyranny and oppression. *Habeas Corpus* is an ancient writ, the origin of which is so obscure that it is said to be lost in antiquity.

An examination and perusal of Philippine legal history would show that the present provision found in our constitution with respect to the writ of *habeas corpus* can be traced back to the Philippine Bill of 1902.[2] The said law provided:

> That the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion, insurrection, or invasion, the public safety requires it, in either of which events the same may be suspended by the President, or by the Governor-General with the

* *No todos dormian en la noche de nuestros abuelos.* Claro M. Recto, Nationalism and Our Historic Past, February 27, 1960.

[1] Villavicencio v. Lukban, 39 Phil. 778 (1919).

[2] Public No. 235, 32 STAT. 691 (1902).

> approval of the Philippine Commission, whenever during such period, the necessity for such suspension shall exist.[3]

Such a provision was reiterated in the Jones Law.[4] Although there is no direct evidence to substantiate the notion that our present constitutional provisions on the privilege of the writ of *habeas corpus* were directly taken from the aforesaid statutes, the striking similarities of the provisions of the Jones Law, the Philippine Bill of 1902, and the constitutional provisions seem to leave no doubt that such was the case. Our present constitution provides:

> Article IV, Section 15 —
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> The privilege of the writ of *habeas corpus* shall not be suspended except in cases of invasion, insurrection, rebellion, or imminent danger thereof, when the public safety requires it.
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> Article IX, Section 12 —
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> The Prime Minister shall be the Commander-in-Chief of all armed forces of the Philippines, and, whenever it becomes necessary he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion or imminent danger thereof, when public safety requires it, he may suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law.

Such historical development of our constitutional provision leads to two generalizations on the matter.

First, the Filipino as a people was not fully aware of this *"great writ of freedom."* Whatever the Filipino now knows as the privilege of the writ of *habeas corpus* is what has been adopted from foreign provisions of law.

Second, an examination of the provisions of law would show that the right of the people to the privilege of the writ of *habeas corpus* is *not* expressly granted but is implicitly assumed by a guarantee against suspension, save in certain cases. At present, there exists no statute or law conferring expressly on the citizenry a positive right to avail of this aforementioned privilege.

What then, do these add up to? Is the privilege inherent in every citizen, or is such a privilege bestowed only on a case to case basis? These questions are still raised despite the fact that two international covenants which provide for the basic human rights of all persons have already come to existence.

Article 9, Universal Declaration of Human Rights provides—

> No one shall be subjected to arbitrary arrest, detention or exile.

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[3] §2 par. 7.
[4] Public No. 240, 29 STAT. 545 (1916).

Article 9 (1), (2) and (4), International Covenant on Civil and Political Rights provides —

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
>
> Anyone who is arrested shall be informed at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The provisions of these international covenants bear a close resemblance with the privilege of the writ of *habeas corpus*. Should these provisions be construed as general principles of international law, then the answer to the previous questions would be that the privilege is inherent in all men because Section 3, Article II of the Constitution provides that:

> The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land,* and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. (underscoring added)

We can say, therefore, that as a general rule, the privilege of the writ of *habeas corpus* cannot be withheld from the citizenry by the government. However, once conditions such as insurrection, rebellion, and invasion prevail, it is the prerogative of the government in the person of the Chief Executive to suspend the privilege—such suspension being based on the inherent nature for self-preservation.

Closely interlinked with this is the role played by the Judiciary during such times of emergency. The burden of determining whether or not the privilege can be availed of during times of emergency falls on its shoulders. From a historical point of view, this herculean task has already been borne by the predecessors of the present Supreme Court. On at least two occasions, the Supreme Court was asked to measure up to its role as guardian of the rights provided for in the constitution.

On January 31, 1905, pursuant to a resolution and request of the Philippine Commission, the then American Governor-General Luke E. Wright suspended the privilege of the writ of *habeas corpus* in particular provinces — Cavite and Batangas.[5]

[5] Resolution of Philippine Commission dated January 31, 1905; Executive Order No. 6, January 31, 1905.

This particular suspension was based on the fact of general knowledge that certain organized armed bands in the country were in open insurrection against constituted authorities.

In response to such declaration, a case arose[6] in which a collateral question was raised, seeking to determine who was the proper authority to determine the existence of a state of rebellion, insurrection or invasion.

The Supreme Court through Justice Johnson held that the act of Congress gave to the Governor-General, with proper approval of the Philippine Commission, the sole power to decide whether a state of rebellion or invasion existed in the country, and whether or not the public safety required the suspension of the privilege of the writ, which decision is conclusive on the judicial department. Such decision of the court was based on the *habeas corpus* provision of the Philippine Bill of 1902 as earlier quoted.[7]

The second suspension of the privilege of the writ of *habeas corpus* was by the President Quirino in a proclamation issued on October 22, 1950.[8] The suspension applied to the persons then detained as well as others who might thereafter be similarly detained:

> for crimes of sedition, insurrection, or rebellion, and all other crimes and offenses committed by them in furtherance or on the occasion thereof, or incident thereto, or in connection therewith.[9]

President Quirino's grounds for suspending the privilege of the writ were akin to those of the first suspension. This was, however, the first time that the privilege was suspended after the establishment of a civil government.[10]

Some segments of society questioned the basis and prerogative given to the Chief Executive upon which the latter suspended the privilege of the writ.[11] The Supreme Court falling back on the ruling of *Barcelon v. Baker*,[12] upheld the constitutional grant given to the president and admitted openly that the determination of the President is binding and conclusive on all courts.

Directly related to the above case which upheld the suspension of the privilege was the effect of the suspension on the constitutional right to bail. This question was presented before the Supreme Court in at least three cases.[13] The Supreme Court, for lack of one vital

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[6] Barcelon v. Baker, 5 Phil. 87 (1905).
[7] *Supra*, note 2.
[8] Proclamation No. 210 (1950), 46 O.G. 4682 (October, 1950).
[9] 46 O.G. 4683 (October, 1950).
[10] Full text of Proclamation is in 46 O.G. 4682.
[11] Montenegro v. Castaneda, 91 Phil. 882 (1952).
[12] 5 Phil. 87 (1905).
[13] Nava v. Gatmaitan, G.R. No. 4855; Hernandez v. Montesa, G.R. No. 4964; Angeles v. Abaya, G.R. No. 5102; 90 Phil. 172 (1951).

vote to make a majority of six as required by the Judiciary Act, failed to make a binding ruling.

By not being able to reach a majority, the view of the dissenting justices in effect became the opinion of the court.[14] Such a holding presupposed that an emergency situation, of itself, called for the suspension of all the applicable constitutional guarantees. It implied that the Constitution was no longer an inviolable instrument in moments of danger to national safety and security — and therefore, the individual rights of the citizenry was put in a state of suspended animation. This should not be the situation. As the American Supreme Court ruled in the case of *Ex-Parte Milligan*[15] *"the Constitution... is a law for for rulers and for people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances."* (Underscoring added).

The reaction of the Supreme Court when confronted with constitutional law problems dealing with the limitations on the powers of the Chief Executive and the enjoyment of individual constitutional rights by the citizenry can be very well deduced from the above-cited cases.

In both cases, the Supreme Court ruled that the decision of the Chief Executive in suspending the privilege of the writ of *habeas corpus* is conclusive and binding on the Court. The Court cannot inquire into the basis for such a declaration for it is assumed that the decision made by the President is supported by substantial evidence and made after a thorough analysis of the situation. In so ruling, the Court has impliedly admitted that it does not have the power, nor the capability of determining for itself the necessity which would warrant the curtailment of certain basic constitutional rights. Whatever is the decision of the Chief Executive stands to be *gospel truth.*

Should the issue put squarely before the Court involve a decision which would require a *"balancing of interests"* — individual human rights vis-a-vis the claim of security of the State, the latter interest would prevail even if such would mean the sacrifice of the individual rights of the citizenry. From the philosophical point of view, the Supreme Court applies the utilitarian principle of: *What is good for the majority should prevail.*

These decisions which deal with crucial issues could have very well been decided either way, but the Court in both cases, with the exception of several justices, took the easy way out — the path of least resistance.

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[14] Justices Padilla, Pablo, and Bautista Angelo constituted the minority.
[15] 4 Wall., 2; 18 L.Ed. 281 (1866).

The role of the Supreme Court as the guardian of constitutional rights was again put to the test close to twenty-one years after President Quirino availed of his powers as Chief Executive.

Proclamation No. 889, dated August 21, 1971, but announced on August 23, 1971, by President (now Prime Minister) Ferdinand E. Marcos, was the third occasion for the Chief Executive of the Philippines to suspend the privilege of the writ of *habeas corpus*. Similar to the grounds set forth in President Quirino's Proclamation is the threat to overthrow the Philippine Government by lawless elements.[16]

Accordingly, the President suspended the privilege of the writ of *habeas corpus* "for the persons presently detained, as well as others who may thereafter be similarly detained for the crimes of insurrection, or rebellion, and other overt acts committed by them in the furtherance thereof." As a consequence of this proclamation, Teodosio Lansang was among those deprived of liberty. Together with other detainees,[17] he sought the aid of the Supreme Court. This case is what we refer to now as the landmark case of *Lansang v. Garcia.*

Briefly stated, two issues were before the Court. The first, like the precedent-laying cases of *Barcelon* and *Montenegro*[18] dealt with the conclusiveness of the executive proclamation. Again, the question before the court was: *May we, the Supreme Court, inquire into the validity of the decision?*

The answer, as ably put by Justice Fernando:[19]

> The doctrine announced in Montenegro v. Castañeda that such a question is political has thus been laid to rest. It is about time, too. It owed its existence to the compulsion exerted by Barcelon v. Baker, a 1905 decision.

From this answer, it would seem at first blush that the Court was to take the bull by its horns. From a perusal of the decision, the writer of the main opinion[20] was quick to point out that even if the Constitution designated the President as the final arbiter in determining the urgency for suspending the privilege of the writ, his power to do so had to be exercised within the limits of the Constitution. Should he over-step such grant of powers, the Supreme Court

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[16] Lansang v. Garcia, G.R. No. 33964, December 11, 1971, 42 SCRA 448 (1971).

[17] Other detainees were: Rogelio Arrienda, Luzvimindo David, Gary Olivar, Nemesio Prudente, Gerardo Tomas, Reynando Rimando.

[18] 5 Phil. 87 (1905); 91 Phil. 882 (1952).

[19] Lansang v. Garcia, *supra*, note 16 at 505.

[20] Chief Justice Roberto Concepcion.

would be ready to *"confine them within their proper bounds."* But did the Court really go that far?

It cannot be denied that the political question doctrine which was availed of in the Barcelon and Montenegro cases was laid to rest. Now, the Court can inquire into the validity of the acts of the President and even exercise a check on him. The Court, however, was unable to nullify the proclamation suspending the privilege of the writ. As the opinion of the Chief Justice stated:

> In the exercise of such authority, the function of *the Court is merely to check* — not to *supplant* — the Executive, *or to ascertain merely whether he has gone beyond* the constitutional limits of his jurisdiction, *not to exercise the power vested in him* to determine the wisdom of his act.[21]

The end result: Even if the Court dared to inquire into the act of the Chief Executive, the consequence of such inquiry was not far from that arrived at by the Court in the cases of Montenegro and Barcelon.[22] Granting that the Supreme Court had the power to inquire into the validity of the proclamation, what they did in reality was to accept as true the information given to them by the President and determine from such information whether the latter's act was within the realm granted to him by the Constitution. The Supreme Court thus was testing the power of the Chief Executive based on his own evidence and therefore, on the latter's own *"home-ground"*. By using such an approach, the Supreme Court of 1971 was in reality no different from the Court in the 1950's.

The second issue: Like the cases of *Nava v. Gatmaitan, Hernandez v. Montesa, Angeles v. Abaya,*[23] the right to bail of a detainee during a period wherein the privilege of the writ of *habeas corpus* was suspended was again brought forth. The Court deemed that no ruling was necessary. As Justice Concepcion puts it:

> Although some of petitioners in these cases pray that the Court decide whether the constitutional right to bail is affected by the suspension of the privilege of the writ of *habeas corpus*, we do not deem it proper to pass upon such question, the same not having been sufficiently discussed by the parties herein.... Neither is it necessary to express our view thereon, as regards those still detained, inasmuch as their release without bail might still be decreed by the Court of First Instance, should it hold that there is no probable cause against them.[24]

The opportunity to resolve a twenty-one year old problem was given to the Concepcion Court but instead of deliberating and hand-

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[21] Lansang v. Garcia, *supra*, note 16 at 480. Footnote deleted. Emphasis in the original.

[22] 91 Phil. 882 (1952).

[23] 90 Phil. 172 (1951).

[24] Lansang v. Garcia, *supra*, note 16 at 495.

ing down a decision, it merely shied away from its duty, turning its head in the other direction. The question regarding the right to bail remained hanging. Such an attitude by the Court shows that its judicial philosophy is one of judicial restraint instead of *activism*. This attitude will be carried over by the Court in resolving cases under the Martial Law.

Perhaps the biggest loser in the Court's decision is the citizenry. We all know that the petitioners in the above-mentioned cases were not the only persons whose liberties were curtailed. Hope was raised when the Court disregarded the political question doctrine but this remained a mere expectation, never to be transformed into reality. Had the Court seized the opportunity and resolved the twenty-one year old dilemna, whatever decision it would have rendered would have been welcomed by the citizenry. All doubts regarding the enjoyment of the constitutional right to bail in emergency situations would have been resolved.

The events which transpired after the third occasion in our history when the privilege of the writ of *habeas corpus* was suspended is now past. Exactly one year and one month later, the whole citizenry was literally *caught* unaware. The rumor which prevailed a few weeks back became a reality. The President, through Proclamation No. 1081,[25] put the entire country under Martial Law — his last attempt to rehabilitate the dying democracy, and to create a new society.

Not all segments of society, however, welcomed this bold but calculated move of the Chief Executive. Dissent was manifest, especially in detention centers where political prisoners were held. Legal challenges were hurled at the proclamation. It was only a matter of time before the Supreme Court would be asked to stand up and play its role as the guardian of constitutional rights of the constituents. The case of *Lansang v. Garcia* was just the prelude.

Without the case of *Aquino v. Ponce Enrile*,[26] a paper which has for its purpose an examination of decisions of the Supreme Court dealing with the suspension of the privilege of the writ would be bereft of substance. After the above-mentioned case, all cases that follow merely fall back on the decision which the Court made in said case. The Court's decision in the aforecited case can very well be taken as its conviction on the matter.

We need not go into the facts which led to the incarceration of the former Senator. Neither do we have to devote time in dis-

[25] 1 Vital Docs. 3 (1972).
[26] G.R. No. L-35546, September 17, 1974, 59 SCRA 183 (1974).

cussing the procedure taken in questioning the validity of the declaration of Martial Law. The importance of this case lies in the issue which was before the Court —

> Whether the proclamation of Martial Law is necessarily accompanied by the loss of the privilege of the writ of *habeas corpus* ...

At the outset, a word of clarification was made by Justice Makalintal to the effect that:

> This is not the decision of the Court in the sense that a decision represents a consensus of the required majority of its members not only in the judgment itself but also on the rationalization of the issues and conclusion arrived at. On the final result, the vote is practically unanimous. . .[27]

It was very evident from the start that most of the justices were going to answer the question in the affirmative.[28] Such an affirmative answer can be very well gleaned from excerpts of the individual opinions of the justices.

As opined by Justice Fernandez:

> The proclamation of Martial Law is conditioned on the occurrences of the gravest contingencies. The exercise of a more absolute power *necessarily includes the lesser power* especially where it is needed to make the first power effective.[29]

Then Justice Castro stated:

> It is thus evident that suspension of the *privilege* of the writ of *habeas corpus* is *unavoidably subsumed* in a declaration of martial law, since one basic objective of martial rule is to neutralize effectively—by arrest and continued detention (. . .)—those who are reasonably believed to be in complicity or are *particeps criminis* in the insurrection or rebellion.[30]

The excerpts from these two Justices alone show how most of the members of the Court value the privilege of the writ. In spite of the fact that the enjoyment of the privilege of the writ is considered as one of the basic constitutional rights of the citizenry, our own Court has permitted the same to be automatically suspended with the declaration of martial law. There may be an imposition of Martial Law without the suspension of the writ, or there may be a suspension of the writ without martial law imposed.

Except for Justices Fernando, Munoz-Palma, and Teehankee, all the rest of the Court members implicitly admitted the *"omni-*

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[27] *Ibid.*, 233-234.

[28] Justice Fernando opined that the issue was an open question, Justices Muñoz-Palma, Teehankee qualifiedly dissented.

[29] Aquino v. Enrile, *supra*, note 26 at 612. Underscoring added.

[30] *Ibid*, at 275-276.

potence" of the Chief Executive in times of crisis, to the extent of putting it within his power to curtail even constitutional rights which are considered inviolable. Such power of the President was acknowledged by the Court in its implicit sanction to General Order No. 2-A.[31] This presidential directive ordered the arrest of individuals suspected to be enemies of the government. The only way by which they could be released was through a Presidential order. Court examination was thus precluded by the act of the Chief Executive.

Granting that the national security was at stake, does this mean that, in effectuating arrests of individuals, the constitutional rights to substantive and procedural due process would be rendered nugatory? Arrests by virtue of the mentioned order were summary in nature. Mere suspicion would be enough to warrant its carrying out by the authorities. To make matters worse, by the suspension of the privilege of the writ, no other means could be availed of by the detained person as a vehicle for examining the validity or legality of his incarceration. This would be in gross and open violation of Article IV, Section 1 of the Constitution which provides that:

> No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.

The imprimatur given by the Supreme Court can also be understood as a surrender of judicial power to the Executive branch of the government. The acts then being exercised and performed by the President were judicial functions. The evaluation of probable cause in the issuance of a warrant, and its execution, were all within the realm of the judiciary. The President can always claim that there was no usurpation of the aforesaid judicial functions but rather, that these were turned over to him temporarily during times of emergency.

In resolving the issue, one thing can be said about the philosophy applied by the justices who answered in the affirmative. The said members of the Court would, as much as possible, avoid any direct confrontation with the Executive branch of the government. If it was possible to support the Chief Executive, the Court would. It definitely would not go out of its way to adopt a stand which would put the Court at loggerheads with a co-equal branch of the government. Reluctantly, the court would yield should it find that from the legal point of view, the stand of the Chief Executive could likewise be sustained and rationalized. By adopting such a posture, the Court upheld the decisions of the Chief Executive in times of emergency. The Court thus supported the President by ruling that

[31] 1 Vital Docs. 47 (1972).

even if martial law suspended the privilege of the writ, such would be denied only to those who are detained by virtue of the directive of the President.[32] Implicitly, the Court has sanctioned a curtailment of a right granted by the Constitution. How far such permissible curtailment has been allowed under the exercise of emergency powers by the President, the cases involving the privilege will show.[33]

By way of general headings, the cases which involve petitions for the issuance of the writ of *habeas corpus* may be divided into three subdivisions. This classification is made on the basis of the close similarity of the facts involved in each case and the uniformity of the decisions arrived at by the high tribunal. The groupings are as follows:

A. Petitions dismissed for being moot and academic—the petitioner having been released from detention.

B. Petitions dismissed on the ground that the Military Tribunals have jurisdiction over the case.

C. Petitions dismissed on the ground that the petitioner is detained by virtue of a lawful charge/order issued by a competent court.

This portion of the paper will present the decisions of the Court directly related to the suspension of the privilege of the writ of *habeas corpus.*

A. MOOT AND ACADEMIC CASES

In all petitions filed before the Supreme Court, petitioners sought the issuance of the writ on the ground that they have been arrested by law enforcement agencies of the government who, at the time of the arrest, did not present the necessary papers[34] to lawfully effect the arrest of said individuals. Following the arrest, petitioners were incarcerated for an indefinite period in the detention centers in military camps. Prior to the hearing of their petition for the writ of *habeas corpus* before the Supreme Court, however, the petitioners were released by the military authorities by virtue of a temporary or permanent order. The Supreme Court therefore did not have the opportunity to go into the merits of the petition and had no alternative but to dismiss the case for being moot and academic.

[32] This was taken from the combined opinion of all Justices who ruled in affirmative.

[33] Not all cases before the Supreme Court have been made an integral part of the paper since several cases bear the same feature.

[34] CONST. (1973), Article IV, Section 3; Rules of Court, Rule 113.

The case of *Herrera v. Ponce Enrile*[35] is a typical example of the cases under this heading.[36] Petitioner Herrera was arrested by the Metrocom on February 19, 1975. Her arrest was made without a warrant, nor were formal charges filed against her. Petitioner was arrested while in the act of distributing propaganda materials for the referendum which was held that year. These materials were opinions of the members of the Civil Liberties Union and the Catholic Bishops League of the Philippines. The law enforcement agencies claimed that such were subversive, and as a consequence, petitioner was detained and investigated. Herrera filed her petition before the Supreme Court on the 21st of the same month, and a writ was granted on the 24th. When the corresponding answer was made by the Solicitor General, the answer served notice to the court that the petitioner had already been released. Through a *per curiam* decision, the Court held:

> It being shown that respondents had in fact released Trinidad Herrera, this petition for habeas corpus has become moot and academic. No further action need be taken by the Court therefore as she is no longer under detention.

The two lines above quoted are echoed in almost the same manner and tenor by the Court in the other moot and academic cases.[37]

However, in two of the cases which fall under this heading, the Supreme Court through now Chief Justice Fernando unequivocally voiced words of caution to law enforcement agencies who effected arrests without the requirements of law.[38]

In *Cayaga v. Tangonan,* the Chief Justice opined:

> Nonetheless, there is pertinence to the observation that the military is called upon to exercise care and prudence to avoid incidents of this character. Martial law has precisely been provided in both the 1935 Charter and the present Constitution to assure that the State is not powerless... when resort to it is therefore justified, it is precisely in accordance and not in defiance of the fundamental law. There is all more reason then for the *rule of law* to be followed.

The opinion of the Chief Justice was reiterated in *Rivera and Beltran v. Garcia*[39] —

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[35] G.R. No. 40181, February 25, 1975; 62 SCRA 547 (1975).

[36] Patron v. Commanding Officer, Custody and Detention, III PC Zone, G.R. No. 37083, (May 30, 1974), 57 SCRA 229 (1974); Cayaga v. Tangonan, G.R. No. 40970, August 21, 1975, 66 SCRA 216 (1975); Lasam v. Enrile, G.R. No. 40134, September 12, 1975, 67 SCRA 43 (1975); Beltran and Rivera v. Garcia, G.R. No. 49014, April 30, 1979, 89 SCRA 717 (1979); Florendo v. Javier, G.R. No. 36101, June 29, 1979, 91 SCRA 204 (1979); this has been reiterated in the recent case of Alonto v. Ponce Enrile *et al.*, G.R. No. 54095, July 25, 1980.

[37] *Ibid.*

[38] Cayaga v. Tangonan, *supra,* note 36 at 219; Rivera and Beltran v. Garcia, *supra,* note 36 at 720-721.

[39] *Supra,* note 36.

> It was on September 21, 1978 that Beltran and Rivera were detained *without* any criminal charge against them.... In the case of Beltran, the information was not filed until November 3, 1978. This is another instance then of the practice, *irregular to say the least*, of persons being restrained of their liberty prior to the filing of any charge or even in the absence of any justification for such detention. There is no unfairness then in characterizing the release of Rivera and the filing of an information against Beltran as due to the filing of the application with this Tribunal for the writ of *habeas corpus*. Were it but for this circumstance, it is not unreasonable to conclude that the officials concerned would not have been prodded into action. It certainly *does not* speak well of officialdom, whether civilian or military, if a person deprived of his liberty *had to go to court before* his rights are respected. (underscoring added).

In both cases, the Chief Justice minced no words in deploring the illegal arrests carried out by the agents of the law, but no other positive action was taken.

B. Petitions for Habeas Corpus dismissed on the ground that Military Tribunals have jurisdiction over them

The Supreme Court in *Aquino v. Military Commission No. 2*[40] upheld the jurisdiction of the duly constituted Military Tribunals to hear and decide cases which fall within its adjudicative sphere as conferred by law.[41] The Supreme Court has uniformly held that the writ of *habeas corpus* will not lie in favor of the petitioner if the latter's case comes within the jurisdiction of the Military Tribunals.[42]

In the case of *Go v. Olivas*,[43] petitioner Go in his petition for the issuance of the writ on November 8, 1976, alleged that he was arrested without a warrant or a judicial order on October 27, 1975 and thereafter detained at Camp Crame for more than a year. The petition alleged that there was no criminal case filed or pending against him in court, hence, he was entitled to immediate release. When the respondents, through the Solicitor General filed their answer, they outlined the reasons for detaining Go. Go was being held on a charge of kidnapping with ransom and a commitment order has already been made by Brigadier General Olivas. The above offense being triable by the Military Tribunals, the respondents moved for the dismissal of the case. The Court ruled in

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[40] G.R. No. L-37364, May 9, 1975, 63 SCRA 546 (1975).

[41] Presidential Decree No. 39 (1972).

[42] Go v. Olivas, G.R. No. 44989, November 29, 1976, 74 SCRA 230 (1976); Romero v. Ponce Enrile, G.R. No. 44613, February 28, 1977, 75 SCRA 429 (1977); Dela Plata v. Escarcha, G.R. No. 46367, August 1, 1977, 78 SCRA 208 (1977); Danganan v. Ponce Enrile, G.R. No. 47540, March 21, 1978, 82 SCRA 185 (1978).

[43] *Ibid.*

favor of the respondents on the following ground through Justice Fernando:

> It thus appears that while illegality was alleged, no jurisdictional question was alleged. It is because of such failure that this petition cannot prosper. . . .

Going further, the court, quoting from the case of *Payumo v. Floyd*:[44]

> . . . where the detained person is held in restraint by virtue of a judgment rendered by a military or naval court, tribunal, or officer, no court entertaining an application for the writ of *habeas corpus* has authority to review the proceedings . . . *in the sense of determining* whether the judgment was erroneous. The only question to be considered is whether the court, tribunal, or officer rendering the judgment had *jurisdiction* to entertain the case and render judgment at all. (underscoring added)

The aforesaid decision was reiterated in *Romero v. Ponce Enrile*[45] wherein the petitioner who was being charged with robbery and serious physical injuries was denied the writ. This ruling was further echoed in the case of *de la Plata v. Escarcha*[46] wherein the Court ruled:

> Inasmuch as Rodolfo de la Plata is lawfully detained by the military authorities (petitioner was charged with robbery in band with the use of firearm, an offense within the jurisdiction of the military tribunals), the petition for *habeas corpus* is not in order.

All court decisions, however, did not rule out the possibility that the writ of *habeas corpus* may be granted. The Court opined:

> A release on *habeas corpus* could still be ordered by the Court if it could be shown that a miiltary tribunal either *lacked jurisdiction* or had *subsequently lost it.*[47]

C. PETITIONS FOR HABEAS CORPUS DISMISSED ON THE GROUND THAT THE PETITIONER IS DETAINED BY VIRTUE OF A LAWFUL CHARGE/ORDER BY THE COURT

Under this third classification, the petitioners in these cases all alleged that they have been arrested without any lawful warrant of arrest nor any other judicial order. Such arrest was made even if no information/complaint had been filed against them. Neither did they have pending court cases. A petition for the issuance of the writ was filed. Almost simultaneously with such filing, the Court issuing the writ was informed of the lawful order which would render nugatory the privilege of the petitioner to avail of the writ.

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[44] 42 Phil. 788 (1922).
[45] *Supra*, note 42.
[46] *Supra*, note 42.
[47] *Ibid.*

. . *Dacuyan v. Ramos*[48] elucidates and typifies the cases under this generalization. Petitioner alleged that he was arrested without a warrant and thereafter detained. In his petition, he assailed the validity of the arrest, search and seizure order (ASSO) and prayed for his release. The Court issued the writ, but, when the respondents made the return, the Supreme Court was informed that charges have been filed against the petitioner before the civil courts and the military tribunals at the same time.

Through Justice Fernando, the Court held:

> Assuming therefore the order of arrest issued by Military Commission to have been defective, the further detention of Engelberto Dacuyan is still valid and legal in view of the standing orders of arrest issued by the Court of First Instance of Manila.[49]

An almost identical ruling was made in *Cañas v. Director of Bureau of Prisons, et al.*[50] Here, petitioner sought his release on the ground that he was arrested without a warrant and confined in the New Bilibid Prison. The Court issued the writ, and when the return was made, the respondents served notice that the petitioner was arrested to serve a criminal sentence imposed by a court. The Court through Justice Antonio ruled:

> It appears from the foregoing that the commitment and detention of David Cañas are in pursuance of a lawful order of the court, issued in connection with Criminal Case No. 44521 for the purpose of executing the judgment therein rendered.
> WHEREFORE, the instant petition is hereby dismissed, . . .

Similar decisions were made by the Court in the earlier cases of *Cruz v. Montoya*[51] and *Rey v. Fernandez.*[52]

The three general rulings outlined above bring into light and explain the action taken by the Court in determining cases on *habeas corpus.* As seen from the earlier discussion, the Court dismissed the petitions on either of these grounds: the issue is moot and academic since the petitioner had been released; relief is denied as proper charges had been filed; or the issue is evaded since jurisdiction is not assailed.

Examining the decisions from the legal point of view and from the definition and purpose of the writ of *habeas corpus,* the rulings laid down by the Court are all in conformity with existing law and are therefore correct. The Court can very well answer that

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[48] G.R. No. 48471, September 30, 1978, 85 SCRA 487 (1978).
[49] *Ibid.*, at 491-492.
[50] G.R. No. 41557, August 18, 1977, 78 SCRA 271 (1977).
[51] G.R. No. 39823, February 25, 1975, 62 SCRA 543 (1975).
[52] G.R. No. 35276, September 28, 1972, 37 SCRA 149 (1972).

"we have done our duty," as expected under the law. But is this really the case? Granted and admitted that the Supreme Court has ruled in accordance with law, has it really extended protection to ensure the enjoyment of constitutional rights, more specifically, the privilege of the writ of *habeas corpus?* The more appropriate question then would be: *In deciding the petitions for the issuance of the writ of habeas corpus, could the Supreme Court have extended the realm of its protection for a fuller enjoyment of the privilege of the writ of habeas corpus?* It could very well be that the decisions of the Supreme Court were all in accordance with law. But, ruling in accordance with law does not mean that the Court has exerted all its efforts in protecting individual constitutional rights. Perhaps the Supreme Court had no other alternative under the circumstances but to confine its decisions regarding the issuance of the writ on a very limited basis. That the Supreme Court could have gone further, however, will always be an issue open to debate.

The reasons which would support this hypothesis follow. In presenting these reasons, the subdivisions given earlier dealing with how the Supreme Court disposed of petitions for *habeas corpus* will be followed. The question therefore that has to be answered is: *How could the Supreme Court have extended the protection it is supposed to accord for enjoying the privilege of the writ of habeas corpus?*

A. THE MOOT AND ACADEMIC QUESTION

The decisions of the Supreme Court show that, actual physical restraint and confinement are pre-requisites before the Court can apply the provisions of the writ of *habeas corpus* in granting or denying the petitioner's plea. Once the petitioner has been released from confinement, the petition becomes moot and academic. This familiar line as quoted from one of the cases reads:

> We have consistently held that where the Petitioner has been released from confinement, the petition for *habeas corpus* should be dismissed for being moot and academic.[53]

This has become the standard form adopted by the Supreme Court in disposing of moot and academic cases.

A perusal of the provisions of the Rules of Court on *habeas corpus* show that the writ affords relief for:

1. deprivation of any fundamental or constitutional right;
2. lack of jurisdiction of the court to impose the sentence or;
3. excessive penalty.

[53] Kintanar v. Amar, G.R. No. 42975, March 15, 1976, 17 SCRA 51 (1976).

Generally, the writ of *habeas corpus* should lie where one is deprived of freedom of action. Any form of physical restraint is reason enough for the issuance of the writ. This liberal construction of the law, however, has not been adhered to by the Court. An example of this is found in the case of *Kintanar v. Amar*.[54]

In this case, petitioners were detained for the death of a certain Anson. Twice they filed a motion seeking their speedy investigation but in both instances, such motions were denied. Petitioners filed a petition for the issuance of the writ of *habeas corpus* which was granted by the Court. The respondents however, in the return of the writ answered that all petitioners were detained by virtue of an arrest, search and seizure order (ASSO). The respondents further countered that since petitioners have already been released, the petition has become moot and academic. Petitioners, on the other hand, contended that since they have been required to report regularly with the Commanding Officer of the CIS, this constituted a restraint of liberty. The Supreme Court, however, had a different outlook as already quoted beforehand.

Placed in almost exactly the same situation, the United States Supreme Court had a different outlook. In the case of *Jones v. Cunningham*,[55] petitioner filed a petition for *habeas corpus*. The latter was a recidivist and had been convicted and committed to serve sentence. He, however, was placed on parole and subject to certain physical restraints such as being under the supervision of his parole officer. Instead of dismissing the petition for *habeas corpus*, the US Supreme Court held:

> . . . In the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual physical custody.... History, usage and precedent *can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty,* restraints not shared by the public generally, which have been thought sufficient in English-speaking world *to support the issuance of habeas corpus.* (Underscoring added).

To drive home the point, the Court went further:

> It (writ) is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Although decisions of foreign courts have no binding effect on our judiciary, the present Court may be persuaded in adopting this outlook. Such interpretation of the scope of the writ would insure blan-

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[54] *Ibid.*
[55] 371 U.S. 236 (1962).

ket coverage over any restraints on physical freedom. Definitely, restraint should not be confined to physical incarceration alone.

In all petitions dismissed for being moot and academic the Court just perfunctorily brushed aside the other issue before the body which concerned the warrantless arrests made by the law enforcement agencies. This attitude can be very well gleaned from the decision of the Court in *Cruz v. Montoya.*[56]

> It would appear therefore that the writ had served its purpose and *whatever illegality might have originally infected* his detention had been cured. (underscoring added).

Implicitly, the Court admitted that a constitutional right had been violated but at the same time ruled that such right or freedom from unlawful arrest has already been remedied by the release of the prisoner.

The conjecture that can be drawn from this summary decision of the Court would be that a person who has been unlawfully arrested can only expect from the Supreme Court, as relief, his personal liberty. No further remedy can be expected.

It can be argued, however, that the petition for the issuance of the writ of *habeas corpus* is not the proper proceeding whereby an affirmative relief can be granted by the Court. But, harping on the ground of immediate public interest involved, the Court could have taken up the issue even if the proceeding before it be improper. This attitude of the Court can be very well be attributed to its advocacy for judicial restraint.

B. WARRANTLESS ARRESTS; THE VALIDITY OF THE ARREST, SEARCH AND SEIZURE ORDER (ASSO)

As earlier mentioned, there were cases before the Court wherein the petitioners were arrested without a warrant and detained under the justification that the subsequent filing of charges would in effect cure the previous wrong already committed.[57] This method of effectuating arrests has been further carried out by agents of the law through the issuance of arrest, search and seizure orders signed by the President.[58] In all the mentioned cases,[59] the validity of these

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[56] *Supra,* note 51.

[57] Duque v. Vinarao, G.R. No. 40060, March 21, 1975, 63 SCRA 206 (1975); Reyes v. Ramos, G.R. No. 40027, January 29, 1976, 69 SCRA 153 (1976); Kintanar v. Amar, G.R. No. 42975, March 15, 1976, 70 SCRA 61 (1976); Cruz v. Gatan, G.R. No. 44910, November 29, 1976, 74 SCRA 227 (1976); Danganan v. Ponce Enrile, G.R. No. 47540, March 21, 1978, 82 SCRA 185 (1978); Dacuyan v. Ramos, G.R. No. 48471, September 30, 1978, 85 SCRA 487 (1978).

[58] Under LOI No. 621, the Minister of National Defense had the power to issue Arrest, Search and Seizure Order; now, only the President has the power to do so under LOI No. 772.

[59] *Supra,* note 57.

orders were assailed, but the Court made no pronouncement on the matter.

The requisites for the valid arrest of an individual are explicitly provided for by the Constitution and the Rules of Court on Procedure.[60] At the same time, the rights of an accused are also expressly granted by the Constitution.[61]

The ultimate purpose of the provision is to protect the privacy and sanctity of the person and of his house and other possessions against arbitrary intrusions by state officers. On the other hand, the only instances wherein a warrantless arrest can be allowed are the following:

1. When the person to be arrested has committed, is actually committing, or is about to commit the offense;
2. When an offense has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it;
3. When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.[62]

Checked against these basic requirements, the validity of the arrest, search and seizure orders and warrantless arrests can very well be assailed. One need not go into an in-depth discussion to point out the fact that the provisions of law on unlawful arrests are diametrically opposed to the ASSO and the procedure of making a warrantless arrest which is later justified by the filing of criminal charges against the detainees.

By failing to rule on the validity of the ASSO and the warrantless arrests, the Supreme Court sanctioned its use by the Chief Executive. The Court cannot claim that the issue on the validity of the both procedures has not been squarely raised and put in question. The legal consequence of this would be the grant of judicial powers and functions on the Chief Executive, thus completing the multifarious roles that he already plays. The indiscriminate use of these arrest procedures has become a sword of Damocles hanging over the heads of the whole population. This inability or refusal of the Court to settle issues ripe for adjudication shows what has

[60] CONST. (1973), art. IV, sec. 1, 3; RULES OF COURT, Rule 113.
[61] CONST. (1973), art. IV, sec. 19, 20.
[62] RULES OF COURT 113, sec. 6.

earlier been pointed out as a definite tendency on its part to avoid a clash with the Executive.

C. THE PASSIVE VIRTUE OF JUDICIAL RESTRAINT

The Supreme Court has restrained itself by the sound exercise of discretion, and also with the realization that there are other factors which should be taken into consideration in determining the effectiveness of the exercise of judicial power.

Maurice Finkelstein aptly characterized this indecision by the Court:

> In declining to decide the cases before them, the Courts had been engaged in the application not of a rigid rule of law, but rather of a flexible standard. This standard was analyzed and it was applied in cases where a *decision on the merits of the prescribed cases* either might involve *consequences too vast for the courts to chance,* or be rendered difficult because the necessary data are not available . . . we thus arrive at a process . . . termed judicial self-limitation.[63]

The above-quoted work typifies the prevailing philosophy of the Supreme Court. Even if the Court is considered supreme in its own sphere, it cannot escape the reality that the domain of the Executive in times of emergency is all-pervading. The Court will pass upon such intrusion only when it is absolutely necessary—a last resort to properly discharge its solemn oath of office. As seen from the cases, the Court more often than not will avoid passing upon the constitutionality of a questioned act thereby implicitly validating the same. Such an attitude can be attributed to the prevailing situation which the court has weighed. Even if they rule on constitutional problems, still, enforcement of the decision lies with the Chief Executive. The latter may render such act of the court *meaningless.*

The present Supreme Court, however, cannot be faulted for its seeming reluctance to uphold the civil liberties. Perhaps, this present era of judicial restraint would be followed by judicial activism once martial law is lifted. This attitude has been expressed by Justice Marshall in *Cohens v. Virginia*:[64]

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

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[63] Finkelstein, *Further Notes on Judicial Self-Limitation,* 39 HARV. L. REV. 221 (1925). Underscoring added.

[64] 19 U.S. 264, 404 (1821).

II. *RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE*

The provision in the Constitution against unreasonable search and seizure[65] protects the individual's right to privacy which in the words of Justice Brandeis is *"the most comprehensive of rights and the right most valued by civilized man."*[66] Historically, the right against unreasonable search and seizure in the Philippines originated and developed, not so much as a result of contemporary circumstances, but as the outcome of legislative debate and revision. The reason is that the American provisions guaranteeing this right were adopted and incorporated into specific portions of constitutional provisions. The provision in the 1935 Constitution, with certain modifications, was taken from the Jones Law of 1916, which was in turn, transcribed from the Fourth Amendment to the US Constitution.

There are significant differences between the unreasonable search and seizure provisions of the 1935 and the 1973 Constitutions. To check the increasing incidence of abuse of administrative searches, such as health and sanitary inspections and immigration checks, the clause *"of whatever nature and for any purpose"* was inserted immediately after *".... unreasonable searches and seizures."* The inclusion of the phrase *"as such responsible officer as may be authorized by law"* is another important change. It effectively allows such officer to make a *"probable cause"* determination, to examine complainants and witnesses he may produce and to eventually issue the search warrant or warrant of arrest—functions which used to be reserved exclusively to a judge under the 1935 Constitution.

Justice Fernando, in *Villanueva v. Querubin*,[67] gives a fuller definition of the right, thus:

> This constitutional right refers to the immunity of one's person, whether citizen or alien, from interference by government, included in which is his residence, his papers, and other possessions. Since, moreover, it is invariably through a search and seizure that such an invasion of one's physical freedom manifests itself, it is made clear that he is not to be thus molested, unless its reasonableness could be shown. To be impressed with such a quality, it must be accomplished through a warrant, which should not be issued unless probable cause is shown, to be determined by a judge after examination under oath or affirmation of the complainant and witnesses he may produce with a particular description of the place to be searched, and the person or things to be seized.

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[65] CONST. (1973), Art. IV, sec. 3.
[66] Dissenting opinion in Olmstead v. U.S., 277 U.S. 438, 478 (1927).
[67] G.R. No. 26177, December 27, 1972, 48 SCRA 345 (1972).

The issue presented in *Lim v. Ponce de Leon*[68] was whether or not defendant-appellee fiscal had the power to order the seizure of the object in question without a warrant of search and seizure even if the same was admittedly the *corpus delicti* of the crime. The Supreme Court held that "without the proper search warrant, no public official has the right to enter the premises of another without his consent for the purpose of search and seizure." Under the 1935 Constitution, the Court further held "the power to issue a search warrant is vested in a judge or magistrate and in no other officer, and no search and seizure can be made without a proper warrant."

Citing Chief Justice Concepcion in *Stonehill v. Diokno*,[69] the Supreme Court reiterated the rule that the legality of seizure can only be contested by the party whose rights have been impaired thereby; that "the objection to an unlawful search and seizure is purely personal and cannot be availed of by third parties."

In *Secretary of Justice v. Marcos*,[70] the Supreme Court chided Judge Pio Marcos of the Court of First Instance of Benguet and Baguio for his failure to observe the requirements of a lawful search and seizure. The Court dismissed the administrative complaint filed by then Secretary of Justice Vicente Abad Santos but found it "not inappropriate to place on record that a trial judge in the position of respondent ought to have abided with the settled juristic norm that a search warrant should not be issued for more than one offense and that the depositions of the witnesses should be made in writing and thereafter attached to the record."

In *Castro v. Pabalan*,[71] the Supreme Court found the search warrant issued by Judge Pabalan tainted with illegality for being violative both of the Constitution and the Rules of Court. The Supreme Court cited *Stonehill v. Diokno*[72] to enumerate the requirements for a reasonable search and seizure. The Court held that there must be a *"probable cause"* determination. This determination cannot be properly made if no specific offense is alleged. Therefore, averments as to the alleged commission of the offenses imputed must not be *"abstract."* The things to be seized should also be particularly described. From the Rules of Court, there is a further requirement that depositions of witnesses should be attached to the record.

While it may be apparent that an individual's right to privacy, which is safeguarded by the provision against unreasonable searches

[68] G.R. No. 22554, August 29, 1975, 66 SCRA 299 (1975).
[69] G.R. No. 19550, June 19, 1957, 20 SCRA 383 (1967).
[70] Adm. Case No. 207-J, April 22, 1977, 76 SCRA 301 (1977).
[71] G.R. No. 28642, April 30, 1976, 70 SCRA 477 (1976).
[72] *Supra*, note 69.

and seizures, has been consistently upheld, the Supreme Court has yet to make a definitive stand on the nature of the arrest, search and seizure order (ASSO) which may be issued by the President or the Minister of National Defense. As earlier stressed,[73] the Supreme Court should stop skirting the issue of the legality of the procedures adopted in issuing an ASSO and must meet it head-on if it is to act as a guardian of human rights.

III. *RIGHT TO DUE PROCESS OF LAW*

Article IV, Section 1[74] of the 1973 Constitution provides —

> No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the law.

Article 7[75] provides —

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 7[76] provides —

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

It is not without deliberate design that the opening clause of the Bill of Rights happens to speak of the much celebrated Due Process Clause. It is rather a frank and outright enshrinement of the fundamental — nay, all-pervading — right to be heard, to have one's day in court, to a speedy, impartial and public trial.

The powers of Government and its concomitant acts are thereby validly curtailed — due process being an exacting condition to be fully complied with under pain of nullity.

What then, is really meant by the phrase "*due process of law*"? Over the years, due process has been subjected to all kinds of definitions — some elaborate, others, very simple — all testimonials to the simple truth that it is elusive of exact apprehension. That the concept was not a fixed and static one was clearly acknowledged. As early as 1918 in the case of *Forbes v. Chuoco Tiaco*,[77] it was pointed out that ". . . *what is due process of law depends on circumstances.*

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[73] See page 265 of this paper.
[74] CONST. (1973), Art. IV, Sec. 1.
[75] Universal Declaration of Human Rights.
[76] *Ibid.*
[77] 16 Phil. 534 (1910).

It varies with the subject matter and the necessities of the situation."[78]

The meaning of due process of law must have to be categorized into two — substantive due process and procedural due process. The first involves the question of whether or not due process is exercised in the making of the law, and the second involves the question of whether or not due process is exercised in the implementation of the law.

In *U.S. v. Ling Fu San,*[79] the Supreme Court proclaimed that due process simply means —

> First. That there shall be a law prescribed in harmony with the general powers of the legislative department of the government;
>
> Second. That this law shall be reasonable in its operation;
>
> Third. That it shall be enforced according to the regular methods of procedure prescribed; and
>
> Fourth. That it shall be applicable alike to all citizens of a state or to all of a class.

and in *Banco Espanol Filipino v. Palanca,*[80] it said that the requirements of due process is satisfied if the following conditions are present, namely:

> First. There must be a court or tribunal clothed with judicial power to hear and determine the matter before it;
>
> Second. Jurisdiction must be lawfully acquired over the person of the defendant or over the property which is the subject of the proceeding;
>
> Third. The defendant must be given an opportunity to be heard; and
>
> Fourth. Judgment must be rendered upon lawful hearing.

Generally, then, due process of law in each particular case means such exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individuals and their rights as those maxims prescribe for the class of cases to which the one in question belongs.[81]

> By due process of law is more clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of general rules which govern society... Due process of law contemplates notice and opportunity to be heard before judgment is rendered, affecting one's person or property.[82]

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[78] *Ibid.*, p. 573. Underscoring added.
[79] 10 Phil. 104 (1908).
[80] 37 Phil. 921 (1918).
[81] 2 Cooley's Constitutional Limitations, 736-740.
[82] Darthmouth College Case, 5 Wheat, 518.

Has our Supreme Court upheld these concepts through the years under Martial Law? At this point, it would seem that a brief survey of decisions will be well taken.

In *Carandang v. Cabatuando,*[83] the Court held that 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 cause.

In *Vda. de Bacaling v. Laguda,*[84] the lessee of a lot was ejected for non-payment of rentals. Judgment was duly rendered and the demolition was sought to be stopped through certiorari proceedings on the ground of denial of due process due to failure to give notice of motion for execution to the guardian *ad litem* of the minor children. The Supreme Court dismissed the petition upon finding that the guardian *ad litem* had been duly apprised of the issuance of the assailed order.

In *Montenegro v. CA,*[85] there was a 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 sufficient excuse for failure to file the brief on time and the appellants appeared to have a meritorious case on the merits.

Where a lawyer absents himself on the scheduled date of trial and his client who is present with his witnesses prayed for postponement in order to engage the services of new counsel, a denial of the motion, as in the case of *Piedad v. Batuyong*[86] is a denial of due process.

In *Vinzons v. Ardales,*[87] and *Minlay v. Sandoval,*[88] the Court stressed that parties in land registration proceedings must be given ful and unimpaired opportunity to prove their respective claims. Mere technicality will not be countenanced for otherwise, the Torrens system will be used as an instrument for fraud.

In *Palang v. Zosa,*[89] the Supreme Court added that the due process clause requires that, for judges, it is not enough to decide cases without bias and favoritism. It does not suffice that they rid themselves of prepossessions. Their actuation must inspire that belief.

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[83] G.R. No. 25384, October 26, 1973, 53 SCRA 383 (1973).
[84] G.R. No. 26694, December 18, 1973, 54 SCRA 243 (1973).
[85] G.R. No. 35913, September 4, 1973, 53 SCRA 14 (1973).
[86] G.R. No. 38024, February 18, 1974, 55 SCRA 763 (1974).
[87] G.R. No. 35738, March 29, 1974, 56 SCRA 492 (1974).
[88] G.R. No. 28901, September 4, 1973, 53 SCRA 1 (1973).
[89] G.R. No. 38229, August 30, 1974, 58 SCRA 776 (1974).

For judges, appearance is just as important as the reality. Like Caesar's wife, a judge must not only be pure but beyond suspicion.

In *Shell Co. of the Philippines v. Enage*,[90] in granting certiorari, the Court observed:

> Respondent Judge failed to have counsel for petitioner Shell 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.... One might as well say, if the respondent judge were to be upheld, that the right to a hearing, far from being the very essence of procedural due process, is just a useless formality.

In *Torres v. Borja*,[91] the Court stated that the expected promotion of a civil service employee is not excepted from the operation of the due process guarantee. There is to be no unfairness or arbitrariness. The right to be heard should not be ruled out. The Court, however, found that the petitioner who challenged the appointment of another was accorded a full hearing and his resort to due process was, therefore, unavailing.

In *Cortez v. Constantino*,[92] the Supreme Court stated that a trial judge who meticulously examined the evidence in a criminal case before him in an eleven-page decision and who carefully prepared a decision explaining why the version of the acquitted defendant was more credible cannot be found liable for grave abuse of discretion.

Guballa v. Caguioa[93] is authority for the ruling that there is no denial of due process if the person who represented the defendant in the filing of an answer and during the pre-trial turned out to be a non-lawyer and the lower Court refused to reconsider a default order. The defendant's own absence at the pre-trial was another reason for the default order. He had his day in court.

In *Villapando v. Quitain*,[94] the Supreme Court reiterated the precedent in *Gutierrez v. Santos*[95] which has been emphasized in various cases that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. The Court added that favoritism by judges becomes more odious if directed against one coming

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[90] G.R. No. 30111-12, February 27, 1973, 49 SCRA 416 (1973).
[91] G.R. No. 31947, March 21, 1974, 56 SCRA 47 (1974).
[92] Adm. Matter No. 1393-CTJ, January 20, 1977, 75 SCRA 12 (1977).
[93] G.R. No. 46537, July 29, 1977, 78 SCRA 203 (1977).
[94] G.R.No. 41333, 41738-41, January 20, 1977, 75 SCRA 24 (1977).
[95] G.R. No. 15824, May 30, 1961, 28 SCRA 24 (1961).

from the poor and the dispossessed. More consideration should be shown to one having less in life.

The Supreme Court in *Amberti v. CA*[96] stated that a motion for postponement of a case based on serious ailment of counsel and consent to postponement of opposing counsel is justified and denial of the motion constitutes a deprivation upon the parties of their day in court. The principle that speedy determination of an action implies speedy trial does not include denial of motion for postponement which denies to the parties respect for their rights and negates observance of requirements of due process.

In all the above cited cases, which actually represent a random sampling of illustrations, it would seem, at first blush, that indeed, the Supreme Court has upheld the right to due process — that it has guarded zealously against encroachments upon this right.

As far as procedural due process is concerned, it cannot be denied that the Supreme Court has been religious in granting to all individuals alike, his day in court. The cases indicate that there is no discrimination at all in the blanket implementation of the due process clause as it applies to procedural matters.

Substantive due process, however, is a thoroughly different affair. Although frequently invoked as a protest against arbitrariness in legislation, it has rarely been invoked with success.

From the very beginning, our Supreme Court has given generous latitude to legislation designed to promote public health, public safety or public welfare.

The pattern was set in the early case of *U.S. v. Toribio*[97] where a statute regulating the slaughter of large cattle, a measure designed to preserve work animals needed for agriculture, was challenged as unlawful deprivation of property. With approval, the Court quoted *Lawton v. Steel*[98] —

> . . . the State may interfere wherever the public interest demands it, and in this particular a large discretion is necessarily vested in the legislative to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not,

[96] G.R. No. 41808, March 30, 1979, 89 SCRA 750 (1979).
[97] 15 Phil. 85 (1910).
[98] 152 U.S. 133 (1893).

> under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Thus, the Court clearly considered itself a competent arbiter of the objective reasonablesness of legislative action. But it also allowed such competency to be limited by the recognition of the presumptive reasonableness of governmental action. In *U.S. v. Salavaria*,[99] the Court was even willing to defer to the legislative judgment of a municipal council, the lowest law-making authority under the then existing system. The Court said —

> Who is in a better position to say whether the playing of *panguingue* is deleterious to social order and the public interest in a certain municipality—the municipal council or the courts? The answer is self-evident. The judiciary should not lightly set aside legislative action when there is no clear invasion of personal or property rights under the guise of police regulation.[100]

Under such rule, rarely did any legislative measure meet with judicial disapproval.

The pattern has not been altered. If at all, it has been reinforced, particularly under martial law. It would seem that our Supreme Court upholds the Rule of Law, but does not question what the law is.

The Supreme Court is quick in upholding the rights of the individual to procedural due process but is painfully slow in recognizing the counterpart right to substantive due process. This is but an illustration of the survival instinct of the members of the Supreme Court — an attempt to hold back its pen in denouncing the excesses of the law out of consideration of, and in deference to, the authority of the Chief Executive. It is in this aspect of the right to due process that the Supreme Court has failed the citizenry.

IV. *FREEDOM OF EXPRESSION*

A. FREEDOM OF SPEECH AND OF THE PRESS

Freedom of speech in a democratic system is one of the most basic rights, and its inclusion in the Bill of Rights would seem almost a superfluity. All the other freedoms would be illusory without the right to hear both sides of a question or to influence public opinion and government decisions through a full and free discussion of men and ideas. The vitality of civil and political institutions in

[99] 39 Phil. 102 (1918).
[100] *Ibid.*

our society depends on a free exchange of ideas. Chief Justice Hughes wrote in *De Jonge v. Oregon* that it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.[101] The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets a democratic society apart from totalitarian regimes. Much emphasis has been placed on an individual's right to speak; there is today sharper realization that in a free society, freedom to hear is just as, if not more, important and valuable from the point of view of the public who need or desire enlightenment. *"It is the function of speech to free men from the bondage of irrational fears,"* Justice Brandeis said in a concurring opinion quoted by our own Supreme Court.[102] It would also be very appropriate to note that Mr. Justice Douglas emphasized that —

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[103]

This same jurist called attention to the use of free speech as a safety valve to release pressures which might otherwise become destructive. It is in the same vein that Justice Malcolm likened comments on the conduct of public men to a scalpel adding: *"The sharpest incision of its probe relieves the abscesses of officialdom."*[104] Other courts justify freedom of speech because it allows personal fulfillment which is essential for a healthy democratic society.[105] The individual must have the right to speak his own mind, to hear others, to belong to groups, and associate with his peers in order to learn and to enjoy the world of ideas.

The Philippine Constitution of 1973, in Article IV, Section 9 provides —

> No law shall be passed abridging the freedom of speech, or of the press. . . .

Freedom of the press and freedom of speech generally are the same, being distinguished only in utterance. The constitutional right to free speech is not limited to public addresses, pamphlets or words of an individual, but it also embraces every form and manner of dissemination of ideas that appear best fitted to be brought to the at-

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[101] 299 U.S. 353, 365 (1937).
[102] Primicias v. Fugoso, 80 Phil. 71, 87-88 (1948), underscoring added.
[103] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).
[104] US v. Bustos, 37 Phil. 741 (1918). Underscoring added.
[105] A. Meiklejohn, *Free Speech and its Relation to Self-Government, Passim.*

tention of the general populace and to the attention of those most concerned with them. The privilege of free speech carries with it freedom of choice as to the mode of expression that may be employed,[106] and the carrying of signs and banners is a natural and appropriate means of conveying information on matters of public concern which may be protected under the constitutional guaranty of free speech and press.[107]

The freedom of speech and the press as guaranteed by the Constitution finds its equivalent in the Universal Declaration of Human Rights, Article 19, which provides:

> Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The International Covenant on Civil and Political Rights, Article 19, provides:

> 1. Everyone has the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be only such as provided for by law and are necessary:
>
> a. for respect of the rights or reputation of others;
>
> b. for the protection of national security or of public order (ordre public, or of public health or morals).

The freedom of speech and of the press guaranteed by the Constitution embraces two fundamental aspects. One is the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent reprisal. This, therefore, implies the prohibition on enforcing acts of government, whether legislative, executive or judicial which amount to censorship of speech or printed expression before permitting its exercise, and the requirement by statute or ordinance of permission to communicate ideas to be obtained in advance from officials who judge the content of the words and pictures sought to be communicated. The right to freedom of speech and of the press cannot and should not be made dependent on the granting of a permit by government officer or body; and included as an aspect of freedom from prior restraint is free-

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[106] Roth v. Local Union No. 1416 of Retail Clerks Union, 24 NE 2nd 280.
[107] Carlson v. People of State of California, 310 U.S. 106; 84 L. Ed. 1104 (1939).

dom of circulation, for without the former, the latter would be of little value. As a matter of principle, a requirement of registration in order to make a public speech is incompatible with an exercise of the right of free speech or of the press.[108]

The second part of this freedom is against the curtailment of the right of expression after it is made so that a person is protected against official reprisal for having exercised his right to express himself. In this connection, it is appropriate to say that the protection afforded by immunity from subsequent punishment is narrower in scope than those derived from immunity from censorship. Thus, though obscene, libelous or slanderous, profane, and insulting words are punishable, their utterance may not be enjoined or censored beforehand as a rule.[109]

When a nation is in a state of emergency, such as war or martial law, many acts, which are permissible during normal times, are prohibited. In the face of the immediate and peremptory requirements of national security, the freedom of speech and of the press may suffer state impositions designed to thwart any possible attempt to utilize these freedoms as instruments of agitation and chaos. As a war or emergency measure, the government may enact laws, the effect of which is to curtail free speech or press because war or emergency open dangers that do not ordinarily exist in other times.[110]

On September 21, 1972, the Philippines was proclaimed to be in a state of martial law. Presidential decrees were enacted to recast the social and political arrangements which provided the causes of social unrest. Letter of Instruction No. 1 promulgated by the President ordered the closure of all newspapers, magazines, radio and television facilities until further orders of the President. General Order No. 2-A ordered the mass arrest of *"criminals"* which included leading journalists in print and electronic media. Press licensing was enforced through Presidential Decree No. 36 which created the Mass Media Council, co-chaired by the Defense and Press Secretaries. Presidential Decree No. 36 virtually gave the government absolute control over the media.

In line with the political normalization program of the government, the various restrictions have been gradually eased. Presidential Decree No. 191 replaced the Mass Media Council by the Media Advisory Council (MAC). The MAC was charged with the

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[108] Thomas v. Collins, 323 U.S. 516, 539, 65 S.Ct. 315 (1945).

[109] US v. Sedano, 14 Phil. 338 (1909); US v. Sotto, 38 Phil. 666 (1918); Patterson v. Colorado, 205 U.S. 454 (1906).

[110] Abrams v. U.S., 250 U.S. 616 (1919).

duty of passing upon applications of mass media for permission to operate so that no form of mass media may operate without first obtaining a Certificate of Authority to operate from the MAC. It still required prior approval by the President. Under LOI No. 12, the Bureau of Standards for Mass Media was created. Under P.D. No. 576, the Media Advisory Council and the Bureau of Standards for Mass Media have now been abolished, and instead, we now have the Broadcast Media Council and the Print Media Council. Under P.D. No. 576, each group was authorized to organize and determine its composition and to lay down its rules, guidelines and policies including self-regulation and internal discipline within its own ranks.

Against this background, it became the task of the Supreme Court to draw a line between the individual's cherished right of freedom of expression and the right of the State and of the society to protect itself and to safeguard the body politic from using these same freedoms to subvert the constituted government.

The Supreme Court of the United States and the Philippine Supreme Court have evolved several tests, namely: the *clear and present danger* test; the *dangerous tendency* test; and the *balancing of interests* test.

The clear and present danger test was first formulated by the Supreme Court of the United States in the case of *Schenk v. United States.*[111] Under such doctrine, freedom of speech and of the press is susceptible of restriction when and only when necessary to prevent grave and immediate danger to interests which government may lawfully protect. In other words, —

> any attempt to restrict free speech must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger, and such danger must have existed at the time the acts complained of were committed; there must be reasonable ground to fear that serious evil will result if free speech is practised and that there must be reasonable ground to believe that the danger apprehended is imminent.[112]

The last occasion in which the Supreme Court expressly applied the clear and present danger test was in *Dennis v. U.S.*[113] and today, it appears to have lost favor with majority of the members of the U.S. Supreme Court, both as a criterion and a legal expression, and Freund termed it as an *"oversimplified judgment."*[114] Justice Brandeis himself realized that the —

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[111] 249 U.S. 47 (1919).
[112] 16 Corpus Juris Secundum, Constitutional Law § 216 (6), p. 1110.
[113] 341 U.S. 494 (1951).
[114] Quoted in separate opinion of Justice Frankfurter in Dennis v. US, *supra*, at 542.

> court has not fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of freedom of speech and assembly as the means of protection.[115]

The bad or dangerous tendency test first appeared in the leading case of *Gitlow v. New York*.[116] As explained in that case, and as quoted in *Cabansag v. Fernandez*,[117]

> If the words uttered create a dangerous tendency which the State has a right to prevent, then such words are punishable... It is sufficient if the natural tendency and probable effect of the utterance be to bring about the substantive evil which the legislative body ought to protect.

The balancing of interests test rests on the theory that

> ...it is the court's function before it when it finds public interests secured by legislation on the one hand and First Amendment freedom (freedom of speech and of the press) affected by it on the other, to balance the one against the other to arrive at a judgment where the greater weight shall be placed.[118]

Emphasis is on balancing the individual and governmental interests involved.

Chief Justice Fred Ruiz Castro, in his Address to the World Law Conference on World Law Day, in August 21, 1977 at the PICC, declared:

> On the matter of observance of human rights, I declare that the Supreme Court of the Philippines has, in all cases brought before it, confronted the issues of human rights of awesome magnitude squarely, and resolved them definitely, forthrightly, and courageously. Never has the Court abdicated its constitutional prerogative of adjudication; never has the Court foresworn the sacred trust reposed in it as the nations's guardian of human rights and as the nation's arbiter of transcendental questions.

Freedom of the press under martial law has not yet been placed in actual issue before the Supreme Court. The case of *Francisco v. Media Advisory Council*[119] would have afforded the Court the chance to give a definite ruling but the death of Francisco intervened. The main issue in this case centered on the authority of the respondent to impose restrictions on the freedom of the press even under martial law. Francisco, the publisher of the Lawyer's Journal, did not register said publication as required by government author-

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115 Whitney v. California, 274 U.S. 357, 376 (1927).
116 268 U.S. 652 (1925).
117 G.R. No. 8974, October 18, 1957.
118 Gonzales v. Comelec, G.R. No. 27833, April 18, 1969, 27 SCRA 835 (1969).
119 72 O.G. 10419, November, 1976.

ities. Respondent MAC, now inexistent, refused to allow the circulation of the August 1973 issue of the Journal for lack of the necessary permit, a requirement imposed by P.D. No. 191. Petitioner pointed out that the Journal is virtually an institution in the legal profession, having started its publication in 1934, or 39 years ago, and that its contents are merely judicial pronouncements, and that its subscription is limited solely to lawyers, therefore, it is not covered by P.D. No. 191. He further contended that independently of such argument, refusal of respondent is violative of the 1973 Constitution.

The Solicitor General, however, contended that the constitutionality of Proclamation No. 1081 need not be passed upon, the issue posed being susceptible of the correct answer in the interpretation to be accorded *"mass media"* in P.D. 191, and he refuted the contention of petitioner that the phrase refers to media of communication addressed to the masses, and prayed for the dismissal of the case for lack of merit.

However, with the death of petitioner Francisco and the decision reached by his heirs not to insist on its claim to enable the Journal to be published, the case had to be dismissed for being moot and academic. The Court, therefore, did not pass upon the constitutional as well as the legal questions raised, and was therefore deprived of the opportunity of ruling on a matter so transcendental in our hierarchy of freedoms.

In the case of *Bocobo v. Estanislao*,[120] there was a criminal complaint for libel filed by private respondent with the Municipal Court against petitioner. The main issue in the case was the jurisdiction of the municipal courts on libel cases. The Supreme Court held that it is a Court of First Instance which is specifically designated to try a libel case, as provided for in Article 360 of the Revised Penal Code. The purpose of said act, according to then Acting Chief Justice Fernando, is to prevent inconvenience or even harassment to those unfortunate enough to be accused of libel if any municipal court where there was publication could be chosen by complainant as venue. Since a radio broadcast, which was the medium used in the alleged breach, may be spread far and wide, much more so in the case of newspaper publication — *"it is not difficult to imagine how deplorable the effect would be for one indicted for such offense."* The Supreme Court, it must be noted, immediately grabbed the opportunity to pay its much daunted lip service to the right of free speech and press and it said, by way of *obiter,* and quoting from Justice Malcolm in *U.S. v. Bustos* —

[120] G.R. No. 30458, August 31, 1976, 72 SCRA 520 (1976).

> to prevent dilution of the constitutional right to free speech and free press, every libel prosecution should be tested on the rigorous and exacting standard of whether or not it could be violative of such fundamental guarantee.[121]

In the case of *Lagunzad v. Vda de Gonzales*,[122] the constitutional right of freedom of speech and of the press was raised as an additional ground in the petition for review. Petitioner filmed a movie entitled *"Moises Padilla Story"* based on an unpublished book narrating the events which culminated in the murder of a mayoralty candidate, the rights to which petitioner had purchased from the author. A few days before the premiere showing of the movie, the mother of Moises Padilla objected to the filming of the movie and the *exploitation of her son's life.* As a result, petitioner and private respondent entered into a Licensing Agreement whereby the former agreed to pay ₱20,000.00 in addition to the royalty to the latter in consideration of the authority to produce the picture. First payment was made, but additional payments were not made. When private petitioner sued the respondent for payment, the trial court and the Court of Appeals found for petitioner. The Supreme Court originally dismissed the petition for lack of merit, but it later gave due course when the petition alleged that the Licensing Agreement infringed on the constitutional right of freedom of speech and of the press.

Justice Ameurfina Melencio-Herrera, writing for the First Division of the Court, held —

> Lastly, neither do we find merit in petitioner's contention that the Licensing Agreement infringes on the constitutional right of freedom of speech and of the press, in that as a citizen and as a newspaperman, he had the right to express his thoughts in film on the public life of Moises Padilla without prior restraint. The right of freedom of expression, indeed, occupies a preferred position in the "hierarchy of civil liberties". It is not, however, without limitation... the prevailing doctrine is that the clear and present danger rule is such a limitation. Another criterion for permissible limitation on freedom of speech and of the press, which includes such vehicles of the mass media as radio, television, and the movies, is the balancing of interests test. That principle requires a court to take conscious and detailed consideration of interests observable in a given situation or type of situation.

The Court observed that in the case at bar, the interests observable are the right to privacy asserted by petitioner and the right of freedom of expression invoked by petitioner. Taking into account the interplay of these interests, the Court held that —

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[121] 37 Phil. 731 (1918).
[122] 92 SCRA 476 (1979).

> under the particular circumstances presented, and considering the obligations assumed in the Licensing Agreement entered into by petitioner, the validity of such agreement will have to be upheld particularly because the limits of freedom of expression are reached when expression touches matters of private concern.

In another decision, *Elizalde v. Gutierrez,* which was a prosecution for libel, the Supreme Court dismissed the case and quoted *U.S. v. Bustos* —

> the freedom of the press is so sacred to the people of these Islands and won at so dear a cost that it should now be protected and carried forward as one would protect and preserve the covenant of liberty itself.[123]

The freedom of expression, which more narrowly refers to freedom of speech and of the press, occupies a preferred position in the hierarchy of human rights as they are essential to the preservation and vitality of our civil and political institutions. Our Supreme Court was not given a chance to rule definitely on these rights. It lost its golden opportunity in *Francisco v. Media Advisory Council,* and since then, the Supreme Court has not given any definite rule on the subject. Aside from extolling the freedom of speech and freedom of the press in *Philippine Blooming Mills Co., Inc.,*[124] the Supreme Court has not made a definite ruling on whether it has now abandoned the clear and present danger test in *Cabansag v. Fernandez.*[125] Our Supreme Court has not made a categorical statement that, under martial law, freedom of speech and of the press exists. What was issued are obiters that freedom of speech and of the press are sacred, but there is really no way of determining whether the Supreme Court is ready to uphold this right. What it says and what it holds are therefore entirely two different things.

B. FREEDOM OF ASSOCIATION

> Freedom of expression and freedom of association are so fundamental that they are thought by some to occupy a 'preferred position' in the hierarchy of constitutional values.[126]

This right is so basic that it exists even without an explicit provision recognizing such right — *"the freedom of speech and freedom of assembly guarantee could be relied upon for that purpose."*[127]

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[123] 37 Phil. 731 (1918).
[124] G.R. No. 31195, June 5, 1973, 51 SCRA 189 (1973).
[125] 102 Phil. 152 (1957).
[126] People v. Ferrer, majority opinion, G.R. No. 32613-14, December 27, 1972, 48 SCRA 382 (1975), citing Kovacs v. Cooper, 336 U.S. 77 (1949); Vera v. Arca, G.R. No. 25721, May 26, 1969, 28 SCRA 351 (1969).
[127] FERNANDO, BILL OF RIGHTS 142 (1970). Underscoring added.

In the Philippines, freedom of association has been expressly recognized since the Malolos Constitution.[128] This intellectual right is now enshrined in the Bill of Rights of our Constitution, thus:

> Section 7. The right to form associations or societies for purposes not contrary to law shall not be abridged.[129]

It may be similarly found in the International Covenant on Civil and Political Rights, as follows —

> 1. Everyone shall have the right to freedom of association with others. . . .[130]

The Supreme Court had an occasion to consider this right in *People v. Ferrer*.[131] This case was an appeal by the government, treated by the Court as a special action for certiorari, from the decision of the lower Court declaring RA 1700[132] unconstitutional for being a bill of attainder and for suffering from vagueness. The Supreme Court reversed the lower court and upheld the validity of the questioned Act.

Admittedly, subversion is a threat to the very existence of legitimate government, but "the remedies to ward off such menace must not be repugnant to our Constitution."[133] "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[134] "The apprehension justifiably felt is no warrant for throwing to the discard fundamental guarantees. Vigilant we had to be, but not at the expense of constitutional ideals."[135]

The majority opinion presents a precise definition of a bill of attainder, thus:

> A bill of attainder is a legislative act which inflicts punishment without trial. Its essence is the substitution of a legislative for a judicial determination of guilt. The constitutional ban against bills of attainder serves to implement the principle of separation of powers by confining legislatures to rule-making and thereby forestalling legislative usurpation of the judicial function. History in perspective, bills of attainder were employed to suppress unpopular causes and political minorities, and it is against this evil that the constitu-

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[128] Article 20. Neither shall any Filipino be deprived of... (2) the right of joining any association for all the objects of human life which may not be contrary to public morals.

[129] CONST. (1973), Art. IV, sec. 6.

[130] Art. 22.

[131] *Supra*, note 126.

[132] "An Act to Outlaw the Communist Party of the Philippines and Similar Associations, Penalizing Membership therein, and for other purposes."

[133] Fernando, dissenting opinion, People v. Ferrer, *supra*, note 126 at 426.

[134] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[135] Fernando, dissenting opinion, *supra*.

> tional prohibition is directed. The singling out of a definite class, the imposition of a burden on it, and a legislative intent, suffice to stigmatize a statute as a bill of attainder.

It is, therefore, surprising when it held that when "the Act is viewed in its actual operation, it will be seen that it does not specify the Communist Party of the Philippines or the members thereof for the purpose of punishment. . . . The term 'Communist Party of the Philippines' is used solely for definitional purposes."

It is submitted that, on the contrary, RA 1700 clearly specifies the Communist Party of the Philippines for the purpose of punishment. The Legislature has, in fact, assumed *"judicial magistracy."*[136] The very title indicates this — *"An Act to Outlaw the Communist Party of the Philippines and similar associations, penalizing membership therein, and for other purposes."* The preamble provides that the Communist Party of the Philippines —

> is, in fact, an organized conspiracy to overthrow thhe Government of the Republic of the Philippines not only by force and violence but also by deceit, subversion, and other illegal means, for the purpose of establishing in the Philippines, a totalitarian regime subject to alien domination and control.

Then, Section 2 reads —

> Section 2. The Congress hereby declares the Communist Party of the Philippines to be an organized conspiracy to overthrow the Government of the Republic of the Philippines a totalitarian regime and place the Government under the control and domination of an alien power. The said party and any other organization having the same purpose and their successors are hereby declared illegal and outlawed.

The words of one of the sponsors of the Act leave no doubt as to the intention to specify the Communist Party of the Philippines and its members for the purposes of punishment:

> Senator Pelaez. Under the present laws, the prosecutors would have to establish the illegal nature of the association, and then, they would have to establish the membership of the persons in that illegal association. Now, under the bill, Congress having made a finding that the so-called Communist Party in the Philippines is in fact an organized conspiracy to overthrow the Government, all that the fiscal will have to prove in a prosecution under this bill is that the defendant has been a member of the so-called party. That is a punishable act, because the theory of the bill is that the existence of the so-called Communist Party of the Philippines presents a clear danger to the security of the country.[137]
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> Senator Pelaez. x x x Now, our laws are inadequate. What is the instrument which the government may use so that the so-called com-

[136] Cummings v. Missouri, 4 Wall, 277, 18 L.Ed. 366 (1867).
[137] Senate Congressional Records, May 14, 1957, pp. 1400-1401.

> munists may not abuse democratic processes? To penalize membership in the Communist Party—that is our answer to them.[138]

On the question of vagueness, one point must be emphasized. Section 4 of RA 1700 states, in part:

> Section 4. After the approval of this Act, whoever knowingly, wilfully, and by overt acts affiliates himself, becomes or remains a member of the Communist Party of the Philippines x x x.

What is meant by *"overt acts?"* House Bill No. 6582 (which gave rise to RA 1700) contained a comprehensive enumeration of specified overt acts. Such vagueness may very well be used as a tool by the unscrupulous to harass citizens in the exercise of the freedom of expression. *"[P]recision of regulation is the touchstone in an area so closely related to our most precious freedoms."*[139]

It is interesting to note that while the Supreme Court upheld the constitutionality of RA 1700, they saw a need to provide for basic guidelines, as follows:

> The Government, in addition to proving such circumstances as may affect liability, must establish the following element of the crime of joining the Communist Party of the Philippines or any other subversive association;
>
> 1. In the case of subversive organizations other than the Communist Party of the Philippines, (a) that the purpose of the organization is to overthrow the present Government of the Philippines and to establish in this country a totalitarian regime under the domination of a foreign power; (b) that the accused joined such organization; and (c) that he did so knowingly, wilfully, and by overt acts; and
>
> 2. In the case of the Communist Party of the Philippines, (a) that the Communist Party of the Philippines continues to pursue the objectives which led Congress in 1957 to declare its unorganized conspiracy for the overthrow of the Government by illegal means for the purpose of placing the country under the control of a foreign power; (b) that the accused joined the Communist Party of the Philippines; and (c) that he did so wilfully, knowingly and by overt acts.

In the motion for reconsideration, counsel for one of the accused prayed that the Supreme Court reconsider the guideline so that, at the end of the paragraphs numbered 1 and 2, the following phrase be added after the phrase *"by overt acts"*:

> "That is, knowing its subversive character and with specific intent to further its basic (subversive) objective by proof of direct participation in the organization's unlawful activities."

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[138] *Ibid*, at 1409.

[139] Gonzales v. Comelec, see note 118 at 871, citing NAACP v. Button, 371 U.S. 415 (1963). Underscoring added.

The Supreme Court denied the motion.[140]

It is submitted that the Supreme Court should have granted the motion, in view of its concern for *"the need for prudence and circumspection in its enforcement operating as it does in the sensitive area of freedom of expression and belief."*[141] The addition of the phrase would more properly reflect the decision of the Supreme Court because as the Court earlier held:

> Indeed, were the anti-subversion act a bill of attainder, it would be totally unnecessary to charge communists in court, as the law alone, without more, would suffice to secure their punishment. But the undeniable fact is that their guilt still has to be judicially established. The Government has yet to prove at the trial that the accused joined the party knowingly, wilfully, and by overt acts, and that they joined the party *knowing its subversive character and with specific intent to further its objective, i.e., to overthrow the existing government by force, deceit, and other illegal means and place the country under the control and domination of a foreign power.* (underscoring supplied)

In the ultimate analysis, this discussion of RA 1700 may be academic in view of the passage of P.D. 885, otherwise known as the Revised Anti-Subversion Act. This particular presidential decree removed all reference to the Communist Party of the Philippines earlier made in RA 1700, and it included a portion enumerating specific acts which may be considered as *"overt acts."* It is, however, ironic that while the Supreme Court chose the path of judicial restraint, the Executive saw the need to remove the infirmities of the questioned Act. The Supreme Court should have exercised judicial activism in protecting our cherished right to freedom of association.

C. RIGHT TO PEACEFUL ASSEMBLY

Article IV, Section 9 of the Bill of Rights states —

> No law shall be passed abridging x x x the *right of the people peaceably to assemble* and petition the Government for redress of grievances. (underscoring added).

Historically, the right of petition is the primary right while the right peaceably to assemble is a subordinate or instrumental right as was reflected in an American case in 1876.[141a] However, as American jurisprudence developed, it has recognized the right of peaceful assembly independent of the political right of assembly in order to petition the Government; and in a 1937 case,[142] the Sup-

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[140] People v. Ferrer, G.R. No. 32613-14, April 30, 1974, 56 SCRA 793 (1974).
[141] *Supra*, note 126.
[141-a] United States v. Cruikshank, 92 U.S. 542 (1875).
[142] De Jonge v. Oregon, 299 U.S. 353 (1937).

reme Court of the United States affirmed the right of peaceful assembly as cognate to that of free speech and press and being equally fundamental as the latter two.

In the international sphere, the right of peaceful assembly is expressly provided for under Article 20 (1) of the Universal Declaration of Human Rights and also under Article 21 of the International Covenant on Civil and Political Rights. Unlike our Constitution, the Universal Declaration and International Covenant provide for the right to peaceful assembly in affirmative terms which give us the impression that this right is so sacred and fundamental that it is not only made one of the basic rights provided for in the constitution but also classified as an entrenched human right that is to be adhered to and respected by all nations of the world.

The question then to be asked is how the Supreme Court of the Philippines has decided on this particular right of peaceful assembly during the martial law period. The cognate right of petitioning the Government for redress of grievances will not be discussed in this paper as there is no available jurisprudence on the matter after the declaration of martial law in 1972.

The first case on this matter was decided on June, 1973, in *Philippine Blooming Mills Employees' Organization v. Philippine Blooming Mills, Co., Inc.*[143] This involved a mass demonstration organized by the petitioner union to protest the alleged abuses of some Pasig policemen in connection with the manhandling of certain workers. The labor union before staging its demonstration in front of Malacañang Palace on March 4, 1969, first informed the company of its proposed mass action. Negotiations ensued wherein the company refused to permit certain workers belonging to the first shift from joining the demonstration as it would reduce the company's operations and would result in a day's loss of profits. Nevertheless, the union continued with its scheduled demonstration which thereafter compelled the company to dismiss 8 of the union officials for violating the existing Collective Bargaining Agreement (CBA) and negotiating in bad faith. Hence, this petition for review of a decision of the Court of Industrial Relations, as the latter upheld the claim of respondent company.

The Supreme Court, through Justice Makasiar, reversed the CIR and upheld the constitutional right of the petitioners to peaceful assembly. The court stated that the *"freedoms of expression and of assembly are included among the immunities reserved by the sovereign people, not only to protect the minority who want to talk,*

[143] G.R. No. 21195, June 5, 1973, 51 SCRA 189 (1973).

but also to benefit the majority who refuse to listen. The rights of free expression and of free assembly are not only civil rights but also political rights essential to man's enjoyment of his life, to his happiness and to his full and complete fulfillment."[144] The Court went on by stating the primacy of human rights over property rights and that while a statute and its purpose that is neither arbitrary nor discriminatory nor oppressive will suffice to validate a law which restricts or impairs property rights, nevertheless, a constitution of valid infringement of human rights requires a more stringent criterion, namely, the existence of a grave and immediate danger of a substantive evil which the State has the right to protect.[145]

In this context, it is clear that the Supreme Court has advocated the application of the clear and present danger rule[146] since the standards for allowable impairment of speech and press are also used for assembly and petition, they being the same category. The mere fact of loss of profit by the company is not a good argument in defeating the primordial right of the workers to stage their demonstration, specially a peaceful one.

In a subsequent case, *Chan Brothers, Inc. v. Federacion Obrera,*[147] the Supreme Court through Justice Fernando again followed the doctrines laid down by the Court in past decisions before martial law in upholding the peaceful picketing by respondent labor union as a constitutional right embraced in the guarantee of free expression. However, the Court qualified this right by saying that picketing or assembly loses its character as a constitutional right where acts of violence and intimidation are employed since it is transformed from an appeal for public support through publicizing the facts of a labor dispute to the commission of anti-social acts that have no place under the Rule of Law.

It is inspiring to note that even in these troubled times, there is sufficient indication that the Supreme Court, at least in theory, still stands four-square behind the Constitution. However, we should not lose sight of the fact that in these two decisions, the demonstration in the PBM case and the picketing in the Chan Bros. case both happened *before* martial law was imposed while the decision itself was only made very much later. Under martial law, demonstrations and rallies are governed by General Order No. 5 and P.D.

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[144] *Ibid.*, p. 201. Underscoring added.

[145] *Ibid.*, p. 203.

[146] It seems that the Supreme Court has modified the application of this rule as enunciated in the case of Lagunzad v. Vda. de Gonzales, 92 SCRA 476, wherein the clear and present danger rule has been expressly abandoned and instead adopted the "balancing of interests" test. For further elaboration, please refer back to the Lagunzad case stated above.

[147] G.R. No. 34761, January 17, 1974, 55 SCRA 99 (1974).

No. 823. In the former, demonstrations, pickets, and other forms of mass action are prohibited in vital industries. Under LOI No. 368, the list of vital industries are so encompassing that it practically includes any and all industries, including schools, banks, and other companies and firms. Also under P.D. No. 823, strikes are expressly prohibited, a violation of which could result in imprisonment and/or fine. It is, on the other hand, despairing to note that ever since September, 1972, there has not been a single case filed in the Supreme Court contesting the validity of these presidential prerogatives as it is blatantly in conflict with the constitutional right of freedom of expression and of assembly. There has not been a strike or demonstration that was not unduly harassed or dispersed by the military. It would have been through an express and categorical pronouncement by the Supreme Court concerning these rights and its existence even at present that we could truly say that the High Court has been a guardian of human rights.

V. *ACADEMIC FREEDOM*

The only constitutional provision expressly relating to *"academic freedom"* is Article XV, Section 8 (2) which provides —

> All institutions of higher learning shall enjoy academic freedom.

There is no related counterpart in the Universal Declaration or the International Covenant. There is no exact definition of what the term academic freedom really means, though many have attempted to explain it. To give it a better perspective, it becomes appropriate to look into the foregoing relevant decisions of our Supreme Court.

The first case that is in point under this topic is that of *Laxamana v. Borlaza,*[148] a decision penned by Justice Makalintal a day before the proclamation of martial law on September 21, 1972. In this case, the then president of the Philippine Normal College issued a memorandum to Felicitas Laxamana, in her capacity as director of publications, to the effect that more care be exercised in guiding the students in the preparation of articles and editorials in the school's official organ; and at the same time calling her attention to an earlier communication from the PNC president proposing certain guidelines for the editorial staff to observe. In the same communication, the president said that the page proofs of the publication be first reviewed by his representative before these are finally approved for print. Viewing these communications as violative of the right to academic freedom, among others, Laxamana brought this action to the Supreme Court. In the meantime, Laxa-

[148] G.R. No. 26965, September 20, 1972, 47 SCRA 30 (1972).

mana was removed as director and given a full time teaching position.

The Supreme Court ruled that the issue had already become academic because the questioned communication, concerning the page proofs to be first reviewed before final publication, were already recalled; and that since Laxamana's designation as director was by mere appointment by the PNC president, then the latter could likewise remove her to be designated as a full-time member of the faculty.

Though the Court did not squarely rule on the question of academic freedom, Justice Fernando, in his concurring opinion, had more to say. The then Associate Justice Fernando likewise agreed that the issue had already become academic. However, he went further in saying that

> freedom of speech and press is the guarantee of the liberty to discuss publicly and truthfully any matter of public interest without previous censorship or subsequent punishment. There should be no restraint imposed in advance unless there be a clear and present danger of substantive evil that Congress has the right to prevent.[149]

He continued by stating that —

> nowhere should there be greater respect for these rights than in educational institutions; otherwise, it would make a mockery of academic freedom if there is the gnawing fear on the part of those competent to contribute with their knowledge gained through years of study and research that what they say, or what they write, if displeasing to the powers that be, could be visited with retribution.... this means the exclusion of governmental intervention in the intellectual life of a university.[150]

Justice Fernando, while admitting that this brief comment was by way of *obiter* ended his opinion by stating that he hopes it will be of some use to heads of educational institutions, be it public or private.

The concept of *"academic freedom"* was more extensively discussed in the subsequent case of *Garcia v. Faculty Admissions Committee, Loyola School of Theology.*[151] In this case, petitioner, a college student, filed a petition for mandamus to compel the respondent to admit her in order to be able to continue her theological studies. The Supreme Court, again through Justice Fernando, denied the petition since there was no clear duty on the part of respondent school to admit Garcia in the current semester even if

[149] *Ibid.*, p. 42.
[150] *Ibid.*, p. 43.
[151] G.R. No. 40779, November 28, 1975, 68 SCRA 277 (1975).

she had been allowed to take up certain courses during the previous summer and was, for all purposes, a *"qualified"* applicant.

The Tribunal noted that the Loyola School of Theology is a seminary for the priesthood and that petitioner was admittedly and obviously not studying for the priesthood, she being a lay person and a woman. And even assuming *arguendo* that she was qualified to study for the priesthood, there is still no duty on the part of the respondents to admit her since the school has clearly the discretion to turn down even qualified applicants due to the limitation of space, facilities, professors, optimum classroom size and component considerations, as well as many other circumstances.

The Supreme Court even went deeper than what was necessary in the disposition of the case by saying that the recognition in the Constitution of *"institutions of higher learning enjoying academic freedom"* was more often identified with the right of a faculty member to pursue his studies in his particular specialty and thereafter to make known or publish the result of his endeavor without fear that retribution would be visited on him in the event that his conclusions are found objectionable to the powers that be. Justice Fernando, quoting Sidney Hook, philosopher and educator, states that "academic freedom is the freedom of professionally qualified persons to inquire discover, publish and teach the truth as they see fit in the field of their competence."[152]

The Constitution refers to *"institutions of higher learning"* and from this follows that the school or college itself is possessed of such a right. This *freedom,* the Court continued, means that the institution decides for itself its aims and objectives and how best to attain them. It is free from outside coercion or interference save possibly when the over-riding public welfare calls for some restraint. It has a wide sphere of autonomy certainly extending to the choice of students.

In retrospect, the Supreme Court has given two aspects of academic freedom—one for the university as an institution and the other, belonging to a university professor. One may not necessarily be connected with the other. The personal aspect of freedom consists in the right of the university teacher to seek and express the truth as he personally sees it. To the collective aspect of freedom, there are four essential elements which the university as an institution enjoys—it must be able to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study. Based on the last freedom, Jus-

[152] *Ibid.,* p. 283.

tice Fernando said that this reinforces the conclusion reached by the Court that mandamus cannot and will not lie.

It is apt to note that the Garcia decision was not unanimous. For purposes of the topic under discussion, we will only dwell on the part of the dissenting opinion of Justice Makasiar concerning academic freedom. Justice Makasiar agrees that all universities of higher learning (whether established by the State or not) as well as individual teachers and professors are guaranteed academic freedom. However, he goes further in expressing that academic freedom should likewise be deemed granted in favor of the student body because the administrative authorities of the college, its faculty and its student population do in fact constitute the educational institution without any one of which the educational institution can neither exist nor operate. *"Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."*[153]

To our mind and based on our analysis of this case, we believe that Justice Fernando did not go far enough in defining the concept of academic freedom. The dissenting opinion is better reasoned out. Academic freedom should not be restricted to the narrow formulation of the four essential freedoms of a university, nor should it be limited to the right of a university professor alone, but should encompass as well the academic freedom of students to learn, analyze, criticize and formulate their own thinking and conclusions on the matter. Nor should academic freedom be limited to institutions of higher learning since it is important, if not vital, that even those of the secondary level of education be made to understand and be critical of things around them them and not just absorb education as it comes without thought or analysis. It is of the essence that students from the lowest levels of education be taught in a free and open atmosphere, unafraid of punishment and retribution in order that they may develop critical minds. Should academic freedom be stifled in our students, then we cannot hope too much for tomorrow for our future leaders would have been deprived of a complete and well-rounded education that would have enabled them to cope with the numerous problems they would have to face.

In a 1977 case, *Montemayor v. Araneta University Foundation*,[154] the Supreme Court, again through Justice Fernando, decided to dismiss a petition for certiorari filed by Montemayor and in effect af-

[153] *Ibid.*, p. 295-297. Underscoring added.
[154] G.R. No. 44251, May 31, 1977, 77 SCRA 321 (1977).

firming its previous ruling on academic freedom enunciated in *Garcia v. Loyola School of Theology.*

Petitioner, a professor of respondent university, was dismissed by reason of immorality. He was charged for making homosexual advances on a teacher and a student. The stand taken by petitioner was that as an employee of the private respondent university, he was entitled to security of tenure as reinforced by the provisions on academic freedom in the Constitution. For him, tenure was the essence of such freedom and without tenure that secures the faculty member against dismissal or professional penalization on grounds other than professional incompetence, then the academic right becomes non-existent.

The Court, in dismissing the petition for certiorari, reiterated its ruling in the Garcia case, saying that —

> academic freedom is the right claimed by an accredited professor, teacher and investigator, to interpret his findings and to communicate his conclusions without being subject to any interference, molestation, or penalization because these conclusions are unacceptable to some constituted authority within or beyond the institution. Security of tenure, of course, is the chief practical requisite for academic freedom of a university professor; however, this does not rule out removal or dismissal for some grave cause like proved incompetence or moral delinquency.[155]

The charge of homosexual advances, if proved, would amount to sufficient cause for removal due to moral bankruptcy.

In this particular case, petitioner was given a hearing with sufficient time and notice, and the opportunity to confront adverse witnesses. He was given the right, before any dimissal, to have the charges against him stated in writing, in specific terms, and to have a fair trial before a special or permanent judicial committee of the faculty. The immoral acts were proved, thereby amounting to sufficient cause for his dismissal. He could not use academic freedom as an excuse to keep his position under the guise of security of tenure.

To our mind, the result of the decision of the Supreme Court was substantially correct because no professor of such proven record should be allowed to stay in the faculty of a college. Academic freedom should be respected and strengthened but no one should be allowed to hide under its cloak to perpetrate a manifest aberration.

We would just like to reiterate that there can only be academic freedom if the various segments of the educational institution were

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[155] *Ibid.*, p. 327-328.

situated in such manner as to be able to check and balance each other so that the basic environment of free education coupled with social practice would pervade in each every educational institution, be it public or private.

VI. LIBERTY OF ABODE AND TRAVEL

The *"right to travel"* is taken in this study to include in its definition its common meaning. No precise or technical meaning is given to this right. Sometimes it is construed in its strictest sense, and other occasions, it is given a wider interpretation. It is therefore considered for purposes of this study to include the right *"to pass from one place to another, whether for pleasure, instruction, business or health."*[156] It is said to be a *"right of national citizenship."*

Long before the adoption of the 1935 Constitution, the Supreme Court had already recognized this right in the frequently cited cases of *Rubi v. Provincial Board of Mindoro* and *Villavicencio v. Lukban.*[157] In *Rubi v. Provincial Board of Mindoro,* the right of a citizen to live and work where he wills was recognized; while in *Villavicencio v. Lukban,* the Supreme Court castigated the Mayor of Manila and its chief of police for depriving women of ill repute residing in Manila of their liberty of abode when the city officials without authority of law, suddenly rounded up these women in the middle of the night and deported them to Davao. The Supreme Court said:

> Liberty of abode is a principle so deeply embedded in jurisprudence and considered so elementary in nature as not even to require a constitutional sanction.

The right has also been recognized in Article 13 of the Universal Declaration of Human Rights, thus:

> 1. Everyone has the right to freedom of movement and residence within the borders of each state.
>
> 2. Everyone has the right to live in a country including his own and to return to his country.

Almost the same principle is contained in our Constitution. The Bill of Rights, Article IV, Section 5 provides:

> The liberty of abode and travel shall not be impaired except upon lawful order of the court or when necessary, in the interest of national security, public safety or public health.

The Supreme Court, on several occasions during martial law, made several pronouncements on the right to travel. In *Picardo v.*

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[156] Price v. City of Atlanta, 31 S.E. 619, 623 (1898). Underscoring added.
[157] 39 Phil. 660 (1919); 39 Phil. 778 (1919).

Secretary of Foreign Affairs,[158] the Supreme Court had to dismiss the petition of Picardo for mandamus. The action was instituted to compel the Secretary of Foreign Affairs to issue him a passport for his sojourn to Red China. At the time that Picardo filed his petition in 1964, the Philippine Government had a standing policy to prohibit all Filipino citizens from visiting communist countries. Events had already overtaken this petition so that it had become moot and academic. Diplomatic relations had already been established between the Philippines and Red China. This lifted the prohibition against Filipino citizens from visiting the said country.

When martial law was declared, foreign travel was restricted, so that among the earliest issuances of the emergency regime was LOI No. 4, which ordered the Secretary of Foreign Affairs —

> not to issue travel papers of any kind such as passports and other like documents to any citizen of the Philippines who may wish to depart from the Philippines for any foreign country ... except those citizens of the Philippines who are being sent abroad in the service of the Government or those who ... are members of the crew of any inter-ocean vessel or ... members of the crew of any commercial aircraft engaged in the international carriage of persons or cargoes or both.

Gradually, however, the restriction was eased and now, the only additional requirement is the issuance of a *"Certificate of Eligibility to Travel"* which is issued by military authorities through the Travel Processing Center. Several national personalities have been refused the certificate for being reportedly under the intelligence agency's *"watch list"*. They filed their petitions for mandamus in the Supreme Court to compel the Travel Processing Center (TPC) to issue the corresponding certificates.

In 1978, Jovito Salonga, former Senator, filed a petition before the Supreme Court praying that a writ of mandamus be issued directing the TPC to issue his certificate to travel. *Before* the Supreme Court could act on the matter, the case became moot and academic because the TPC had already granted the petition.

In the Supreme Court Resolution of November 2, 1978, Chief Justice Fernando in a brief separate opinion concurred in by Justices Munoz-Palma, Santos and Fernandez, said:

> This is how I would view the matter not only where petitioner is concerned but in all other similar cases. Respondent Travel Processing Center should discharge its function conformably to the mandate of the Universal Declaration of Human Rights on the right to travel....

[158] 75 O.G. 10285 (June, 1979).

Quoting President Marcos in his keynote address at the Manila World Law Conference in 1977, lifting the ban on international travel, Chief Justice Fernando continued:

> There should be fidelity to such a pronouncement... as an agency of the executive branch, the Travel Processing Center should ever be on its guard, lest the impression be created that such declarations amount to ... no more than munificent bequests in a pauper's will.

In April 1980, Jovito Salonga again went to the Supreme Court with the same petition. The Supreme Court, perhaps fed up with petitions of the same character clogging its dockets[159] came up with a definite ruling on the matter. While the Supreme Court could have dismissed the second petition of Salonga because the merits of the controversy had already been removed with the issuance of the travel certificate, obviating the necessity of any ruling, the Court chose to reprimand the TPC, "in view of the likelihood that in the future, this Court may again be faced with a situation like the present which takes up its time and energy needlessly."[160] It castigated the TPC and said that —

> . . . respondent Travel Processing Center should exercise the utmost care to avoid the impression that certain citizens desirous of exercising their constitutional right to travel could be subjected to inconvenience or annoyance.

Recognizing that the freedom to travel is *"certainly one of the most cherished"*, the Supreme Court directed the officer-in-charge of the TPC that "in case of doubt, the view of General Ver should immediately be sought." Furthermore, the Supreme Court also chided petitioner by reminding him that "petition for such certificate of eligibility to travel be filed at the earliest opportunity to facilitate the granting thereof and preclude disclaimer as to the person desiring to travel being in any way responsible for delay."

Despite this, the Supreme Court continued to receive similar petitions, prompting it to promulgate *en banc* another Resolution on May 29, 1980 concerning *Daisie P. Olaguer v. General Fabian Ver, et al.*[161] wherein the Court resolved to grant the petition and *commanded* and *required* the respondents "to issue and deliver to petitioner her certificate of eligibility to travel and such travel papers as may be necessary to enable her to travel abroad and enable her

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[159] Santos v. Special Committee on Travel Abroad, G.R. No. 45748; (April, 1980); Pimentel v. Travel Processing Center, G.R. No. 49637 (October, 1979); Gonzales v. Special Committee on Travel, G.R. No. 46466 (February, 1980).

[160] Supreme Court Resolution en banc, G.R. No. 53622, April 25, 1980. Underscoring added.

[161] G.R. No. 53923, May 29, 1980.

to attend the graduation of her son at the Massachussetts Institute of Technology."

The Supreme Court in these cases had clearly shown utmost concern for human rights. Through these cases, it had shown the critics of martial law that it had an independent existence, and that when it wishes to assert its judicial power, it could do so. The ruling, specially in *Salonga v. Ver*, clearly shows that the Supreme Court could still be the guardian of human rights, although it is limited to a passive role. For the Supreme Court to give a definite ruling on a case which has become moot and academic is to engage in judicial activism for which it must be commended.

However, a word of caution is in order. The right to travel is one which only a certain class or level of society is concerned with. To a majority of our people who are more concerned with basic economic needs, this right is bereft of meaning.

CONCLUSION

The pattern has fallen in place.

Why then, this seeming abdication of its role as the guardian of human rights? Under Martial Law, the traditional equality, independence and separation of the branches of government are suspended and in its place is the recognized supremacy of the Executive. Now, more than ever, should the Supreme Court discharge with even more zeal and conviction its solemn obligation of protecting the rights of the citizenry.

The Supreme Court has taken a stance of timidity in this period of Martial Law. It should have taken the course of judicial activism — instead, it has chosen to be a child of its times, unmindful of the pressures that bear on it to uphold the rights we hold dear and sacred. It has likened itself to the bamboo that sways with the wind — unlike the molave that stands firm and unshakable in the midst of the storm. It has opted for a compromised existence rather than a principled end.

Whether this is the wiser choice, no one can really say for now. Time, and history, will tell.