LAW, POLITICS AND A CHANGING COURT — THE FATEFUL YEARS 1985-1986

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> *The term "constitutional law" symbolizes an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law, thinking as lawyers think.*
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> — C. L. BLACK, JR.,
> PERSPECTIVES IN CONSTITUTIONAL LAW 1 (1970)

> *. . . Of course the Supreme Court justices decide cases on the basis of their ideas of "policy." But to say this, as to say that judges make law, is not the end but only the beginning of sophistication. For there are levels of policy; and in Supreme Court litigation, values, like troubles, come not single spies but in battalions.*
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> — P. A. FREUND,
> THE SUPREME COURT OF THE UNITED STATES 28 (1961)

To appraise Constitutional Law cases decided in 1985 and the first half of 1986 is to see the work of a Court at the end of an era, during a brief transition, and at the beginning of a new reign and realize how the Court has indeed shaped and in turn been shaped by the political events of that period. The era of the Fernando Court came to an end with the retirement of the Chief Justice in July of 1985 and was followed by the appointment of Chief Justice Makasiar and after him of Chief Justice Aquino whose tenures were so brief the Court could be considered in transition. A people's revolution in February 1986 resulted in a change in the membership of the Court — and one may assume in its basic outlook — and the elevation to the Chief Justiceship of Senior Justice Teehankee as a fitting climax to his consistent dissents against the last administration.

It will be convenient to discuss the cases in Constitutional Law under the following headings: "Judicial Review and the Case and Controversy Requirement," "The Powers of Government," and "The Guarantees of Individual Rights."

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I. JUDICIAL REVIEW AND THE CASE AND CONTROVERSY REQUIREMENT

A. *Political Questions*

The Legitimacy of the Aquino Government.—In *Lawyers' League for a Better Philippines v. President Aquino*,[1] the Supreme Court dismissed several petitions questioning the legitimacy of the Aquino government on the ground that it had been established in violation of the 1973 Constitution. The Court held that the legitimacy of the government was a political question for the people to decide. It said in a brief resolution: "The people have accepted the government of President Corazon C. Aquino which is in effective control of the entire country so that it is not merely a de facto government but is in fact and in law a de jure government."

Indeed, it has been said that under a written constitution, the people can do no act except make a new constitution or make a revolution.[2] Whether the change is due to a new constitution or to a revolution, the change does not admit of judicial review. The question is political. If a court decides at all *qua* court, it must necessarily affirm the existence and authority of the government under which it is exercising judicial power.[3] As Melville Weston put it long ago, "the men who were judges under the old regime and the men who are called to be judges under the new have each to decide as individuals what they are to do; and it may be that they choose at grave peril with the factional outcome still uncertain."[4]

By holding that the question was political and affirming that it was itself part of the new government, the Court in effect followed the lead of its earlier ruling in *Javellana v. Executive Secretary*,[5] *Occeña v. COMELEC*,[6] and *Mitra v. COMELEC*.[7] In those cases, the Court in effect held that the effectivity of the new Constitution and the changes made by it were political questions for the people to decide. As the Court said in *Occeña*: "[P]etitioners have come to the wrong forum. We sit as a Court duty-bound to uphold and apply that Constitution. . . . It is much too late in the day to deny the force and applicability of the 1973 Constitution."

Now, after a revolution, the Court found itself faced again with a political decision made by the people. From the point of view of the 1973 Constitution, the new government could indeed be "illegal." But from the point of view of the state as a distinct entity, not necessarily bound to

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1 G.R. Nos. 73748, 73972 & 73990, May 22, 1986.
2 V. SINCO, PHILIPPINE POLITICAL LAW 7 (11th Ed., 1962), *citing* Commonwealth v. Collins, 8 Watts (Pa.) 331, 349.
3 Luther v. Borden, 7 How. 1 (1849).
4 Weston, *Political Questions*, 38 Harv. L. Rev. 296, 305 (1925).
5 50 SCRA 30 (1973).
6 104 SCRA 1 (1981).
7 104 SCRA 59 (1981).

employ a particular government to carry out its will, the new government is the direct act of the state itself. As Dean Sinco well said, it is only by a narrow definition that a government brought about by direct act of the people could be considered a de facto government. As the product of a successful direct state action, it is the lawful de jure government.[8]

The "Snap" Presidential Election — A Political Question. — Actually, people power, which culminated in the February 1986 revolution, began with the agitation for a special election. The Batasang Pambansa responded with a call for election on February 7, 1986 for President and Vice President on the basis of a letter from President Marcos that he would "irrevocably vacate the position of President effective . . . when the election is held and after the winner is proclaimed and qualified as President by taking his oath of office ten (10) days after his proclamation."

Suits were filed in *Philippine Bar Association v. COMELEC*,[9] questioning the validity of BP Blg. 883. The principal ground for the challenge of the validity of the statute was that the conditional resignation of the President did not create the vacancy required by Art. VII, Sec. 9 which authorized the calling of a special election.

After deliberating, seven Justices (Chief Justice Aquino, Justices Teehankee, Concepcion, Abad Santos, Plana, Escolin and Relova) voted to dismiss the petitions. On the other hand, five Justices (Gutierrez, De la Fuente, Cuevas, Alampay and Patajo) voted to declare the statute unconstitutional. In accordance with *Javellana v. Executive Secretary*,[10] Justice Teehankee was of the view that as there were less than ten votes for declaring BP Blg. 883 unconstitutional, the petitions should be dismissed.

No opinion of the Court was delivered. In his separate opinion, Justice Teehankee held that the question had become political because of events which had overtaken the cases. Because the Court did not issue an injunction, he said, political parties had nominated candidates and had began preparations for the polls, and even those originally opposed to the validity of the statute had agreed to the holding of the election. For this reason, he said, the real issue had shifted "from the constitutionality of the law due to the lack of actual vacancy in the office of the President to a political question that can only be truly decided by the people in their sovereign capacity." He quoted then Labor Minister Blas Ople as saying the Court was confronted with a *fait accompli* — "the elections are on" — because the Court did not issue a restraining order. The scheduled election, he argued, could indeed well be Philippine democracy's last chance. The Court could not stand in the way of letting the people decide through their ballot, either to give the incumbent President a new mandate or to elect a new President.

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[8] V. SINCO, *supra* note 2.

[9] G.R. Nos. 72915, 72922, 72923, 72924, 72927, 72935, 72935, 72954, 72957, 72968 & 72986, Dec. 19, 1985.

[10] *Supra* note 5.

Similar sentiments were expressed individually by Justices Plana, Escolin and Relova.

On the other hand, Justice Gutierrez argued that the calling of a special election was unconstitutional because there was no vacancy in the office of the President. He stated:

> A special election may not be called for just any purpose or on any occasion. A special election becomes necessary only when a vacancy is created by death, permanent disability, removal from office, or resignation. I cannot accept the proposition that a simulated or fictitious vacancy is a "vacancy" as understood in the law of public officers. The vacancy must be real and in *esse,* not a parody or shadow of the real thing. In the same way that death, disability, or removal from office must be actual and permanent before the pertinent provisions of Section 9, Article VII of the Constitution may come into play, so must a resignation be real and irrevocably permanent. ....
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> If the exigencies of national interest are pressing, now or in the near future, and if the need for establishing political and economic stability is imperative, that elections for a President and a Vice-President can no longer wait for 1987, the Constitution provides the remedy. The President can *resign* and pursuant to Section 9, Article VII of the Constitution, the Speaker of the Batasan shall act as President until the President and the Vice President or either of them shall have been elected in the special elections called to fill the vacancy thus created and shall have qualified.
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> Neither can the special elections be premised on the accountability provisions in Article XIII of the Constitution. Snap elections to make the executive accountable to the people are for parliamentary systems. We have a presidential form of government.

One may agree with the plurality Justices that the nation was all set for an election and it would be frustrating for it to be told the elections were off because the law was invalid. But then by not issuing a writ of preliminary injunction the Court decided as much in favor of holding the election.

Impeachment—A Political Question: *Romulo v. Yñiguez.*—The "snap" election was not the only means taken to end the 20-year tenure of President Marcos. Attempts were also made to impeach him for alleged "hidden wealth." In the Batasang Pambansa, opposition members, representing the requisite 1/5 for initiating impeachment proceedings, filed on August 13, 1985 a resolution and a verified complaint against him. In accordance with the rules of the BP, the resolution and the complaint were referred to the Committee on Justice, Human Rights and Good Government. However, the committee found the complaint not sufficient in form and substance to warrant further consideration and accordingly dismissed it. It then submitted a report which the BP noted and sent to the archives. MP Mitra moved for the recall of the resolution and complaint, but his motion was disapproved.

In *Romulo v. Yñiguez*,[11] petitioners, who were members of the opposition party, brought a suit for prohibition, questioning the constitutionality of the rules which required preliminary approval of a complaint for impeachment before it could be reported to the BP for trial. They asked the Court for a writ of preliminary mandatory injunction against the Committee on Justice, Human Rights and Good Government to recall from the archives the resolution and complaint for impeachment so that the BP could conduct the trial.

The Court dismissed the suit. By denying Mitra's motion to recall the resolution of impeachment, the BP had in effect confirmed the action of the Committee on Human Rights and Good Government in dismissing the impeachment resolution, so that for all intents and purposes it was the action of the BP which the petitioners sought to prohibit. Interference by the judicial department with the work of a legislative committee would be tantamount to an interference with the work of the legislature itself.[12]

But the Court proceeded to discuss the validity of the rules on impeachment. The rules of the BP required that if 1/5 of the members gave due course to a complaint for impeachment, the Committee on Justice, Human Rights and Good Government should determine whether the complaint was sufficient in form and substance. If it found it was, the BP would furnish the respondent with a copy so that he could file his answer. Otherwise, the committee should dismiss the complaint. If the complaint was found sufficient and an answer was filed, the rules required that the committee determine whether sufficient grounds existed. If it found such grounds, the committee then required the parties to file affidavits and counter affidavits to determine whether there was probable cause for impeachment. A resolution containing the articles of impeachment would be filed only if the committee had found probable cause. Even then, the articles of impeachment must be approved by a majority of all the members of the BP before a trial could be held.

The Supreme Court held that the rules did not violate Art. XIII, Sec. 3 because they referred to the *disposition* of complaints for impeachment. They were not part of the *initiation phase* of the impeachment proceedings but of the "trial phase." Nor is the constitutional provision requiring the concurrence of at least 2/3 of all members of the BP for conviction violated by the rules authorizing the dismissal of a complaint by a majority vote of the BP since with such number it was obvious that the 2/3 vote could not be obtained. The Court said Art. XIII, Sec. 3 merely provides how a judgment of conviction can be sustained but is silent as to how a complaint for impeachment can be dismissed.

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[11] 141 SCRA 263 (1986).

[12] Abueva v. Wood, 45 Phil. 612 (1924); Alejandrino v. Quezon, 46 Phil. 83 (1924).

Justices Melencio-Herrera, Plana, Escolin, Gutierrez, De la Fuente, Cuevas and Alampay concurred, while Justices Teehankee and Abad Santos reserved their votes.

It seems to me that when the 1973 Constitution provides that a complaint for impeachment can be initiated by the vote of 1/5 of all the members of the Batasang Pambansa the intention is that the case should proceed to trial and should not be defeated or frustrated even though the majority should vote to dismiss it. Any rule providing for dismissal after 1/5 of the members have voted to give due course to the petition would be contrary to the 1973 Constitution and therefore would be void.

Nor does it seem tenable to me to say that because a majority has voted to dismiss a complaint, that it would be useless to proceed to trial because it is certain that the 2/3 vote needed to convict a respondent would not be attained. That also would short circuit the whole process of impeachment which contemplates a trial, as long as 1/5 of all the members vote to give due course to a petition.

B. *Mootness*

The Functions of Judicial Review. — In two decisions[13] rendered in 1981, the Supreme Court pointed out that judicial review involves the exercise of two functions: *checking* and *legitimating*. The checking function is the more familiar and indeed the more dramatic, because by means of this function, the Court curbs the exercise of powers by the other branches of the government. The legitimating function, on the other hand, sometimes passes unnoticed because it may simply result, according to the Court, from the mere dismissal of a petition challenging the validity of a statute. The presumption of validity which inheres in every law then operates.

In *Salonga v. Cruz Paño*[14] the Court mentioned a third function of judicial review—the *symbolic* or *educational* function—to justify the decision of a constitutional question, even as it dismissed the case for being moot and academic. That case was brought to enjoin the prosecution for subversion of former Senator Jovito Salonga on the ground that there was no probable cause established against him in the fiscal's investigation. The Court found the claim to be true. But while the draft of the opinion, prepared by Justice Gutierrez, was being circulated, the prosecution moved for the dismissal of the case in the Regional Trial Court, which actually granted the motion, thus rendering the Supreme Court case moot and academic. Justice Abad Santos ruefully said in his concurring opinion, "The Court has been pre-empted by a 'first strike' which has occurred once too often," thus hinting at a possible leak of the decision.

The opinion of the Court by Justice Gutierrez, while holding that the case had become moot and academic, nevertheless proceeded to decide the

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[13] Occeña v. COMELEC, 104 SCRA 1 (1981), Mitra v. COMELEC, 104 SCRA 59 (1981).

[14] 134 SCRA 438 (1985).

constitutional issues raised for two reasons: (1) The fiscal had said the dismissal of the criminal case was without prejudice to its refiling inasmuch as the petitioner had not been placed in jeopardy; (2) The Supreme Court has the duty to formulate "guiding and controling constitutional principles, precepts, doctrines or rules. It has the symbolic function of educating bench and bar on the extent of protection given by constitutional guarantees."

The legitimating, checking and symbolic functions are by-products of the Court's power of judicial review. They are not self-consciously to be performed for their own sake, praiseworthy as the effort to educate the bench and bar may be. Where there is no case and controversy, or where one has ceased to be a lively controversy and become moot, there is no warrant for the Court to make pronouncements at large. The Justices, in Eugene Rostow's phrase, "are inevitably teachers in a vital national seminar."[15] But they are so only in cases in which by the nature of the function they have a *duty to decide*. As Paul Freund[16] has written:

> The themes I have tried to develop can perhaps be brought together in an encompassing question: Should the Court serve as the "conscience of the country"? Put in this way as today it often is put, the answer is plain. It would be a morally poor country indeed that was obliged to look to any group of nine wise men for ultimate moral light and leading, much less a group limited to men drawn from one profession, even that of the law. But there are two narrower senses in which the Court does inevitably serve as a public conscience. The great fundamental guarantees of the constitution are, after all, moral standards wrapped in legal commands: due process of law, equal protection of the laws, cruel and unusual punishment, free exercise of religion. When claims are raised in lawsuits that invoke these ethical-legal standards, the opinions of the Court are bound to contribute to our more general thinking about social justice and ethical conduct. Some of our most memorable utterances on these themes we owe to the great Justices who have delivered them as part of their judgments in concrete cases: Holmes, Brandeis, Stone, and Hughes, to name only the departed. There is a second sense in which the Court serves as a public conscience, which paradoxically tends to limit the Court's freedom of utterance on these themes. The Court has warrant to speak only in the decision of specific litigation and then only as the logic of the case requires these issues to be stirred. In this sense the Court becomes a conscience by acting to remind us of limitation on power, even judicial power, and the interrelation of good purposes with good means. Morality is not an end dissociated from means. There is a morality, which respects the limitations of office and the fallibility of the human mind. Justice Brandeis used to remind himself and others that self-limitation is the first mark of the master. That, too, is part of the role of conscience.

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[15] Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). Compare L. TRIBE, GOD SAVE THIS HONORABLE COURT 27 (1985): "Even though the Supreme Court speaks only when deciding actual cases, its discourse is sometimes conducted at a higher level than that literally necessary for the resolution of the particular disputes in question. Justices speak...on themes that transcend the outcome of a given controversy, and to the very heart of what we are as a nation. For this reason the Supreme Court has been called 'The Schoolmaster of the Republic.'"

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

In *Salonga* the Court could have ignored mootness and decided the case, because of the threat of refiling of criminal charges against the petitioner by the fiscal. There are authorities in the United States that the voluntary cessation of an illegal act does not render a case moot if the respondent is free to return to his illegal conduct.[17] Indeed, in *Toyoto v. Ramos*[18] the Court refused to consider a case for habeas corpus moot and academic as a result of the release of the petitioners three days after the filing of their case, because the release was only temporary and the petitioners could be arrested any time.

On the other hand, in *Eastern Broadcasting Corp. (DYRE) v. Dans*[19] the Court, also through Justice Gutierrez, dismissed a case on the ground of mootness but not until it had laid down guidelines for courts and administrative agencies. That was a suit to compel respondent officials of the Ministry of Transportation and Communication to allow the reopening of a radio station which had been closed on the ground that it had allegedly been used to incite the people to sedition. The petitioner contended that it was not heard before its station was closed. However, it subsequently moved to withdraw its petition on the ground that it had sold the station to a party and the National Telecommunications Commission had expressed willingness to grant a license. The Court considered the case moot. By way of giving guidelines, it held that before a broadcast station may be closed, the cardinal primary rights previously enumerated in *Ang Tibay v. CIR*[20] must be observed, one of which is the right of a party to be heard in an administrative investigation. The Court stated that radio and television stations are protected by the free speech clause of the Constitution, although compared to print media their freedom is somewhat lesser. This is because the impact of speech is forceful and immediate. Unlike the readers of printed work, the radio audience has lesser opportunity to cogitate, analyse and react to the utterance. At the same time, the Court recognized the role which broadcast media play in the information of the public.

II. THE POWERS OF GOVERNMENT

Validity of Sequestration Orders.—The Provisional Constitution, adopted after the revolution, provides for the sequestration of ill-gotten wealth of the former President, his relatives and his associates. In *Tourist Duty Free Shops, Inc. v. Presidential Commission on Good Government,*[21] the Supreme Court denied an application for a temporary restraining order and upheld the validity of sequestration orders issued by the PCGG on its finding that the former First Lady was part owner of the TDFS and that the latter had received special privileges from the government.

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[17] United States v. W.T. Grant & Co., 345 U.S. 629 (1953); De Funis v. Odegaard, 416 U.S. 312 (1974).

[18] 139 SCRA 316 (1985).

[19] 137 SCRA 647 (1985).

[20] 69 Phil. 635 (1936).

[21] G.R. No. 74302, May 27, 1986.

On the other hand, in *Cruz v. Presidential Commission on Good Government*,[22] the Court denied an application for temporary restraining order against an order of the PCGG, "freezing" the bank account of the petitioner, a close associate of the former President, and allowing him to withdraw not more than ₱30,000 a month. The Court said it "perceiv[ed] no undue injury to the petitioner which would warrant the issuance of a temporary restraining order."

State Immunity from Suits. — In *United States v. Ruiz*,[23] the Supreme Court clarified that only when the state enters into a commercial contract can it be considered to have waived its immunity. In ordering the dismissal of an action for specific performance against the U.S. Government, the Court, in an opinion by Justice Abad Santos, said: "[A] state may be said to have descended to the level of an individual and can thus be deemed to have tacitly given its consent to be sued only when it enters into business contracts. It does not apply where the contract relates to the exercise of its sovereign functions. In this case the projects are an integral part of the naval base which is devoted to the defense of both the United States and the Philippines, indisputably a function of the government of the highest order; they are not utilized for nor dedicated to commercial or business purpose."

On the other hand, the Court held in *Malong v. PNR*[24] that the family of a passenger, who fell from a moving train because it was overloaded, and, as a result, died, could sue the Philippine National Railways because it is not performing a governmental function. The fact that the PNR is declared by law to be an instrumentality of the government does not change its character as a government corporation, no different from its predecessor, the Manila Railroad Co.

Validity of "One Port-One Operator" Policy of the PPA.—In *Philippine Ports Authority v. Mendoza*,[25] the Supreme Court upheld the validity of the "one port-one operator" policy in the operation of arrastre services, against the claim that such policy would enable the formation of monopolies, contrary to Art. XIV, sec. 2 of the Constitution. The background of that policy is as follows: In 1977 the Philippine Port Authority adopted a policy of allowing only one arrastre operator for every port in the Philippines. Accordingly, eleven operators at the Cebu City port merged into one corporation, called United South Dockhandler, Inc. However, other arrastre operators questioned the "one port-one operator" policy and obtained from the Regional Trial Court an injunction against the implementation of the policy. PPA appealed.

[22] G.R. No. 74281, May 27, 1986.
[23] 136 SCRA 487 (1985).
[24] 138 SCRA 63 (1985).
[25] 138 SCRA 632 (1985).

The Supreme Court held that the power granted to PPA under PD 857, Sec. 6(2)(V), to provide services within port districts, includes the power to adopt the policy in question. Such policy does not violate the constitutional ban on monopolies. The use of the word "regulate" in Art. XIV, Sec. 2 of the Constitution indicates that monopolies, properly regulated, may be allowed. The Court quoted from a treatise on Corporation Law: "Competition can best regulate a free economy. Like all basic beliefs, however, that principle must accommodate hard practical experience. There are areas where for special reasons the force of competition, when left wholly free, might operate too destructively to safeguard the public interest. Public utilities are an instance of that consideration."[26] In the case at bar, the area affected is maritime transportation in the port of Cebu, the operations of which affect not only the City of Cebu, the principal port in the South, but also the economy of the whole country. Any prolonged disjunction of the services being rendered there could prejudice not only inter-island but also international trade and commerce.

According to the Supreme Court, PPA's policy of integration through compulsory merger may not even be in this instance considered as promoting a monopoly because the fact of the matter is that actually USDI is composed of the eleven port service contractors which previously had used the ports. Consequently, the petition was granted and the orders appealed from were reversed.

The Nature of Government Corporations.—The recurrent question under the 1973 Constitution is whether all government owned or controlled corporations are embraced in the civil service, or whether only those created by special law are contemplated, thus excluding those organized under the general Corporation Code. The question arose in *National Housing Corp. v. Juco.*[27] Juco was an employee of the National Housing Corp. He filed a complaint for illegal dismissal with the Ministry of Labor and Employment but his case was dismissed by the labor arbiter on the ground that the NHA is a government-owned corporation and jurisdiction over its employees is vested in the Civil Service Commission. On appeal the NLRC reversed the decision and remanded the case to the labor arbiter for further proceedings. NHA in turn appealed to the Supreme Court.

In an opinion written by Justice Gutierrez, the Court held that the NHA, being 100% owned by the government, is embraced in the civil service and, therefore, falls under the jurisdiction of the Civil Service Commission. The NHA, it was pointed out, performs essentially governmental functions, that of carrying out the government housing program.

The NLRC invoked an opinion of then Secretary Abad Santos in which he held that the phrase "government-owned or controlled corporations"

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26 OLECK, MODERN CORPORATION LAW 197.
27 134 SCRA 172 (1985).

in Section 1, Article XII, B, of the Constitution contemplates only government corporations *created by special law.* He stated that since the Constitution provides for the organization or regulation of private corporations only by "general law," expressly excluding government-owned or controled corporations, it follows that whenever the Constitution mentions government-owned or controlled corporations, it must refer to those created by special law. The NLRC also invoked PD No. 868 which repealed laws exempting government-owned or controlled corporations from the coverage of the civil service laws and rules to show that corporations not governed by special charters or laws are not within civil service coverage.

In disposing of these contentions, the Court held that the Constitutional Convention referred only to government-owned or controlled corporations created by special law because they were the only corporations then in existence. Accordingly, the fact that corporations owned or controlled by the government may be created by special charter does not mean that such corporations not created by special law are not covered by civil service. For the same reason, the decree repealing laws granting exemption to government corporations created by special laws from the coverage of civil service laws referred to them and not also to those created under the Corporation Law because the laws repealed granted exemption only to such corporations created by special laws. There was no similar exemption granted in the general Corporation Law which called for repeal.

The Court pointed out the mischief of excluding government corporations not created by special law from the scope of the Civil Service. Exemption would permit the circumvention of Art. XII, B, Sec. 1 of the of the 1973 Constitution. It would be possible for a regular ministry in the government to create subsidiary corporations under the Corporation Code funded by a willing legislature. Such corporations could in turn create subsidiary corporations. These corporations would enjoy the best of the two worlds. The officials and employees would be free from the strict accountability required by the Civil Service Law and the regulations of the Commission on Audit. Their income would not be subject to the competitive restraints of the open market nor to the terms and conditions of civil service employment. Conceivably, all government-owned or controlled corporations could be created, no longer by special charters, but through incorporation under the general law. The constitutional amendment including such corporations in the scope of the civil service would cease to have any application.

It may indeed be that if government corporations created under the Corporation Law are exempted from the scope of the Civil Service that their officials and employees will have the advantages pointed out by the Court. But I do not see how they can have "the best of the two worlds," because, for one thing, they will not have the security of tenure that civil

service laws give to its members. They will have job security, to be sure, as the labor laws would afford them, but not the security of tenure of civil servants which is concededly greater than that given to other employees.

The fact is that government entities may have to be organized under the Corporation Law for purely business reasons. In that case, the government has to be competitive, which obviously it cannot do if it is constrained by the laws on civil service. On the other hand, if a government entity is incorporated under a special law because it is organized for a public purpose, there is every reason to consider its employees civil service employees.

Justice Abad Santos dissented. He argued that the NHA was organized in accordance with the Corporation Law (Act No. 1459). Hence, it is not covered by Civil Service Laws. However, he said he was not prepared to say whether on the other hand it was covered by the Labor Code. That must depend, he said, upon the purpose of the inquiry. A corporation may be "government-owned or controlled" for one purpose but not for another.

III. INDIVIDUAL RIGHTS

A. *Due Process*

Publication as Condition for the Effectivity of Laws.—In *Tañada v. Tuvera*[28] the Supreme Court unanimously ruled that presidential issuances of a public nature or those of general applicability must be published before they can take effect. That case was a suit for mandamus arising from complaints against secret decrees issued during the martial law period. But while the Justices were as one in requiring publication, they were divided on the question whether that should be in the *Official Gazette.*

Four Justices[29] contended that publication in the *Official Gazette* was required on the basis of the provision of Commonwealth Act No. 638, which states: "There *shall* be published in the *Official Gazette*: [1] all important legislative acts and resolutions of a public nature of the Congress of the Philippines; [2] all executive and administrative orders, proclamations, except, such as have no general applicability." The word "shall," in their opinion, imposes on the government the duty to publish the decrees.

On the other hand, eight Justices held that publications in the *Gazette* was not required. Chief Justice Fernando, with whom four Justices concurred, held the view that "publication need not be confined to the *Official Gazette.*" Justice Plana argued that publication in the *Official Gazette* was not required for two reasons. First, Art. 2 of the Civil Code provides that if a statute provides its own date of effectivity, it shall take effect on that date. Secondly, Commonwealth Act No. 638 does not say that if the laws

[28] 136 SCRA 27 (1985).

[29] Justice Escolin wrote an opinion in which Justices Teehankee, Melencio-Herrera and Relova concurred.

required to be published in the *Gazette* are not published there that those laws cannot take effect. Indeed, Commonwealth Act No. 638 cannot so provide because statutes "are equal and stand on the same footing. A law, especially an earlier one of general application, such as Commonwealth Act No. 638, cannot nullify or restrict the operation of a subsequent statute that has a provision of its own as to when and how it will take effect. Only a higher law, which is the Constitution, can assume that role."

There is much to commend this view of Justice Plana. At the same time there is a need for an official repository of all laws, so that a provision for an *Official Gazette* in the Constitution appears to be necessary.

Problems of Retroactivity.—In the same case of *Tañada v. Tuvera*,[30] the Justices expressed views on the problem of retroactivity created as a result of a ruling that unless it is published in the *Gazette* a decree would have no force and effect. Justice Escolin, with Justices Teehankee, Melencio-Herrera and Relova, said that presidential decrees which had not been published in the *Official Gazette* had no force and and effect unless parties had relied on them. Chief Justice Fernando disagreed. He thought that it was enough if the decrees had been published or brought to the attention of those they are intended to affect. He explained that unless this was done, transactions made on the basis of such decrees would be open to question. Criminal prosecutions based on such decrees might be attacked as ex post facto.

An Unbiased Judge as Requirement of Due Process.—In *Tañada v. Philippine Atomic Energy Commission*[31] the Supreme Court granted a petition for prohibition and restrained the PAEC from hearing an application for license for the operation of the Bataan nuclear power plant. The Court, through Justice Plana, found that in three publications, the PAEC had prejudged the safety of the nuclear power plant. Although at the time two of the publications were issued a majority of the PAEC commissioners had not yet been appointed, nonetheless they were then already holding responsible posts in the PAEC and, therefore, they could not escape responsibility for these publications.

Chief Justice Aquino dissented on the ground that the question was political. He stated: "The great public interest in the dispute does not justify the petitioners in using the Supreme Court to interfere with the hearings of the PAEC."

On the other hand, Justice Patajo, dissenting, pointed out that the pamphlets used as evidence of prejudgment, referred to the safety of nuclear power plants in general and not to the Bataan plant in particular

The Right of the State to be Heard. — In *People v. Bocar*,[32] the Supreme Court held that the summary dismissal of a criminal case, based solely

[30] *Supra* note 28.
[31] 141 SCRA 307 (1986).
[32] 138 SCRA 166 (1985).

on the questioning by a judge of complainant and the accused without placing them under oath, constitutes a denial of the State's right to due process and ousts the court of jurisdiction. Consequently, the trial court's order dismissing the case was void and could serve as a bar to another prosecution for the same offense.

B. *Search and Seizure*

The Problem of Describing Books and Other Literature. — Following the 1984 decision in *Burgos v. Chief of Staff*,[33] the Court in 1985, in *Corro v. Lising*,[34] invalidated for lack of particular description a search warrant issued by the Regional Trial Court. The Court found the following description lacking in particularity: "1. Printed copies of Philippine Times; 2. Manuscript/drafts of articles for publication in the Philippine Times; 3. Newspaper dummies, articles, printed matters, handbills, leaflets, banners; 4. Typewriters, duplicating machines, mimeographing and tape recording machines, video machines and tapes, which have been used and are being used as instrument and means of committing the crime of inciting to sedition defined and penalized under Article 142 of the Revised Penal Code, as amended by PD 1835."

Similarly, in *Nolasco v. Cruz Paño*,[35] a warrant for the seizure of "Documents, papers and other records of the Communist Party of the Philippines/New People's Army and/or the National Democratic Front, such as Minutes of the Party Meetings, Plans of these groups, Program List of possible supporters, subversive books and instructions, manuals not otherwise available to the public, and support money from foreign or local sources was held to be lacking in particularity.

At the heart of the problem in these cases was the fact that the documents and papers in question had been ordered seized not for what they were but for the ideas which they contained. Had they been ordered taken because, say, they were the subject of theft, their description might be sufficient. But because the basis for their seizure was their content, the requirement that the things seized must be particularly described must be observed with "the most scrupulous exactitude."[36] As the U.S. Supreme Court held, the danger of disregarding this requirement is the danger of leaving the protection of freedom of expression to the whim of the officers charged with executing the warrant. Indeed, Justice Abad Santos noted in his concurring opinion in *Nolasco v. Cruz Paño* that, under similar warrants as that involved in that case, even *Playboy Magazines* had been seized by the military.

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[33] 133 SCRA 800 (1984).
[34] 137 SCRA 541 (1985).
[35] 139 SCRA 502 (1985).
[36] Marcus v. Search Warrant, 367 U.S. 717 (1961) (seizure of "obscene publications"); A Quantity of Books v. Kansas, 378 U.S. 206 (1964) (seizure of "obscene books.").

Warrantless Searches anl Seizures. — In *Nolasco v. Cruz Paño*,[37] one of the petitioners, Milagros Aguilar-Roque, had long been wanted for rebellion for which charges had been filed against her with the military commission. On August 6, 1984, she was finally arrested, together with Cynthia Nolasco, by the Constabulary Security Group. The arrest took place at 11:30 a.m. at the intersection of Mayon and P. Margal streets, Quezon City. At 12 noon of the same day, the apartment she was renting at 239-B Mayon St. was searched and 428 documents and a portable typewriter and 2 wooden boxes were seized. On the basis of the documents seized, the fiscal's office charged Aguilar-Roque and the other petitioners merely with illegal possession of subversive materials. The case was filed with the Metropolitan Trial Court. Aguilar-Roque asked for the suppression of the evidence, but, as her efforts failed, she went to the Supreme Court. Although the search was made without a warrant, it turned out that, on the day the search was conducted, Judge Ernani Cruz Paño of the Regional Trial Court had issued a warrant against Aguilar-Roque. The Supreme Court annulled the search warrant for lack of particular description, but, just the same, upheld the search and seizure in this case on the ground that it was incidental to a valid arrest.

In invalidating Judge Cruz Paño's warrant, the Court stated, through Justice Melencio-Herrera: "[The warrant] does not specify what the subversive books and instructions are; what the manuals not otherwise available to public contain to make them subversive or enable them to be used for the crime of rebellion. There is absent a definite guideline as to what items might lawfully be seized, thus giving the officers of the law discretion regarding what articles they should seize. It is thus in the nature of a general warrant."

But the Court nonetheless sustained the search and seizure as incident of a valid arrest. It stated: "Considering that Aguilar-Roque has been charged with Rebellion, which is a crime against public order; that the warrant for her arrest has not been served for a considerable period of time; that she was arrested within the general vicinity of her dwelling; and that the search of her dwelling was made within a half hour of her arrest, we are of the opinion that, in her respect, the search at No. 239-B Mayon Street, Quezon City, did not need a search warrant; this, for possible effective results in the interest of public order."

This part of the majority opinion drew sharp dissents from Justices Teehankee, Abad Santos and Cuevas. Justice Cuevas's concurring and dissenting opinion is notable for its discussion of the validity of warrantless searches as incident of a valid arrest. He argued that the search in this case could not be considered because the search took place half an hour after the arrest and at a place far from the place of the arrest. "[Thus] the search

[37] *Supra* note 35

was made in a place other than the place of arrest and not on the occasion of, nor immediately after, the arrest." He agreed, however, that not all the things seized should be ordered returned to their owners. Objects and properties, the possession of which is prohibited by law, cannot be returned to their owners. These include subversive materials.

C. *The Privilege Against Self Incrimination*

Immunity Statutes and the Privilege. — In *Galman v. Pamaran*,[33] the prosecution questioned before the Supreme Court a ruling of the Sandiganbayan, excluding the testimony of the accused before the Agrava Board investigating the Aquino-Galman murder case on the ground that the accused were immune from the use of their testimony. The prosecution argued that under Section 5 of PD 1886, such testimony was excluded only if given after a witness had invoked the right against self-incrimination. The immunity clause provided:

> No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to a subpoena issued by the Board on the ground that his testimony or the evidence required of him may tend to incriminate him or subject him to penalty or forfeiture, but his testimony or any evidence produced by him shall not be used against him in connection with any transaction, matter or thing concerning which he is compelled, after having invoked his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying nor shall he be exempt from demotion or removal from office.

The Court dismissed the petition by a vote of 10-3, with almost all the concurring Justices writing separate opinions to explain their votes. A common theme running through the separate opinions of the majority is that, considering the language of Section 5, the accused had been compelled to testify and that the only way to redress violation of their constitutional right was to declare their testimony inadmisible against them. "[T]he strong testimonial compulsion imposed by Sec. 5 of PD 1886, viewed in the light of the sanctions provided in Sec. 4, infringes upon the witness' right against self-incriminatiin," said Justice Cuevas. He argued that "The only way to cure the law of its unconstitutional effects is to construe it in a manner as if the immunity had in fact been offered. The applicability of the immunity granted by P.D. 1886 cannot be made to depend on a claim of the privilege against self-incrimination which the same law practically strips away from the witness."

Justices Teehankee, Melencio-Herrera and Relova dissented in separate opinions. Justice Teehankee argued that the accused did not invoke the privilege before giving their testimony. They in fact appeared before the

[33] 138 SCRA 294 (1985).

Agrava Board as ordinary witnesses who could invoke the privilege only when a question was asked. He rejected the majority's contention that the accused should at least have been warned of their right of silence. "As observed by former Senator Ambrosio Padilla as *amicus curiae* . . . they were all too eager to testify and make a strong effort to gain support from the Fact-Finding Board and the public for the military version and report that the assassin was Galman who was forthwith gunned down by the military escorts and guards at the tarmac."

Immunity statutes are enacted to provide a substitute for the privilege against self-incrimination. In the United States, following *Counselman v. Hitchcock,*[39] which held that to justify compulsion to testify the witness must be given immunity coextensive with the privilege, the U.S. Congress enacted a law granting "transactional immunity," by exempting the witness from prosecution.[40] But possibly through a misreading of a later ruling,[41] Congress subsequently replaced "transactional immunity" with "use and fruits immunity,"[42] which merely exempts a witness from the use of his testimony but not from prosecution in respect of the transaction or matter concerning which he is compelled to testify. A subsequent case[43] found "use of fruits immunity" adequate to supplant the privilege against self-incrimination.

In the Philippines, Republic Act No. 1379, which took effect on July 18, 1955, grants "transactional immunity" to witnesses in proceedings for the forfeiture of unexplained wealth. On the other hand, PD 1886, involved in *Galman v. Pamaran,* obviously following the developments abroad, gave only "use and fruits immunity." The Decree was promulgated to enable the Agrava Board to secure testimony not otherwise available in investigating the assassination of Sen. Aquino on August 21, 1983.

In order to claim immunity, a witness must first invoke his privilege against self-incrimination. This is clear from the language of the Decree. For it may well be that the witness was waiving the privilege and was willing to testify. It did not necessarily follow that because Section 5 required every person summoned by the Agrava Board to testify that such person was thereby compelled to testify. Whether he was compelled to testify is a question of fact.

On the other hand, it could not simply be assumed either that because some of the accused were, as Justice Teehankee put it in his dissent, eager to sell their version of the assassination, that their testimonies were voluntary. The testimony could indeed be exculpatory, as the natural tendency

[39] 142 U.S. 547 (1892).
[40] See Compulsory Testimony Act of 1893, 27 Stat. 443.
[41] Murphy v. Waterfront Commission, 378 U.S. (1964).
[42] 18 USC sec. 6002.
[43] Kastigar v. United States, 406 U.S. 446 (1972); Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972).

of a witness is to avoid an admission of guilt, but whether the testimony is voluntary is a different matter.

What the Supreme Court could have looked into was whether the accused, when they appeared as witnesses before the Board, had been represented by counsel, or whether they had been informed of their right of silence and, in the event they invoked this right, offered the immunity provided by the Decree. Those who were, or at least who knew that it was their right to have the assistance of counsel, could be held to have waived the privilege against self-incrimination, by their failure to invoke the privilege. Such, for instance, was Gen. Fabian Ver, whose testimony showed beyond doubt that he knew his constitutional right. But those who testified without counsel and without being warned of their constitutional right could not be similarly categorized. As to them there was doubt whether, in failing to invoke the privilege, their intention was to waive it.

The argument made by some of the majority Justices that it was futile for the witnesses to claim the privilege because the law required them to testify, overlooks the fact that the Decree itself required such claim to be made in order to exclude the possibility that a witness was willing to testify.

Waiver of Miranda Warnings. — Last year, in *People v. Galit*,[44] the Court reversed a conviction for robbery with homicide for two reasons: first, it found the testimony of the principal witness to be unreliable and, second, it found the confession of the accused to have been obtained through torture. This finding would have sufficed to render the confession of the accused inadmissible, and, since there was no other evidence, to reverse the conviction of the accused. But the Court added by way of dictum: "This Court, in the case of *Morales v. Ponce Enrile*,[45] laid down the following procedure in custodial investigations: 'No custodial investigation shall be conducted unless it be in the presence of counsel engaged by the person arrested, or by any person on his behalf, or appointed by the Court upon petition either of the detainee himself or of anyone on his behalf. The right to counsel may be waived but the waiver shall not be valid unless made with the assistance of counsel. Any statement obtained in violation of this procedure, whether exculpatory or inculpatory in whole or in part, shall be inadmissible in evidence.' "

Actually, the quotation from *Morales v. Ponce Enrile* was itself merely a dictum, because the Court in fact dismissed the petition for habeas corpus in that case after finding that, although the petitioners had been arrested without a warrant, they were subsequently charged in court with rebellion.

When this fact was pointed out to the Court in *People v. Sison*,[46] the Court referred to *People v. Galit* as having "put to rest all doubts regarding

[44] 135 SCRA 465 (1985).
[45] 121 SCRA 538 (1983).
[46] 142 SCRA 219 (1986).

the ruling in *Morales v. Enrile* and *Moncupa v. Enrile cases.*" On this basis, it upheld the trial court's ruling rejecting the extrajudicial confession of a member of the New People's Army charged with subversion. Thus, a dictum became a doctrine.

Heretofore, the Court has been determining the voluntariness of waivers on a case-to-case basis. In fact, in *People v. Nicandro*,[47] which it decided only last February 11, 1986, or just three months before *People v. Sison*, it set aside an extrajudicial confession after finding that it was obtained by the police without adequately explaining to the accused her rights. With the *Morales* dictum now enshrined as doctrine, it would seem that the Court has adopted a flat rule of judicial administration: No extrajudicial confesison given without the assistance of counsel is admisible even if the accused has been adequately informed of his rights of silence and to counsel, unless he was assisted by a counsel at the beginning in waiving those rights. It would seem that the case-to-case approach, looking for aggregate unfairness, has become, to adopt a figure of Profesor Freund, so much weariness of flesh and spirit that a flat rule of judicial administration became necessary.

The insistence on the new rule may result in banning all waivers of the rights of suspects under Art. IV, sec. 20. For a suspect, who may have been assisted by counsel at the initial stage of the investigation, may find it hard to discharge his counsel. The result may well be that no confession would ever be given without the assistance of counsel. This will require the police to keep attorneys at the station house, otherwise their investigation will have to await the arrival of counsel. Whether this will unduly hamper police investigations, only time and experience with the new rule can tell.

People v. Nicandro was an appeal from a judgment of conviction for selling marijuana cigarettes and flowering tops. The trial court found the accused guilty and sentenced her to *reclusion perpetua* and fined her ₱20,000.00 on the basis of the testimony of Pat. Romeo Joves and her own statement allegedly given during custodial interrogation. The Supreme Court found the testimony of Pat. Joves full of contradictions and consequently gave it no weight. As to the statement of the accused to the police, the Court found that it had been given without the benefit of Miranda warnings. The opinion of the Court, written by Justice Plana, stressed the duty of police interrogators to give "meaningful information rather than just the ceremonial and perfunctory recitation of an abstract constitutional principle" to the accused. "[The interrogator] is not only duty-bound to tell the person the rights to which the latter is entitled; he must also explain their effects in practical terms, e.g., what the person under interrogation may or may not do, and in a language the subject fairly understands. . . . [W]here

[47] 141 SCRA 289 (1986).

the right has not been adequately explained and there are serious doubts as to whether the person interrogated knew and understood his relevant constitutional rights when he answered the questions, it is idle to talk of waiver of rights." In this case, the Court said, "What specific rights [Pat. Joves] mentioned to appellant, he did not say. Neither did he state the manner in which the appellant was advised of her constitutional rights so as to make her understand them."

Had the Court simply concluded on this note that there was no valid waiver of the right to silence and to counsel, there would be no question. For these rights can be waived.[48] But it said that "the right of a person under investigation to remain silent and to counsel, and to be informed of such right can be waived." The right to be informed of the rights to remain silent and to counsel — what is known as the right to be given Miranda warnings — cannot be waived because it is the basis for making an intelligent waiver. This is clear from the ruling in *Miranda v. Arizona*,[49] from which the Constitutional provision was adopted: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive *effectuation* of those rights, provided the waiver is made voluntarily, knowingly and intelligently." It is thus the "effectuation of the rights" to silence and to counsel which can be waived, not the right to the Miranda warnings.

D. *Freedom of Expression*

Scope of Freedom of Speech. — In *Salonga v. Cruz Paño*,[50] one of the bases for the finding of probable cause against the petitioner was a statement he had allegedly made while in the United States to the effect that a violent struggle in the Philippines was most likely should reforms be not instituted by President Marcos. This was held to be a legitimate exercise of freedom of thought and expression.

> ...The United States Supreme Court in *Noto v. United States* (367 U.S. 290) distinguished between the *abstract teaching* of the moral propriety or even moral necessity for a resort to force and violence and speech which would prepare a group for violent action and steer it to such action. In *Watts v. United States* (394 U.S. 705), the American court distinguished between criminal threats and constitutionally protected speech.
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> In the case before us, there is no teaching of the moral propriety of a resort to violence, much less an advocacy of force or a conspiracy to organize the use of force against the duly constituted authorities. The alleged remark about the likelihood of violent struggle unless reforms are instituted is not a threat against the government. Nor is it even the uninhibited, robust, caustic, or unpleasantly sharp attack which is protected

[48] *E.g.*, People v. Caguioa, 95 SCRA 2 (1980).
[49] 384 U.S. 436 (1968).
[50] *Supra* note 14.

> by the guarantee of free speech. Parenthetically, the American case of *Brandenburg v. Ohio* (395 U.S. 444) states that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. The words which petitioner allegedly used according to the best recollections of Lovely are light years away from such type of proscribed advocacy.

The distinction between advocacy of abstract doctrine and advocacy of action is really not new. It was first made in *Gitlow v. United States*[51] and later emphasized in *Yates v. United States.*[52] In the Philippines, such distinction was relied upon to sustain the conviction for inciting to sedition of early Communists in *People v. Evangelista.*[53]

In *Salonga v. Cruz Paño,* the petitioner's speech did not constitute incitement, but merely expression of opinion. But suppose it was an incitement, would the speaker be liable? The Court's citation of *Brandenburg v. Ohio* raises some inquiry whether the "bad tendency" test adopted in the early cases would still be adhered to. For under the *Brandenburg* test, it is not enough that the speaker advocated action or engaged in incitement but the likelihood of imminent lawless action must also be proved. Some American commentators[54] consider the *Brandenburg* test to be the most speech-protective test yet devised, by its combination of emphasis of the nature of words (the incitement) and the circumstances in which they are used (which makes their utterance dangerous). Whether our Supreme Court is prepared to adopt this test for subversive speech is not clear. In its decision in 1951 in *Espuelas v. People,*[55] the last word on the matter, it adhered to the "bad-tendency" test of its earlier decisions.[56] In other contexts, however, pressed preference for the "clear-and present danger" rule.
particularly speech in public places[57] and movie censorship,[58] it has ex-

The objection to "clear-and-present danger" is that it requires judges to guess about the future. It is thus a subjective test. On the other hand, the test of incitement in *Brandenburg* focuses more on the nature of the words rather than their context and is thus regarded as a more objective standard for free speech cases.

The Validity of Movie Censorship. — In *Gonzales v. Kalaw Katigbak*[59] the Supreme Court ruled that the power of the Board of Review for Motion

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51 268 U.S. 652 (1925).
52 354 U.S. 298 (1957).
53 57 Phil. 354 (1932). *See also* Evangelista v. Earnshaw, 57 Phil. 255 (1932).
54 Gunther, *Learned Hand and the Origin of Modern First Amendment Doctrine: Some Fragments of History,* 27 STAN. L. REV. 719 (1975).
55 90 Phil. 524 (1951).
56 People v. Evangelista, 57 Phil. 354 (1932); Evangelista v. Earnshaw, 57 Phil. 255 (1932).
57 Reyes v. Bagatsing, 125 SCRA 553 (1983).
58 Gonzales v. Kalaw Katigbak, 137 SCRA 717 (1985).
59 137 SCRA 717 (1985).

Pictures and Television is limited to the classification of films and that censorship can only be ordered where there is a clear-and-present danger of a substantive evil to public safety, public morals, public health or any other public interest. On this ground, the Supreme Court, through Chief Justice Fernando, found that the Board had committed an abuse of discretion when it ordered the deletions of portions of Lino Brocka's *Kapit sa Patalim,* a commentary on social and political conditions in the country, and only relented later although still classifying the film as fit "For adults only," after the movie producer brought the case to the Court. But though the Court found an abuse of discretion, it failed, for lack of necessary votes, to find that the abuse was grave so as to justify setting aside the Board's action. The Board classified the film as fit for adult showing only because of scenes showing women in a theater club, erotically dancing naked, and lesbian kissing and caressing. The Court found the Board's perception as to what is obscene to be "unduly restrictive," and endorsed the following test of obscenity in *Roth v. United States*:[60] "Whether to a person applying contemporary community standards, the dominant theme of the material, taken together as a whole, appeals to the prurient interests." Nevertheless, the Court failed to find, as already stated, that the Board had gravely abused its discretion.

The Court left in doubt the validity of Executive Order No. 876-A, section 3(c) of which authorizes censorship of movies found violating the standards set forth therein. In the United States, movie censorship has been upheld provided the procedure for the review of films assures prompt judicial review. In *Freedman v. Maryland,*[61] the U.S. Supreme Court ruled: "[W]e hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the danger of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. ... [T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing of the film. ... [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

The Validity of Area Restrictions. — In *Reyes v. Bagatsing,*[62] the Supreme Court upheld the use of streets and parks for public assemblies and rallies. From time immemorial, they have been regarded as public forums for the discussion of public issues. May certain streets be nevertheless declared off-limits to demonstrations and rallies? In *German v. Barangan*[63] the Court, through Justice Escolin, held that the restriction on the

[60] 354 U.S. 476 (1957).
[61] 380 U.S. 51 (1965).
[62] 125 SCRA 553 (1983).
[63] 135 SCRA 514 (1985).

use of J. P. Laurel Street in Manila was justified by the need to secure the safety of the President and his family at Malacañang Palace. It recalled that, in 1972, mobs had crashed through the palace gates and scaled its fence. It dismissed the petitioners' claim that their intention on October 2, 1984, in marching on J. P. Laurel Street, was to hear mass at the St. Jude Chapel near Malacañang, until they were dispersed by the Presidential Security Command. Accordingly, the Court dismissed the petition for mandamus.

Justice Teehankee dissented, pointing out that there was no clear-and-present danger posed by the proposed rally because the respondents were in full control. They had in fact placed an advanced checkpoint as far as the Sta. Mesa Rotonda.

While admitting that the petitioners were really anti-government protesters, Justice Makasiar nevertheless dissented on the ground that there was no clear-and-present danger of disorder.

The validity of area restrictions to protect foreign embassies was not decided, although the question was raised, in the earlier case of *Reyes v. Bagatsing*.[64] There the Court stated: "... Moreover, respondent Mayor relied on Ordinance No. 7295 of the City of Manila prohibiting the holding or staging of rallies or demonstrations within a radius of five hundred (500) feet from any foreign mission or chancery and for other purposes. Unless the ordinance is nullified, or declared *ultra vires*, its invocation as a defense is understandable but not decisive, in view of the primacy accorded the constitutional rights of free speech and peaceable assembly. Even if shown then to be applicable, that question still confronts this Court." The ruling in *German* is therefore the first case of its kind on this question.

E. *The Writ of Liberty*

Functions of the Writ of Habeas Corpus. — The writ of habeas corpus proved to be the efficacious remedy it is intended to be for inquiring into all manners of illegal restraints. In *Toyoto v. Ramos*,[65] the Supreme Court ordered the release, by means of the writ of habeas corpus, of persons whose prosecution for subversion had been dismissed by the trial court but whose detention by the military was nevertheless continued. The petitioners belonged to a group called "Urban Poor." They were charged with subversion and no bail was recommended for their provisional liberty. However, the Regional Trial Court found that their only purpose in holding a rally was to petition the government to allow them to transfer to the Dagat-dagatan government project for squatters Accordingly, it ordered the dismissal of the case against the petitioners, but the military refused to release them, on the ground that a PDA had been issued against them. They, therefore, filed a petition for habeas corpus on December 5, 1985. Three days later, they

[65] 139 SCRA 316 (1985).
[64] *Supra* note 62.

were temporarily released by the military. The respondent then asked the Supreme Court to dismiss the case on the ground that it had become moot. The Court refused to treat the matter as moot because the petitioners could be rearrested by the military any time despite their acquittal by a court of competent jurisdiction. Speaking for the Court, Justice Abad Santos wrote: "We thus have the sorry spectacle of persons arrested, charged and tried for merely exercising their constitutional rights. And the injury was compounded when the over zealous minions of the government refused to release them even after they had been acquitted by a court of competent jurisdiction because they were covered by a PDA. To be sure it cannot be denied that there was a flagrant violation of human rights."

In the same vein, the dismissal of a petition for habeas corpus cannot be rendered moot by the mere release of the petitioners if nonetheless they are subject to other forms of restraints. In *Moncupa v. Ponce Enrile*,[66] the petitioner was arrested on April 22, 1982 and subsequently charged with illegal possession of subversive materials before the City Court. His companions were charged with subversion but he was excluded from the information. Yet his motions for bail were denied. For this reason he applied for habeas corpus. He was later temporarily released from detention under certain conditions. The question was whether this rendered his case moot and academic.

The Supreme Court ruled that the conditions attached to his release constituted restraints justifying the issuance of the writ. These restrictions concerned curtailment on his right to travel outside Metro Manila, to change his place of residence, and to give interviews to the media. Such restrictions limited the freedom of movement of petitioner. For it is not physical restraint alone which can be inquired into by means of the writ of habeas corpus but any kind of restraint. Indeed the restrictions imposed in this case may be likened to the release of an accused on probation. The probationer is not really a free man.

Did the 1983 Ruling in Garcia-Padilla Become Precedent? — In what was generally considered a major blow to civil liberties, the Court in 1983 held in *Garcia-Padilla v. Ponce Enrile*:[67] "The function of the PCO is to validate, on constitutional ground, the detention of a person for any of the offense covered by Proclamation No. 2045 which continues in force the suspension of the privilege of the writ of habeas corpus. If the arrest has been made initially without any warrant, its legal effect is to render the writ unavailing as a means of judicially inquiring into the legality of the detention in view of the suspension of the privilege of the writ. The grant of the power to suspend the said privilege provides the basis for continuing with perfect legality the detention as long as the invasion or rebellion has not been repelled or quelled, and the need therefor in the interest of public safety

[66] 141 SCRA 233 (1986).
[67] 121 SCRA 472 (1983).

continues. The significance of the conferment of this power, constitutionally upon the President as Commander-in-Chief, is that the exercise thereof is not subject to judicial inquiry, with a view to determining its legality in the light of the bill of rights guarantee to individual freedom. . . ."

Last year, the Court, instead of acting on the motion for reconsidera- of the petitioners, dismissed the case on the ground of mootness.[68] Thirteen of the petitioners had been released, while one had been charged with illegal possession of firearms and ammunition and a warrant for his arrest had been issued by the trial court. But even as the Supreme Court had declared the case moot, it said that had the petitioners remained under detention, it would have reconsidered its earlier decision because of the promulgation in the meantime of PD 1877, replacing the presidential commitment order with the preventive detention action (PDA) which authorized the detention of individuals for one year. The Court thus left open its original holding that where the privilege of the writ of habeas corpus is suspended, courts are without power to inquire into the arrest of persons covered by the proclamation suspending the privilege of the writ. But Chief Justice Fernando wrote that "while I signed the above *per curiam* opinion as it clarifies the duration of preventive detention, I am not persuaded that the original decision expresses what to my mind should be the controlling principles as to the questions dealt with in my separate opinion." Similarly, Justice Abad Santos concurred and said: "If I had my way I would set the original decision aside because of its slavish tone." Justice Teehankee reiterated his dissent in the original decision.

At the very least, it is submitted that with the dismissal of the case on the ground of mootness, the decision rendered in 1983 never became precedent. It is as though the petitioners had been released while their application for the writ was pending. At any rate, the Court, three months later, indicated that it would not be bound by a PDA if in the meantime the detainee had been tried and found innocent. In *Toyoto v. Ramos*,[69] it PDAs, after the trial court had dismissed charges of subversion against ordered the permanent release of the petitioners who were being held under them for insufficiency of evidence. In an opinion by Justice Abad Santos, the Court condemned this as "a flagrant violation of human rights."

F. *Social and Economic Rights*

Right to College Education and Academic Freedom. — In two cases decided in 1985, the Supreme Court upheld students right to a college education which cannot be denied simply because students have engaged in demonstrations. In *Villar v. TIP*,[70] the Court, through Chief Justice Fernando, held: "The Constitution guarantees the right to an education not only in

[68] 137 SCRA 647 (1985).
[69] *Supra* note 65.
[70] 135 SCRA 706 (1985).

the elementary and high school but also on the college level. While Art. XV, sec. 6(5) mentions only free elementary and secondary education, it does not preclude the establishment by the state of free college education. Free college education is not mentioned as a duty of the State only because of the lack of sufficient funds." But, the Court added, the right to college education is available only on the basis of merit. Accordingly, it approved the denial of enrollment to three students because of "marked deficiency," even as it ordered the enrollment of four others who had been refused admission for engaging in protests. The Court quoted Justice Fortas's statement in *Tinker v. Des Moines*[71] that students do not shed their constitutional right of expression at the gate of the schoolhouse.

On the same ground, the Court, in *Arreza v. Gregorio Araneta University Foundation*,[72] ordered the admission of students who had led a rally around the premises of the Gregorio Araneta University Foundation to protest the merger of the Institute of Animal Science with the Institute of Agriculture. The school authorities charged that the students had used "condemnatory language," and accordingly refused them enrollment. In granting mandamus, the Court reiterated its ruling[73] the previous year, 1984, to the following effect: "If in the course of such demonstration, with an enthusiastic audience goading them on, utterances, extremely critical, at times even vitriolic, were let loose, that is quite understandable. Student leaders are hardly the timid diffident type. They are likely to be assertive and dogmatic. They would be ineffective if during a rally they speak in the guarded and judicious language of the academe. At any rate, even a sympathetic audience is not disposed to accord full credence to their fiery exhortations. They take into account the excitement of the occasion, the propensity of speakers to exaggerate, the exuberance of youth. They may give the speakers the benefit of their applause, but with the activity taking place in the school premises and during the daytime, no clear and present danger of public disorder is discernible. This is without prejudice to the taking of disciplinary action for conduct, which, to borrow from Tinker, 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.' "

On the other hand, a school has the prerogative to choose its students as part of its constitutionally-guaranteed academic freedom. In *Tangonan v. Cruz Paño*[74] the Supreme Court sustained the lower court's decision dismissing a suit for mandamus to compel the Capitol Medical Center Nursing School to admit a student. The student had been admitted the previous school year, 1975-1976. Because she failed in a subject (Psychiatric Nursing), she tried to take the course again in another school, but she was denied admission for attempting to bribe the dean to admit her.

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71 137 SCRA 647 (1985).
72 137 SCRA 94 (1985).
73 Malabanan v. Ramento, 129 SCRA 359 (1984).
74 137 SCRA 245 (1985).

She then tried to reenroll at the Capitol Medical Center School of Nursing and, when she was denied admission, she brought a suit for mandamus.

In affirming the lower court's decision, the Court reiterated its ruling in *Garcia v. The Faculty Admission Committee, Loyola School of Theology*[75] that as part of its academic freedom, a school or college has a "wide sphere of autonomy certainly extending to the choice of students."

Transfer of Private Lands to Aliens Before the 1935 Constitution Valid.—In *Tejido v. Zamacoma,*[76] the Court, through Justice Cuevas, upheld the validity of transfers of private lands in favor of aliens before the effectivity of the 1935 Constitution. The appellants in that case brought an action for the recovery of 18 parcels of land in La Carlota, Negros Occidental alleging that the conveyance of the lands made by their predecessors-in-interest way back in 1926 was void because the person to whom they were conveyed, the late Pedro Uriarte, was a Spanish citizen. However, the trial court dismissed the case, holding that the prohibition in the 1935 Constitution against alien ownership of public or private lands in the Philippines took effect only on November 15, 1935.

On appeal the Court affirmed the decision. According to the Court, before the effectivity of the 1935 Constitution, there was no ban on aliens owning private lands in the Philippines. The prohibition contained in Act No. 2814 applied only to public agricultural lands or lands of the public domain. The Court ruled that Article XIII, section 5 of the 1935 Constitution, which in effect prohibited the transfer of private lands to aliens, can not be retroactively applied. Moreover, in this case, since the lands were at the time of litigation in the hands of Filipino citizens, there was no public policy which would be served by allowing the appellants to recover the lands.

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[75] 68 SCRA 277 (1975).
[76] 138 SCRA 78 (1985).