THE SUPREME COURT ON THE SUPREME LAW: AN ANNUAL SURVEY

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This article was originally given as a lecture on constitutional law for the benefit of those preparing for the annual bar examinations. While the primary aim was to give an account of Supreme Court decisions in 1988 and the first half of 1989 on this subject, it was obvious from the outset that such an account, in order to serve the purpose, should not consist merely of a summary of rulings. It must present the cases in perspective by relating them to the existing body of case law. The task, in Justice Frankfurter's words, called for the "admeasurement of judicial conclusions according to intrinsic coherence, to harmony with professed criteria, to consistency with invoked precedents and regard for relevant but unmentioned and unrejected precedents."[1]

In the performance of this task, occasional disagreements with the Court are inevitable. For the issues raised in some of the cases are among the most profound problems that can confront a nation. And when these issues are decided in specific controversies, their resolution is not for all times. The resolution constitutes an invitation to a national dialogue. As the philosopher John Rawls has argued, "[a]lthough the court may have the last say in settling any particular case, it is not immune from powerful political influences that may force a revision of its reading of the constitution. . . . The final court of appeal is not the court, nor the legislature, but the electorate as a whole."[2]

It is to respond to the invitation that this annual review of decisions in constitutional law is presented. The cases will be discussed under the following heads: "Judicial Review in Operation," "The Separation of Powers," and "Individual Rights."

I. JUDICIAL REVIEW

Some Problems of Prospectivity and Retroactivity

1. Retroactive and Prospective Overruling of Decisions. – In CRUZ v. PONCE ENRILE,[3] the Supreme Court ruled that its decision in *Olaguer*

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1 Frankfurter, *Thomas Reed Powell*, 69 HARV. L. REV. 797,798 (1956).

2 J. RAWLS, A THEORY OF JUSTICE 390 (1971), drawing on A. M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

3 160 SCRA 700 (1988).

v. Military Commission No. 34,[4] holding military tribunals to be without jurisdiction to try civilians during martial law as long as civil courts are open and functioning, applies retroactively not only to those cases pending review but even to those in which the sentences had already become final. As a result, the Court nullified the proceedings against 183 individuals, although it directed the Department of Justice to refile the charges within 180 days with the civil courts, with credit given for service of sentence should petitioners be again convicted in the new proceedings. The Court excepted, however, from its ruling parties who had fully served their sentences, those who had been acquitted and those who had been convicted but later granted amnesty. The main ruling rejected the Solicitor General's suggestion to limit the retroactive application of *Olaguer* and the distinction he urged between those charged with common crimes and those charged with so-called "political offenses." The Court, in an opinion by Justice Narvasa, stressed that the issue was the lack of jurisdiction of military tribunals over civilians:

> Conformably with this holding, the disposition of these cases would necessarily have, as a premise, the invalidity of any and all proceedings had before courts martial against civilian petitioners. There is all the more reason to strike down the proceedings leading to the conviction of these non-political detainees who should have been brought before the courts of justice in the first place, as their offenses are totally unrelated to the insurgency avowedly sought to be controlled by martial law.
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> Due regard for consistency likewise dictates rejection of the proposal to merely give "prospective effect" to *Olaguer*. No distinction should be made, as the public respondents propose, between cases still being tried and those finally decided or already under review. All cases must be treated alike, regardless of the stage they happen to be in, and since according to *Olaguer*, all proceedings before courts martial in cases involving civilians are null and void, the Court deems it proper to adhere to that unequivocal pronouncement, perceiving no cogent reason to deviate from the doctrine.

But, in NASECO v. NLRC,[5] the Court held that its 1985 decision in *NHA v. Juco*,[6] to the effect that employees of government-owned or controlled corporations, whether organized by special law or in accordance with the general corporation law, were subject to the jurisdiction of the Civil Service Commission, was only of prospective application. Through Justice Padilla, it ruled that cases involving employees of government firms organized under the general corporation law were cognizable by the NLRC if they had been filed before January 17, 1985, the date of the decision in *NHA v. Juco*, because at that time the applicable ruling[7] recognized the jurisdiction of the NLRC over such government corporations. In that case, the complaint for illegal dismissal of an employee had been

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[4] 150 SCRA 144 (1987).

[5] G.R. Nos. 69870 & 70295, Nov. 29, 1988.

[6] 134 SCRA 172 (1985).

[7] PAL v. NLRC, 124 SCRA 583 (1983); PAL v. NLRC, 126 SCRA 223 (1983); NASECO v. LEOGARDO, 130 SCRA 502 (1984).

filed on December 6, 1983 and "it would be oppressive to Credo [the complainant] to give the *NHA* ruling retroactive effect." Moreover, according to the Court, its decision in *NHA v. Juco*, which was based on the 1973 Constitution, had been abrogated by the 1987 charter which considers as members of the civil service only those employed in government-owned or controlled corporations "with original charters," thereby excluding those employed in those that are organized under the general law from coverage.

How do we account for the different results reached in the two cases of CRUZ v. PONCE ENRILE and NASECO v. NLRC? In both,the Court dealt with the effect to be given to its decisions overruling earlier ones concerning the jurisdiction of courts. But while it gave retroactive effect to its decision in one, it limited the effect of its other decision prospectively. If, as the Court stated in CRUZ v. PONCE ENRILE, its earlier ruling in *Olaguer* was premised on the invalidity of the military trials of civilians by military courts because of lack of jurisdiction, the question is why the lack of jurisdiction of the NLRC, as decreed in *NHA v. Juco*, was any less invalid. Conversely, if, as held in NASECO v. NLRC, it is the law (i.e., the *NHA* ruling) in force at the time of the filing of the complaint that is decisive on the question of jurisdiction, why were not decisions of military courts, rendered pursuant to prior decisions[8] sustaining their jurisdiction over civilians during martial law, valid, since the overruling decision in *Olaguer* was rendered only after those cases had been decided?

I would venture to suggest that the distinction lies in the fact that the objection to military trials of civilians goes to the fairness of proceedings, to the very integrity of such trials, and ultimately to the abhorrence for military trials of civilians, where the civil courts are open, although I should think that, to be consistent, the Supreme Court should have invalidated as well decisions of acquittal, for justice is done not only the accused but also the accuser.[9]

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[8] Aquino v. Military Commission No. 2, 63 SCRA 546 (1975); Gumaua v. Espino, 96 SCRA (1980); Buscayno v. Enrile, 102 SCRA 7 (1981); Sison v. Enrile, 102 SCRA 33 (1981); Luneta v. Special Military Commission No. 1, 102 SCRA 56 (1981); Ocampo v. Military Commission No. 25, 109 SCRA 22 (1981); and Buscayno v. Military Commission Nos. 1, 2, 6 and 25, 109 SCRA 273 (1981).

[9] This is shown by the Court's quotation in *Olaguer* from *Toth v. Quarles*, 350 U.S. 5 (1955): "The Presiding Officer at a court martial is not a judge whose objectivity and independence are protected by tenure and undiminished salary and nurtured by the judicial tradition, but is a military officer. Substantially different rules of evidence and procedure apply in military trials. Apart from these differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."

On the other hand, the error which the Court had perceived in *NHA v. Juco*, in upholding the jurisdiction of the Civil Service Commission over that of the NLRC, was simply the consequence of its interpretation of the 1973 Constitution on the scope of the civil service, an interpretation moreover that lacked the unanimity that *Olaguer* had in overruling a prior decision. Justice Abad Santos' dissent in the *NHA* case somewhat undercut the majority opinion's underpinning, although a later unanimous decision[10] applied it.[11]

It could not be that at bottom the different results reached in CRUZ v. PONCE ENRILE and NASECO v. NLRC were the consequence of the application of the provisions of the 1987 Constitution[12] which in the meantime had come into force. To be sure, in NASECO v. NLRC the Court assumed that the new Constitution applied to the case, but then only hypothetically, its real holding being based on the parties' reliance on the older ruling at the time of the commencement of the suit. It is doubtful whether had the suit been filed with the Civil Service Commission in compliance with *NHA v. Juco*, the Supreme Court would have nevertheless held that the case should have been brought in the NLRC.

The truth is that whether an overruling decision is to be given retroactive or only prospective effect must take into account various factors, among them (i) the purpose to be served by the new standards, (ii) the extent of the reliance by the parties on the old standard, and (iii) the effect on the administration of justice of a retroactive application of the new standards.[13] In CRUZ v. PONCE ENRILE, the Court placed greater weight on the purpose of the new rule prohibiting the military trials of civilians, even to the extent of invalidating in collateral proceedings final sentences and even at the risk -- it may be added -- that the new trials might be barred by the statute of limitations. On the other hand, in NASECO v. NLRC, the Court's primary concern was the fact that the parties had relied on the older doctrine and that the retrospective application of the new ruling would have an unsettling effect on the administration of justice. It is obvious that no rule of absolute retroactive invalidity can be formulated and that the best that can be hoped for is a sliding rule that takes into account the various factors earlier mentioned.

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[10] Quimpo v. Tanodbayan, 146 SCRA 137 (1986). *See also* MWSS v. Hernandez, 143 SCRA 602 (1986).

[11] For a criticism of *NHA v. Juco*, *see* Mendoza, *Law, Politics and a Changing Court - The Fateful Years 1985-1986*, 61 PHIL L. J. 1, 10-12 (1986).

[12] Art. VII, Sec. 18 provides that "A state of martial law does not . . . authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function," while Art. IX , B, Sec. 2 (1) provides that "The civil service embraces . . . government-owned and controlled corporations with original charters."

[13] Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965).

2. *Misapplication of Prospectivity Doctrine.* -- An entirely different question is the effect to be given to a decision interpreting and applying a constitutional provision, as distinguished from an overruling decision. Of necessity, such a decision must retroact to the date the Constitution took effect and bind not only the immediate parties to the case but others as well who are similarly situated. Such a decision cannot be given prospective application only, without suspending the effectivity of the Constitution. Yet this was what was done in ZALDIVAR v. SANDIGANBAYAN[14] and ZALDIVAR v. GONZALES.[15] When told that its original decision holding that the new Constitution[16] had relieved the Tanodbayan (now called the Special Prosecutor) of his power to investigate and prosecute graft cases and transferred this to the Ombudsman, would result in the nullification of many cases already filed in the Sandiganbayan, the Court declared its decision to be prospectively applicable only, except with respect to the ZALIDIVAR case and those in which the accused had questioned the authority of the Tanodbayan (Special Prosecutor). The Supreme Court invoked *Johnson v. New Jersey,*[17] in which the ruling in *Miranda v. Arizona,*[18] which recognized the right of persons under custodial interrogations to certain "warnings" and to the assistance of counsel, was applied only with respect to trials occurring after the date of its promulgation on July 13, 1966.

But *Johnson v. New Jersey* dealt with the effect of an overruling doctrine (*Miranda v. Arizona*) on pending cases, considering that the new doctrine changed the existing rule. In giving prospective effect to the overruling decision, the Court's purpose was to make case law operate in similar fashion as statute law, namely, prospectively. On the other hand, the decision in the ZALDIVAR cases does not constitute an overruling doctrine. It is the Constitution, not the decision in those cases interpreting Art. XI, Sec. 7, which made new law. Having previously declared the Constitution to have taken effect on February 2, 1987,[19] the Court should have applied the Constitution to cases filed after that date. To rule that, nevertheless, cases filed after that date but before the promulgation of the Court's decision on April 27, 1988 should not be affected by the new rule is to make the decision and not the Constitution the prevailing rule.

Indeed the technique of prospective overruling is premised on a recognition that the new decision makes new law and, as law generally speaks prospectively, so must the new doctrine be prospective in

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14 160 SCRA 843 (1988).

15 160 SCRA 843 (1988).

16 Art. XI, Secs. 7 and 13 (1).

17 388 U.S. 719 (1966).

18 384 U.S. 436 (1966).

19 De Leon v. Esguerra, 153 SCRA 602 (1987); Reyes v. Ferrer, 156 SCRA 314 (1987); Osias v. Reyes, 159 SCRA 305 (1988).

application.[20] The decision in ZALDIVAR, however, does not make new law but only interprets the new Constitution. It is the Constitution which constitutes new law, by allocating the powers and functions between the Ombudsman and the Special Prosecutor. Hence, it is the Constitution, not the decision in ZALDIVAR v. SANDIGANBAYAN, which should be given prospective effect.

The absurdity of giving prospective application to the decision interpreting the law is best seen when it is considered that while the Court held that, effective February 2, 1987 (when the new Constitution took effect), the Special Prosecutor could no longer file cases without the prior authority of the Ombudsman, the Court nevertheless held that its ruling took effect only on the date it was made on April 27, 1988. The net result is that the Special Prosecutor actually ceased to have independent power to prosecute graft cases only on April 27, 1988.

The Court's concern that unless its decision was prospectively applied the decision would have unsettling effect on the administration of justice could have been resolved simply by considering the Special Prosecutor as a *de facto* public officer acting under his old powers as Tanodbayan. Of course, this would mean that all the cases filed by him before the decision in ZALDIVAR v. SANDIGANBAYAN, including those filed against the petitioner in that case, were valid. This approach would, however, avoid possible criticism that the decision in that case favored only the parties in that case and others who questioned the authority of the Special Prosecutor.

II. THE SEPARATION OF POWERS

A. Congress and the Electoral Tribunals

In LAZATIN v. HRET[21] the Court upheld the power of the House Electoral Tribunal, as the "sole judge" under the Constitution[22] of the election, returns and qualifications of members of the House of Representatives, to set the deadline for the filing of electoral protests. The case arose from an election protest filed on February 8, 1988 by Lorenzo G. Timbol against Carmelo F. Lazatin who had been proclaimed as Representative of the First District of Pampanga. Lazatin moved for the dismissal of the protest on the ground that under Sec. 250 of the Omnibus

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[20] Compare Justice Frankfurter's statement in *Griffin v. Illinois*, 351 U.S. 12 (1956): "For sound reasons, law generally speaks prospectively . . . We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the consideration that give prospective content to a new pronouncement of law. . ." *See also* Magtoto v. Manguera, 63 SCRA 4 (1975).

[21] G.R. No. 84297, Dec. 8, 1988.

[22] Art. VI, Sec. 17.

Election Code (BP Blg. 881), such protest should have been filed within ten days from his proclamation on May 27, 1987, or not later than June 6, 1987. He argued that since Timbol had filed a petition to annul the proclamation on May 28, the 10-day period was suspended but it began to run again on January 28, 1989, when Timbol was served a copy of the decision of the Supreme Court reinstating his proclamation. The result was that Timbol had only 9 more days, or until February 6, 1988, within which to file his protest. The protest he actually filed on February 8, 1988, was therefore filed out of time. The HRET denied Lazatin's motion. Hence, he filed a petition for certiorari.

The Court dismissed Lazatin's petition. It held that Sec. 250 of the Omnibus Election Code, which Lazatin invoked, was no longer effective. This provision governed the proceedings of the Commission on Elections under the prior Constitution, at the time when it was vested with the power to decide questions concerning the election, returns and qualifications of members of the defunct Batasang Pambansa. That power has been restored in the 1987 Constitution to the Electoral Tribunals of both Houses of Congress. The Court held that the applicable law was Sec. 9 of the Rules promulgated by the HRET. Under this provision, election protests must be filed within 15 days from the effectivity of the Rules on November 22, 1987, where the proclamation was made prior to such date, otherwise within 15 days from the date of proclamation. Accordingly, it was held that Timbol had 15 days from November 22, 1987, or not later than December 7, 1987, within which to bring his protest. However, on September 15, 1987, the COMELEC had nullified Lazatin's proclamation and it was reinstated only later when the Supreme Court reversed the COMELEC. Timbol received a copy of the Supreme Court's decision setting aside the COMELEC resolution on January 28, 1988. For all intents and purposes, therefore, Lazatin's proclamation became effective only on January 28, 1988, so that the 15-day period for filing a protest must be reckoned from that date. It was therefore held that as Timbol actually filed his protest on February 8, 1988, or 11 days after January 28, 1988, his protest was timely.

In upholding the power of the HRET to promulgate rules governing contests relating to the elections, returns, and qualifications of members of the House of Representatives, the Court stressed the HRET's role as the sole judge of such contests and affirmed the decision in the landmark case of *Angara v. Electoral Commission*,[23] in which the Tribunal's power was characterized as "full, clear and complete," leaving no residuary power in the Houses of Congress in which it was vested under the Jones Law.[24]

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[23] 63 Phil. 139 (1936).

[24] Sec. 18.

B. The President

1. Presidential Appointments and the Power of Congress to Confirm. – Art. VII, Sec. 16 of the Constitution provides:

> The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of the departments, agencies, commissions or boards.

In *Sarmiento v. Mison,*[25] the Supreme Court construed this provision, by way of dictum, as requiring confirmation only of the appointments mentioned in the first sentence, namely:

> First, the heads of the executive departments, ambassadors, other public ministers and consuls, officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution:
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> (The "other officers" whose appointments are vested in the President in the 1987 Constitution are:
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> 1. Regular members of the Judicial and Bar Council (Art. VIII, Sec. 8 (2));
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> 2. Chairman and Commissioners of the Civil Service Commission (Art. IXB, Sec. 1 (2));
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> 3. Chairman and Commissioners of the Commission on Elections (Art. IXC, Sec. 1 (2));
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> 4. Chairman and Commissioners of the Commission of Audit (Art. IXD, Sec. 1 (2)); and,
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> 5. Members of the Regional Consultative Commission(Art. X, Sec. 18)).

On the other hand, those mentioned in the second and third sentences are vested solely in the President or, in the case of "officers lower in rank," in the President, the courts or the heads of departments, agencies, commissions or boards.

The dictum became the ruling when, in CONCEPCION BAUTISTA v. SALONGA,[26] it was held that the appointment of the Chairman of the

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[25] 156 SCRA 549 (1987).

[26] G.R. No. 86439, April 13, 1989.

Commission on Human Rights was not subject to confirmation and that it was beyond the power of the Executive and Legislative branches of the government to agree on the submission of the nomination to the Commission. The Chairman and the members of the Commission on Human Rights are among the officers "whom [the President] may be authorized to appoint pursuant to the second sentence," since their positions are not among those enumerated in the first sentence but are provided for by law.[27]

Mary Concepcion Bautista had been appointed Chairman of the CHR and had taken her oath of office. For some reason, however, the Office of the President submitted her appointment to the Commission on Appointments. Bautista refused to submit to the jurisdiction of the appointments body and filed a petition for certiorari with the Supreme Court. When the Commission disapproved her appointment on the ground that she had refused to submit the papers required by it, Bautista asked the Court to nullify the Commission's action.

In an opinion by Justice Padilla, the Court, 9 to 4, ruled that Bautista's appointment was not subject to confirmation by the Commission and that it had become complete when she took her oath of office. The President, said the Court, could not "from time to time move power boundaries in the Constitution differently from where they are placed by the Constitution."

> . . . Neither the Executive nor the Legislative (Commission on Appointments) can create power where the Constitution confers none. The evident constitutional intent is to strike a careful and delicate balance in the matter of appointments to public office between the President and Congress (the latter acting through the Commission on Appointments). To tilt one side of the scale is to disrupt or alter such balance of power. In other words, to the extent that the Constitution has blocked off certain appointments for the President to make with the participation of the Commission on Appointments, so also has the Constitution mandated that the President can confer no power of participation in the Commission on Appointments over other appointments exclusively reserved for her by the Constitution. The exercise of political options that finds no support in the Constitution cannot be sustained.

The Court also rejected the contention advanced by Hesiquio R. Mallillin, who had been designated acting Chairman of the CHR, that at all events it was within the President's power to remove Bautista. It noted that while originally Executive Order No. 163 gave the Chairman and members of the CHR a seven-year term, the amendment on June 30, 1987 converted the term into a "tenure . . . at the pleasure of the President." The Court declared the amendment unconstitutional, as being contrary to Art. XIII, Sec. 17 (2) which provides that "the term of the office of the Members of the Commission on Human Rights shall be provided by law."

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[27] Executive Order No. 163, dated May 5, 1987.

Justice Gutierrez, who dissented in the *Mison* case, again dissented. He argued:

> (1) If the officers in the first group are the only appointees who need confirmation, there would be no need for the second and third sentences of Section 16. They become superfluous . . .
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> (3) The second sentence of Section 16 starts with , "He shall also appoint . . . " Whenever we see the word "also" in a sentence, we associate it with preceding sentences, never with the different sentence that follows. On the other hand, the third sentence specifies "other officers lower in rank" who are appointed pursuant to law by the President "alone." This can only mean that the higher ranking officers in the second sentence must *also* be appointed with the concurrence of the Commission on Appointments . . . By express constitutional mandate, it is Congress which determines who do not need confirmation. Under the majority ruling of the Court, if Congress creates an important office and requires the consent of the Commission before a presidential appointment to that office is perfected, such a requirement would be unconstitutional. . . .

Apparently answering the majority opinion in *Sarmiento v. Mison* that the Constitutional Commission deliberately curtailed the powers of the Commission on Appointments because experience under the previous Constitution showed that the Commission had become a "venue of horse-trading and similar malpractices," Justice Gutierrez said that "the delays and posturings are part of the democratic process" and "they should never be used as arguments to restrict legislative power where the Constitution does not expressly provide for such limitation."

Justice Cruz reiterated his dissent in the *Mison* case, calling attention to absurd consequences flowing from the majority decision: appointments to important positions in the government, such as those of Commissioners on Human Rights and Governor of the Central Bank, would not be subject to confirmation, but those of lesser categories, like colonels in the armed forces, are. He pointed out that even the President did not seem to agree with the *Mison* decision as shown by her submission of the appointment in this case to the Commission on Appointments.

On the other hand, Justice Griño-Aquino, joined by Justice Medialdea, argued that the CHR is like the Civil Service Commission, the Comelec and the COA, whose members are appointed by the President with the consent of the Commission on Appointments. Chief Justice Fernan and Justice Sarmiento took no part.

On June 1, 1989, the Court denied a motion for reconsideration of its decision in which it reiterated its opinion in *Mison*. The Court in *Mison* invoked both text and legislative history of Art VII, Sec. 16 in support of its interpretation. It called attention to the language of the provision that, with respect to the first class of public officers, the President's power is to "nominate and, with the consent of the Commission on Appointments, appoint" such officers. It contrasted this with the language used with

respect to the second and third classes of officers, to wit: "[The President] shall also appoint all other officers of the government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint," which does not mention the Commission on Appointments.

For the legislative history of the provision, the Court turned to the Record of the Constitutional Commission, which showed that the original draft of Art. VII, Sec. 16 was as follows:

> The President shall nominate and, with the consent of a Commission on Appointment, shall appoint the heads of the executive departments and bureaus, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain and all other officers of the Government whose appointments are not otherwise provided for, and those whom he may be authorized by law to appoint. The Congress may by law vest the appointment of inferior officers in the President alone, in the courts or in the heads of departments.

However, Commissioner Vicente Foz moved for the amendment of the provision, first, by dropping heads of bureaus from the list of officers whose appointments are subject to confirmation on the ground that "The position of bureau director is actually low in the executive department and to require further confirmation of presidential appointment of heads of bureaus would subject them to political influence," and, second, by putting a period after the word "captain" and replacing the phrase "and all" with the phrase "he shall also appoint." Commissioner Regalado, Vice Chairman of the Committee on the Executive Department, gave this interpretation if Foz's amendments were adopted: "Madam President, the Committee accepts the proposed amendment because it makes it clear that those other officers mentioned therein do not have to be confirmed by the Commission on Appointments." When put to a vote, Foz's proposals were both approved.[28]

There are two problems raised by the Court's interpretation of Art. VII, Sec. 16. First, if colonels and naval captains are subject to confirmation, why not also other officers of higher rank, like the Central Bank Governor, who, under the Court's categorization, falls under the third group, namely, "those whom he may be authorized by law to appoint?" Second, if only those in the first class of officers are subject to confirmation by the Commission on Appointments, why does the Constitution say that the appointments of those belonging to the fourth class may be vested "in the President alone," thus implying that the appointments of others need confirmation?

With respect to the first problem, the Court stated that the "contrasts (in the language used) underscore the purposive intention and

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[28] 2 RECORD OF THE CONSTITUTIONAL COMMISSION 514-15, 520 (1986).

deliberate judgment of the framers of the 1987 Constitution" to require confirmation with respect to the first class. The Court elaborated upon this point in its resolution denying reconsideration and stated that "the *main* concern of the framers was not to classify officers by rank or importance in providing for the participation of the Commission on Appointments in the review of presidential appointments, but to group certain officers as requiring such confirmation and leaving other appointments to the President alone, that is, without confirmation or consent of the Commission on Appointments."

With respect to the second problem, it is said that the use of the word "alone" was merely a "slip or *lapsus* in draftsmanship." The original draft of Art. VII, Sec. 16 was adopted from the provision of the 1935 Constitution.[29] The members of the Constitutional Commission overlooked the fact that, after they had decided to trim down the list of appointments subject to confirmation, the word "alone" lost its meaning and should have been deleted.

The comparison drawn by the majority, between the language of the first sentence ("The President shall *nominate* and, with the consent of the Commission on Appointments *appoint* . . .") and that of the second sentence ("He shall also *appoint* all other officers . . .") as basis for its conclusion that only those mentioned in the first sentence require confirmation, overlooks the fact that when the Constitution intends to require confirmation, it states so expressly[30] and that when it does not intend such confirmation, it is just as categorical.[31]

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[29] Art. VII, Sec. 10 (3) of the 1935 Constitution provided: "The President shall nominate and with the consent of the Commission on Appointments, appoint the heads of the executive departments and bureaus, officers of the Army from the rank of colonel, of the Navy from the rank of captain or commander, and all other officers of the Government whose appointments are not herein otherwise provided for, and those whom he may be authorized by law to appoint."

[30] Consider the following provisions expressly subjecting appointments to confirmation:

> Art. IXB, Sec. 1 (2): The Chairman and Commissioners [of Civil Service] shall be appointed by the President with the consent of the Commission of Appointments . . . .
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> Art. IXC, Sec. 1 (2): The Chairman and Commissioners [of Election] shall be appointed by the President with the consent of the Commission on Appointments. . . .
>
> Art. IXD, Sec. 1 (2): The Chairman and Commissioners [of Audit] shall be appointed by the President with the consent of the Commission on Appointments. . . .

[31] Consider the following provisions expressly dispensing with the need for confirmation:

> Art. VII, Sec. 3 . . . The Vice-President may be appointed as a Member of the Cabinet. Such appointment requires no confirmation.
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> Art. VIII, Sec. 9. The Members of the Supreme Court and judges of lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. Such appointments need no confirmation.

On the other hand, the Record of the Constitutional Commission supports the view that whether the appointments mentioned in the second sentence are subject to the power of the Commission on Appointments to confirm was made to depend on the terms of the statute vesting such appointments in the President. Thus, in concluding the debate on this provision, Commissioner Joaquin Bernas said in answer to a query of Commissioners Hilario Davide and Francisco Rodrigo that Congress was not precluded from requiring that certain other appointments of the President be submitted to the Commission on Appointments for confirmation. The record of the Commission shows the following:

> MR. DAVIDE: I just would like to get a clearer intention. With the acceptance of that proposed amendment, would Congress be prohibited from creating an office and vesting the authority of appointing the officials therein in the President, with the requirement that such appointments should bear the conformity or consent of the Commission on Appointments? Under the proposal, it would seem that all other such officials may be appointed without the consent of the Commission on Appointments, prohibiting, therefore, the legislature to so create an office for which the requirement for consent of the Commission on Appointments for positions therein is stated in the law itself.
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> FR. BERNAS: Madam President, the Constitutional list of officers whose appointments need no confirmation of the Commission on Appointments is not exclusive. If the Congress is so minded, it may require other officers also to be confirmed by the Commission on Appointments.
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> MR. RODRIGO: Madam President, before we vote, may I be clarified. As worded now, other officers, aside from those enumerated here, may also be appointed by the President with the confirmation of the Commission on Appointments, if it is so provided in this Constitution. I remember Commissioner Bernas say that officers may also need the confirmation of the Commission on Appointments if so provided by law, so that the approval of that amendment which says "UNDER THIS CONSTITUTION" does not exclude the power of the legislature to enact a law providing that these officials shall need the confirmation of the Commission on Appointments.
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> FR. BERNAS: It does not.
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> MR. RODRIGO: Thank you.
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> THE PRESIDENT: Is there any objection to this proposed amendment of Commissioners Foz and Davide as accepted by the Committee? (Silence) The chair hears none; the amendment, as amended, is approved.[32]

Art. XI, Sec. 9. The Ombudsman and his Deputies shall be appointed by the President from a list of at least six nominees prepared by the Judicial and Bar Council, from a list of three nominees for every vacancy thereafter. Such appointments need no confirmation. . .

[32] 2 RECORD OF THE CONSTITUTIONAL COMMISSION 520-521, July 31, 1986.

It is not true that the framers were not concerned with the importance of the office in deciding which appointments are subject to confirmation and which are not. They were. The last sentence providing for the appointment of inferior officers by the President alone or by the courts or heads of departments makes this clear. The Foz proposal to exempt bureau directors was based on an appreciation of their relative unimportance.

Indeed, the question is whether the framers of the Constitution intended to exempt from confirmation the appointment, for example, of the Governor of the Central Bank, whose powers are so vast he can actually plunge the nation into a financial crisis. If they did, for what reason did they exempt him?

The majority in the *Mison* case held that the Appointments Clause represents a compromise between the 1935 Constitution (which required practically all Presidential appointments to be confirmed) and the 1973 Constitution (which gave the appointing power solely to the President). The real compromise seems to me to have been made when certain appointments were removed from the power of the Commission of Appointments to review and made instead subject to prior screening by the Judicial and Bar Council. The compromise was not made by enlarging the number of appointments which the President alone can make. For in truth, a restriction on the power of appointment, whether in the form of subsequent confirmation or of prior screening, is central to the system of checks and balances embodied in the Constitution.

2. *The President's Powers Under Martial Law.* - - In TUASON v. REGISTER OF DEEDS,[33] the Supreme Court struck down former President Marcos' cancellation of the sales of the government property known as Tala Estate, as an unwarranted exercise of judicial and legislative powers under martial law. The facts showed that petitioners bought in 1965 from the Carmel Farms, Inc. a piece of land in Caloocan City, by virtue of which title was issued in their names and they took possession of their property. However, in 1965, President Marcos, exercising martial law powers, issued Presidential Decree No. 293 cancelling the certificates of titles of Carmel Farms and declaring the lands covered by them, including that sold to petitioners, to be open for disposition and sale to the members of the Malacañang Association, Inc. The lands in question were part of the Tala Estate which the government had sold to Carmel Farms. However, according to the decree issued by the President, neither the original purchasers nor their transferees had paid in full the purchase price, with the result that title had remained in the government. Petitioners brought suit for certiorari and prohibition, questioning the constitutionality of the decree. The Supreme Court said:

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[33] 157 SCRA 613 (1988).

> The decree reveals that Mr. Marcos exercised an obviously judicial function. He adjudged it to be an established fact that "neither the original purchasers not their subsequent transferees have made full payment of all installments of the purchase money and interest on the lots claimed by Carmel Farms, Inc., including those on which the dwellings of the members of . . . (the) Association (of homeowners) stand." And applying the law to that situation, he made an adjudication that "title to said land has remained with the Government, and the land now occupied by the members of said association has never ceased to form part of the property of the Republic of the Philippines," and that "any and all acts affecting said land and purporting to segregate it from said property of the Republic . . . (were) null and void *ab initio* as against the law and public policy." . . . Since Mr. Marcos was never vested with judicial power . . . the judicial acts done by him were in the circumstances indisputably perpetrated without jurisdiction. The acts were completely alien to his office as chief executive, and utterly beyond the permissible scope of the legislative power that he had assumed as head of the martial law regime.
>
> Moreover, he had assumed to exercise judicial power . . . without a trial at which all interested parties were accorded the opportunity to adduce evidence to furnish the basis for a determination of the facts material to the controversy. He made the finding ostensibly on the basis of "the records of the Bureau of Lands." . . .
>
> The decree was not as claimed a licit instance of the application of social justice principles or exercise of police power. It was in truth a disguised, vile stratagem deliberately resorted to favor a few individuals, in callous and disdainful disregard of the rights of others. It was in reality a taking of private property without due process and without compensation whatever, from persons relying on the indefeasibility of their titles in accordance with and explicitly guaranteed by law.

Presidential Decree No. 293 was, therefore, declared unconstitutional and void.

Justice Feliciano, concurring wrote:

> . . . The emergence of Presidential Decree No. 293 into public light underscores the fact that Mr. Marcos also purported at times to exercise judicial prerogatives. If one viewed P.D. No. 293 as issued by Mr. Marcos in his presidential capacity, as it were, the decree is constitutionally vitiated as an exercise of a power -- judicial power -- deliberately denied to the Chief Executive by the Constitution. This is made clear in Mr. Justice Narvasa's opinion. On the other hand, if one viewed P.D. No. 293 as rendered by Mr. Marcos in his other, assumed -- *i.e.* legislative -- capacity, the decree is similarly flawed as a bill of attainder and ultimately, again, as an assumption unto himself of a power and authority clearly withheld by the Constitution from both the Chief Executive and the legislative body and lodged elsewhere in our constitutional system.

Chief Justice Teehankee concurred in a separate opinion.

3. *Effects of Pardon.* -- In MONSANTO v. FACTORAN,[34] the Supreme Court held that, while pardon remits the consequences of a criminal conviction and restores the convict's eligibility to hold public office, it cannot *ipso facto* restore him to office from which he might have been removed. He may apply for reappointment but his conviction must be taken into account in assessing his fitness. Petitioner was formerly assistant treasurer of Calbayog City. She was convicted of estafa through falsification of public documents and sentenced accordingly by the Sandiganbayan. She appealed to the Supreme Court and, while her appeal was pending, she was granted absolute pardon and "restored to full civil and political rights by President Marcos." The Ministry of Finance agreed to reinstate her without the need of a new appointment but when the new administration assumed power, it held that she was not entitled to automatic reinstatement on the basis of the pardon granted to her. She brought an action in the Supreme Court, contending that, as she had been granted pardon while her case was still pending,[35] the accessory penalty of forfeiture of office did not attach.

In an opinion by Chief Justice Fernan, the Court affirmed the action of the Executive branch. It rejected the view that pardon makes the person pardoned a new man, as if he had never committed an offense. "We cannot perceive," the Court said, "how pardon can produce such 'moral changes' as to equate a pardoned convict in character and conduct with one who has constantly maintained the mark of a good, law-abiding citizen." Accordingly, it was held that "when [petitioner's] guilt and punishment were expunged by her pardon, this particular disability [disqualification from public office] was likewise removed. Hence, petitioner may apply for reappointment to the office which was forfeited by reason of her conviction. And in considering her qualifications and suitability for the public post, the facts constituting her offense must be and should be evaluated and taken into account to determine ultimately whether she can once again be trusted with public funds." The Court also denied her request for exemption from payment of the civil indemnity imposed upon her. It held that this can only be extinguished through any of the modes prescribed by the civil law.

Justices Padilla and Feliciano filed separate concurring opinions in which they invoked Art. 36 of the Revised Penal Code that pardon does not work a restoration of the right to hold public office, or the right of suffrage, unless such rights are expressly restored by the terms of the pardon. They disagreed, in this respect, with the majority ruling that the pardon granted the petitioner resulted in removing her disqualification from holding public employment. While the pardon stated that petitioner was being "restored to full civil and political rights," Justice Feliciano did

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[34] G.R. NO. 78239, Feb. 9, 1989.

[35] Under Art. VII, Sec. 11 of the previous Constitution, as amended, there was no condition that pardon could only be granted after conviction.

not regard this as sufficient because it did not specify the right to public office, considering that there are other "political rights."

The statement that "in the eyes of the law the offender [who is pardoned] is as innocent as if he had never committed the offence," which the Court in MONSANTO found to be "sweeping" and therefore overruled, does not seem to have ever been adopted as a rule in any previous decision. While this statement, which was made in *Ex parte Garland*,[36] was quoted in *People v. Vera*,[37] it was only by way of dictum. In *Cristobal v. Labrador*[38] and *Pelobello v. Palatino*,[39] what was said about pardon was this, which is consistent with what the Court said in MONSANTO:

> An absolute pardon not only blots out the crime committed, but removes all disabilities resulting from the conviction. In the present case, the disability is the result of conviction without which there would be no basis for disqualification from voting. Imprisonment is not the only punishment which the law imposes upon those who violate its command. There are accessory and resultant disabilities, and the pardoning power likewise extends to such disabilities. When granted after the term of imprisonment has expired, absolute pardon removes all that is left of the consequences of conviction.[40]

Rather, the statement that "while amnesty looks backward and abolishes and puts into oblivion the offense itself, it so overlooks and obliterates the offense with which he is charged that the person released from amnesty stands before the law precisely as though he committed no offense," was said in another case,[41] about amnesty, not pardon, which is really correct because in amnesty, unlike in pardon, there is no previous conviction that leaves a stigma.

C. *The Judicial Department*

1. Jurisdiction of Civil Courts under Martial Law. -- Mention has been made of the ruling in CRUZ v. PONCE ENRILE,[42] invalidating the proceedings of military tribunals in cases involving civilians during martial rule if the civil courts are open and operating.

In ABERCA v. VER,[43] the Supreme Court, through Justice Yap, held that, while civil courts cannot inquire into cases of illegal detention when the privilege of the writ of habeas corpus is suspended, they can try cases brought under Art. 32 of the Civil Code for damages for illegal

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36 71 U.S. (4 Wall.) 333, 18 L. Ed. 366(1867).

37 65 Phil. 56, 108 (1937).

38 71 Phil. 34 (1940).

39 72 Phil. 441 (1941).

40 *Supra* at 38.

41 Barrioquinto v. Fernandez, 82 Phil. 642, 647 (1949).

42 *Supra* note 3.

43 160 SCRA 590 (1988).

arrests and detentions and other violations of constitutional rights, and that military officers found responsible for such acts can be held liable. Accordingly, the Court set aside an order of the trial court, dismissing a complaint for damages brought against then Major General Fabian Ver and several other officers of the Armed Forces, except for two, for alleged illegal searches and seizures, illegal arrests, and torture of petitioners by members of the Armed Forces of the Philippines in the course of preemptive strikes against communist underground houses in 1983, when the privilege of the writ of habeas corpus was suspended. The Court said:

> It may be said that the respondents, as members of the Armed forces of the Philippines, were merely responding to their duty, as they claim, "to prevent or suppress lawless violence, insurrection, rebellion and subversion." . . . But this cannot be construed as a blanket license or a roving commission untrammeled by any constitutional restraint, to disregard or transgress upon the rights and liberties of the individual citizen enshrined in and protected by the Constitution. The Constitution remains the supreme law of the land to which all officials, high or low, civilian or military, owe obedience and allegiance at all times.

While holding that a superior military officer is not answerable for damages on the theory of *respondeat superior,* nevertheless the Court said such officers may be held liable if found to be "directly or indirectly" responsible for the violations of constitutional rights because of the specific language of Art. 32 of the Civil Code.

Under what circumstances a superior military officer may be found responsible for an arrest in an emergency situation was discussed in *Moyer v. Peabody,*[44] which dealt with an action for damages for imprisonment of the plaintiff. The action was brought against the former Governor of Colorado and the Adjutant General of the National Guard who ordered the arrest of the plaintiff during a state of insurrection. Justice Holmes, speaking for the Court, affirmed the dismissal of the action, stating: "So long as such arrests are made in good faith and in honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had reasonable ground for his belief." It would be a different matter, however, if, as in ABERCA v. VER, the complaint alleged intimidation and harassment by military authorities. Such allegation is equivalent to an allegation of bad faith.

2. *No Extrajudicial Work for Judges.* -- In *IN RE* RODOLFO U. MANZANO,[45] a Regional Trial Court Judge in Ilocos Norte was appointed member of the Provincial Committee on Justice, whose functions are (1) to receive complaints regarding abuses committed by arresting officers, jail wardens, fiscals or judges and to refer them to the proper authorities and (2) to recommend the revision of laws found to be prejudicial to the

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[44] 212 U.S. 416, 417 (1908).

[45] Adm. Matter No. 88-7-1861-RTC, Oct. 5, 1988.

administration of criminal justice. The committee was formed pursuant to Executive Orders No. 856 and 326 of the President and is under the supervision of the Secretary of Justice. Before accepting his appointment, the judge raised the question of propriety to the Supreme Court, which held that the Committee's functions were administrative in character because they involved "the regulation and control of the conduct of individuals and the promulgation of rules and regulations to carry out a declared policy." Hence, the judge's membership in the committee would be violative of Art. VIII, Sec. 12. The Court, through Justice Padilla, cited Justice Fernando's concurring opinion in *Garcia v. Macaraig*,[46] that a member of the judiciary cannot be required to perform non-judicial functions and that only a higher court can pass on his actuations because he is not the subordinate of an executive or legislative official. Nonetheless, the Court stated that, without becoming members of such committees, judges should render assistance to such committees when this is incidental to the fulfillment of their judicial duties.

Justice Gutierrez, joined by Chief Justice Fernan and Justices Narvasa, Melencio-Herrera, and Griño-Aquino, dissented. Adhering to the majority's test of what constitutes "administrative" function, he argued that the work of the committee does not involve the regulation or control of the conduct of individuals nor the promulgation of rules and regulations but is purely advisory, with respect to problems affecting the administration of justice. The constitutional provision, he pointed out, is intended to prohibit judges from getting involved in activities which could compromise their independence or hamper their work. Studying problems involving the administration of justice does not involve the performance of executive or legislative functions.

Justice Melencio-Herrera also dissented, stating that what is contemplated by the constitutional prohibition is the designation of judges to such quasi-judicial bodies as the Securities and Exchange Commission (SEC), or administrative agencies such as the Bureau of Internal Revenue (BIR), because these are full-time positions which would interfere with the discharge of judicial functions. She pointed out that the Committee on Justice is only a study group with recommendatory functions and that the membership of judges in the committee is appropriate to their primary functions.

This case seems to be indeed based on too narrow a view of Art. VIII, Sec. 12, when what is actually contemplated is the designation of judges to sit in administrative agencies[47] or to perform administrative functions in another branch of the government.[48] The Committees on Justice created by Executive Order No. 856 are inter-agency bodies and

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[46] 39 SCRA 106 (1970).

[47] Manila Electric Co. v. Pasay Trans. Co., 57 Phil. 600 (1932).

[48] Garcia v. Macaraig, *supra* note 46.

their functions are purely advisory. That is why the majority in this case even admonished judges to assist the committees, although it enjoined them from becoming members. It would seem that the Court's real objection was against placing judges under the supervision of a non-judicial officer. Even then, however, the Secretary of Justice does no more than supervise the work of the committee as chairman thereof. He does not review their work as judges, which is what is really prohibited by the doctrine of separation of powers.[49]

D. The Civil Service Commission

A recurrent question under the 1973 Constitution was whether all government-owned or controlled corporations were embraced in the Civil Service, or whether only those created by special law are contemplated, thus excluding from coverage those organized under the general Corporation Code. The question is an important one because it implicates many other questions, such as whether employees in such firms are governed by civil service laws or the labor laws, which agency of government (the Civil Service Commission or the National Labor Relations Commission) has jurisdiction over such employees, and whether such employees are subject to the jurisdiction of the Ombudsman.

In 1985, the Court held in *NHA v. Juco* [50] that government-owned or controlled corporations, regardless of the manner of creation, were embraced within the Civil Service because the 1973 Constitution[51] did not make any distinction. The Court pointed out the mischief of excluding government corporations not created by special law from the scope of the Civil Service. It would be possible for a Ministry in the government to create subsidiary corporations under the Corporation Code, funded by public funds. Such corporations could in turn create other subsidiary corporations. The officials and employees of such corporations would enjoy the best of both worlds as they would be free from strict accountability under the Civil Service Law and the regulations of the Commission on Audit. The income of such corporations would not be subject to the competitive restraints of the open market nor to the terms and conditions of civil service employment. Conceivably, many government-owned or controlled corporations would no longer be created by special charters, but through incorporation under the general law. The constitutional provision including such corporations in the scope of the Civil Service would cease to have any application.[52]

The doctrine of *NHA v. Juco* was abrogated by the 1987 Constitution which, by including in the coverage of the Civil Service only

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[49] *See* Hayburns Case, 2 Dall. 409 (1792).

[50] *Supra* note 6.

[51] 1973 CONST., Art. XII, B, Sec. 1.

[52] For criticism of the ruling in this case see, Mendoza, *supra* note 11.

government-owned or controlled corporations "with original charters,"[53] by clear implication excludes from such coverage those organized under the general Corporation Law. Moreover, the deliberations of the Constitutional Commission show that the purpose for the qualifying phrase "with original charters" was to overrule the decision in the *NHA* case and to limit the coverage of the Civil Service only to government corporations organized by special law or, what is the same, "with original charters."[54] This was the ruling in NASECO v. NLRC[55] in which the Supreme Court applied the 1987 Constitution even though the case arose under the previous Constitution. Accordingly, the Court upheld the jurisdiction of the NLRC over a complaint for reinstatement on the ground of illegal dismissal of an employee since NASECO is not a government-owned or controlled corporation "with original charter." Although wholly owned by the government, NASECO was organized as a subsidiary of the National Investment and Development Corp., which in turn is a subsidiary of the Philippine National Bank.

E. The Special Prosecutor and the Ombudsman

In ZALDIVAR v. SANDIGANBAYAN[56] and ZALDIVAR v. GONZALES,[57] jointly decided by the Supreme Court, it was held that the new Constitution transferred the power of the Tanodbayan to investigate and prosecute graft cases to the Ombudsman. Accordingly, the Court voided cases filed by the former Tanodbayan (renamed Special Prosecutor by the 1987 Constitution) against the petitioner for violation of the Anti-Graft and Corrupt Practices Act and ordered him (the Tanodbayan) to desist from investigating other cases against the petitioner. In its resolution denying reconsideration, the Court declared its decision to be prospective only, except with respect to the ZALDIVAR cases and those in which the accused had questioned the authority of the then Tanodbayan to continue prosecuting cases on his own after February 2, 1987, the date the new Constitution took effect. The Court also held that the constitutional provision on the Ombudsman did not need implementing legislation, thus rejecting the argument of respondent Tanodbayan that until the Office of Ombudsman was organized by law, he continued to exercise his old powers.

In ruling that, upon the effectivity of the new charter, the Tanodbayan had lost the power to investigate, the Court relied on the following constitutional provisions:

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53 Art. IX, B, Sec. 2 (1).

54 1 RECORD OF THE CONSTITUTIONAL COMMISSION 583-585 (1986).

55 *Supra* note 5.

56 *Supra* note 14.

57 *Supra* note 15.

> Art. XI, Sec. 7: The existing Tanodbayan shall hereafter be known as Office of the Special Prosecutor. It shall continue to function and exercise its powers as now or hereafter may be provided by law, except those conferred on the Office of the Ombudsman created under this Constitution.
>
> Art. XI, Sec. 13: The Office of the Ombudsman shall have the following powers, functions and duties:
>
> (1) Investigate on its own, or on complaint by any person, any act or omission that appears to be illegal, unjust, improper, or inefficient.

The decision in these cases drew criticisms from some quarters. Former Constitutional Commissioner Blas Ople said:

> The Court linked Section 7 to Section 13, as it should, but it misread the nature of the investigative function of the Ombudsman in Subsection (1) of Section 13.
>
> What is contemplated in that section is not the power to investigate and to prosecute anti-graft cases, which clearly continued to be lodged in the Office of the Special Prosecutor (Section 7) but the duty of the Ombudsman to "act promptly on complaints filed in any form or manner against public officials or employees of the government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations. . ." (Section 12)
>
> This function is to be distinguished from investigation and prosecution because the Ombudsman would cease to be that unique creature if it was clothed with prosecution powers.[58]

The power to investigate and prosecute criminal cases which are cognizable by the Sandiganbayan is vested in the Tanodbayan by Secs. 10 (b) and 17 of Presidential Decree 1630. On the other hand, the power to investigate administrative acts alleged to be "contrary to law, unreasonable, improper, or inefficiently performed," is separately conferred on him by Secs. 10 (a) and 12. One could thus argue that what was vested in the Ombudsman by Art. XI, Sec. 13 (1), is the investigation of *administrative acts* but that the investigation of *criminal complaints* has been continued in the Tanodbayan (now Special Prosecutor). However, the Court rejected this distinction in its resolution on the motion for reconsideration in the ZALDIVAR cases.[59] It ruled that the Constitution does not distinguish between the investigation of administrative offenses and that of criminal offenses and that the framers of the Constitution intended to make the Special Prosecutor a "mere subordinate" of the

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[58] Ople, *The Crisis of the Supreme Court*, 2 NATION WATCH 2, at 5 (May 2, 1988).

[59] G.R. Nos. 79690-707 & 80578, May 19, 1988.

Ombudsman whose authority is needed before the Special Prosecutor can act.

F. THE PCGG

1. Powers of the PCGG. -- In LIWAYWAY PUBLISHING CO. v. PCGG[60] and BULLETIN PUBLISHING v. PCGG,[61] the Court, through Chief Justice Teehankee, enjoined the Presidential Commission on Good Government (PCGG) from stopping withdrawals, transfers and remittances of bank deposits of the Liwayway Publishing Co., and from voting the shares of stock in the Bulletin Publishing Co. which the PCGG had sequestered. Actually, because Liwayway Publishing had claimed that the prohibition would virtually shut down the publication, the PCGG had earlier agreed not to exercise its powers in a way that would "impinge upon the freedom of expression or freedom to publish the newspaper." On the other hand, in the BULLETIN case, although the PCGG had declared its intention to vote the shares of stock of three suspected "cronies" or "dummies" of former President Marcos, it later abandoned its plan "for the purpose of maintaining [the company's] freedom and independence as guaranteed in the Constitution." The PCGG announced it would instead take other steps to prevent the dissipation and disposition of funds and assets of the company. The resolution of the case was facilitated by the fact that, while it was pending, the sequestered shares of two of the suspected "cronies" [Jose Y. Campos and Cesar Zalamea] were paid for by the Bulletin Publishing Co. to the government. On the other hand, with respect to the shares of the third [Eduardo Cojuangco, Jr.], the Bulletin Publishing made a cash deposit. The understanding was that if it was determined in the pending case in the Sandiganbayan that the shares belonged to the State, the stocks would be issued in the name of the Republic of the Philippines and then endorsed by it to the Bulletin Publishing Co. Should the shares be declared to belong to Cojuangco, the government would return the money deposited by the Bulletin Publishing.

In ordering the PCGG to allow Liwayway Publishing to withdraw from its accounts and enjoining it from voting the shares of stock of Bulletin Publishing, the Court declared that its purpose was to "uphold the freedom of our press institutions to independently manage their affairs and effectively preserve their editorial policies and objectives, without the shadow of government participation and intervention." The fact, however, that the companies in these two cases were publishing firms seems to be only incidental. The "freeze" of bank deposits of Liwayway Publishing and the threat of the PCGG to vote the sequestered shares of stock in the Bulletin Publishing were not directed at the exercise by the

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[60] 160 SCRA 716 (1988).

[61] 160 SCRA 716 (1988).

two firms of their right to publish. The PCGG order would have no more impact on press freedom than a law setting a speed limit would have on a reporter rushing to an important public event. The "freeze" of bank deposits, if it would "virtually shut down the publication," as claimed in the LIWAYWAY PUBLISHING CO. case, and the threat to vote the shares of stock in the BULLETIN PUBLISHING CO. case would be invalid, regardless of whether the sequestered companies were engaged in business. Conversely, if it was shown that the stockholders and directors of the two firms were "dummies" of the former President, the PCGG orders would be valid, following the 1987 ruling in *BASECO v. PCGG*.[62]

The reason for this is that a governmental act which only incidentally restricts freedom of speech is valid, unless the restriction has a significant or disproportionate effect on such freedom.[63] For example, an ordinance prohibiting the littering of streets in the interest of cleanliness and sanitation is different from an ordinance that outrightly bans the distribution of leaflets on the streets.[64] Indeed, the problem raised by the proposed actions of the PCGG in the LIWAYWAY and BULLETIN cases was not press freedom but the propriety, in a democratic society, of the government being in the business of running a news publication. The issue was the institutional autonomy of the press rather than free speech.

2. *PCGG Cases Exclusively Cognizable by Sandiganbayan.* -- On the other hand, in PCGG v. PEÑA,[65] the Court ruled that acts of the PCGG could be questioned only in the Sandiganbayan and not in any court, and that appeals in such cases would be exclusively reviewable by the Supreme Court. On this ground, the Court set aside an injunctive order issued by a Regional Trial Court, restraining the depository bank of two sequestered firms (American Inter-Fashion Corp. and De Soleil Apparel Mfg. Co.) from releasing funds without the signature of the PCGG fiscal agent whose authority, however, had been subsequently revoked by the PCGG. The Court, through Chief Justice Teehankee, said:

> Having been charged with the herculean task of bailing the country out of the financial bankruptcy and morass of the previous regime and returning to the people what is rightfully theirs, the Commission could ill-afford to be impeded or restrained in the performance of its functions by writs or injunctions emanating from tribunals co-equal to it and inferior to this Court. Public policy dictates that the Commission not be embroiled by legal suits before inferior courts all over the land, since the loss of time and energy required to defend against such suits would defeat the very purpose of

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[62] 150 SCRA 181 (1987). *Cf.* Associated Press v. NLRB, 301 U.S. 103 (1937) (law recognizing employees' rights of self-organization and bargaining, even as applied to a press agency, is valid).

[63] *See* Stone, *Content-Neutral Restrictions*, 54 U. OF CHI L. REV. 46, 105-114 (1987).

[64] *Compare* Valentine v. Chrestensen, 316 U.S. 52 (1942) *with* Schneider v. State, 308 U.S. 147 (1939).

[65] 159 SCRA 559 (1988).

> its creation. Hence, Sec. 4 (a) of Executive Order No. 1 has expressly accorded the Commission and its members immunity from suit for damages in that: "No civil action shall lie against the Commission or any member thereof for anything done or omitted in the discharge of the task contemplated by this order."

Justice Feliciano, concurring, agreed that all cases pertaining to the recovery of ill-gotten wealth of the former President and the latter's associates are exclusively cognizable by the Sandiganbayan, but argued that the PCGG is not a quasi-judicial body like, for instance, the National Labor Relations Commission (NLRC) or the Securities and Exchange Commission (SEC). It is more like a public prosecutor, and, as such, its findings are not entitled to the same respect that findings of administrative agencies have. It can only determine the existence of a *prima facie* case, for the purpose of filing it in the Sandiganbayan. He also took issue with the majority that the PCGG enjoys immunity from suits. He said that this view "would institutionalize the irresponsibility and non-accountability of members and staff of the PCGG, a notion that is clearly repugnant to both the 1973 and 1987 Constitutions and a privileged status not claimed by any other official of the Republic under the 1987 Constitution." He argued that the grant of immunity under Sec. 4 (a) of Executive Order No. 1 meant no more than that "the PCGG or any member thereof may not be held civilly liable for acts done in the performance of official duty, provided that such member had acted in good faith and within the scope of his lawful authority."

Justice Gutierrez, on the other hand, dissented, protesting the Court's finding that the predecessor-in-interest of the sequestered firms, Glorious Sun Fashion Garments Mfg. Co., was a "crony" corporation. He argued that, on the contrary, the company was the victim of the past regime and should be allowed to seek redress from the courts on issues which had nothing to do with "cronyism."

III. INDIVIDUAL RIGHTS

A. Loss and Reacquisition of Citizenship

1. Expatriation by Naturalization in a Foreign State. -- In FRIVALDO v. COMELEC,[66] the annulment of petitioner's election and the termination of his continuance in office as governor of Sorsogon was sought on the ground that he had divested himself of his Philippine citizenship by being naturalized as an American citizen. The action was brought in the Commission on Elections. Petitioner moved for the dismissal of the suit, alleging that he had simply been forced to apply for American citizenship because of the persecution during the Marcos years and that, at any rate, he had reacquired Philippine citizenship by filing his certificate of candidacy in 1988 and by his active participation before that in the 1987

[66] G.R. NO. 87193, June 23, 1989.

congressional election. As the COMELEC insisted on hearing the case against him, petitioner filed a petition for certiorari and prohibition in the Supreme Court.

Through Justice Cruz, the Court held that by seeking naturalization in the United States, petitioner had renounced Philippine citizenship. It rejected his claim that he had simply been forced to apply for American citizenship. It pointed out that other Filipinos, among them the late Ninoy Aquino, had been exposed to the same risk because of opposition to Marcos' rule, but they had held on to their Philippine citizenship.

On petitioner's claim that he had been repatriated because by taking part in the Philippine elections he automatically forfeited his American citizenship, Justice Cruz said that this was a matter between him and the United States. Such forfeiture of American citizenship did not automatically restore his citizenship in the Philippines. Under Commonwealth Act No. 63, Sec. 2, it was pointed out, citizenship in this country can only be reacquired by an act of Congress, by naturalization or by repatriation, in the case of Filipino women who lost their citizenship by marriage to foreigners and those declared deserters from the armed forces. The Court concluded that petitioner's election did not cure his lack of eligibility because his election was based on a mistake. On the other hand, it would be an "anomaly (to have) a person sitting as provincial governor in this country, while owing exclusive allegiance to another country."

Justice Gutierrez concurred in a separate opinion, while Justice Cortes limited her concurrence in the result. On the other hand Justice Sarmiento took no part.

It may be noted, in connection with the claim made in this case that by taking part in Philippine elections petitioner forfeited his American citizenship, that in *Afroyim v. Rusk*,[67] the United States Supreme Court held that Congress was without power to strip an American of his citizenship because he voted in a foreign election.

2. *Renunciation or Denaturalization? The Case of Willie Yu.* -- Willie Yu was naturalized as a Philippine citizen in 1978. In 1981, he secured a renewal of his Portuguese passport from the Portuguese embassy in Tokyo. The passport had been originally issued to him in 1971. In 1980, he signed commercial documents in Hongkong in which he declared that his nationality was Portuguese. He brought an action for certiorari in the Supreme Court to stop the Commission on Immigration and Deportation from deporting him, claiming that he was a naturalized citizen of the Philippines.

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[67] 387 U.S. 253 (1967), *overruling* Perez v. Brownell, 356 U.S. 46 (1958).

In YU v. DEFENSOR SANTIAGO[68] the Court, by Justice Padilla, held that petitioner's acts constituted express renunciation of Philippine citizenship, under Commonwealth Act No. 63, Sec. 1 (2). Accordingly, it dismissed the petition.

Justice Gutierrez, joined by Chief Justice Fernan, dissented. He argued that a citizen may get a foreign passport simply for convenience, or to avoid discriminatory visa requirements or he may do so because he really wants to give up his Philippine citizenship. But, he said, whatever might be the reason must be determined in a trial and not in an administrative proceeding, such as that undertaken by the Commission on Immigration and Deportation. Justice Cruz also dissented in a separate opinion.

Both the majority and dissenting Justices assumed that renunciation could be inferred from certain acts. They only differed on whether this could be determined in a collateral proceeding, such as a petition for habeas corpus, or whether this should be decided in a regular court proceeding. I believe the real question in this case is whether the acts attributed to the petitioner (*i.e.*, obtaining a foreign passport and declaring in commercial documents his former nationality) constitute *express* renunciation. While the acts in question may imply renunciation, they do not constitute express renunciation as required by Sec. 1 (2) of Commonwealth Act No. 63. They could have been done for some other purpose than a desire to divest one's self of one's citizenship.[69] Express renunciation must be shown by distinct or unequivocal declaration that leaves no doubt as to a person's intention. It cannot be inferred from conduct, unless the conduct is itself a ground provided by law for loss of citizenship. To paraphrase the American Supreme Court, the Constitution can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it.[70]

Nonetheless, the majority ruling in this case may be sustained but on the ground that the acts of the petitioner constitute proof of falsely swearing allegiance to the Philippines.[71] For example, in *Knauer v. United States*,[72] it was held that an individual who falsely swears allegiance to the German Reich and was a "thoroughgoing Nazi and faithful follower of Adolf Hitler" may be stripped of his citizenship through the cancellation of his certificate of naturalization. If the decision in YU v. DEFENSOR SANTIAGO had been made to rest on this

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[68] G.R. No. 83832, January 24, 1989.

[69] *See, e.g.*, Palanca v. Republic, 80 Phil. 578 (1948).

[70] Afroyim v. Rusk, 387 U.S. 253 (1967).

[71] Under Commonwealth Act No. 473, Sec. 18 (a), in relation to Commonwealth Act No. 63, Sec. 1 (5), a certificate of naturalization may be cancelled if it was fraudulently obtained.

[72] 328 U.S. 654 (1946).

ground, *i.e.*, fraudulently obtaining naturalization rather than express renunciation, there need be no fear, as Justice Gutierrez apprehended that even natural-born citizens could lose their citizenship on such slender grounds as those found by the majority in this case.

B. Requirements of Fair Procedure

1. Search and Seizure Clause. -- In QUINTERO v. NBI,[73] petitioner was charged with direct bribery in a complaint filed with the City Fiscal of Pasay, on the basis of P379,000.00 which the National Bureau of Investigation (NBI) had seized from petitioner's residence. The money had allegedly been paid to petitioner in consideration of his signing a letter to the Constitutional Convention, of which he was a member, denouncing the existence of a "payola" made by the First Lady, Imelda Marcos, to influence the delegates in the performance of their functions. Quintero filed a petition for certiorari and prohibition in the Supreme Court to annul the search warrant issued against him and all proceedings taken pursuant to it, alleging that the alleged bribe money had been "planted" to destroy him for exposing the "payola" in the Convention.

The Supreme Court found Quintero's allegation to be true. The Court took note of the fact that shortly after Quintero's exposé, then President Marcos vowed to take action against him and that the raid on his house was conducted the same day President Marcos made his vow.

Through Justice Padilla, the Court held that the search warrant used was void because the NBI agent who applied for it had no personal knowledge of the offense later charged against the petitioner. On the other hand, the Court found the statement of Congressman Artemio Mate, who said he saw Quintero in his sick bed in the hospital receiving money from two persons after being given a folder containing a document, to be incredible. In the first place, there was no evidence to show that the document in the folder was Quintero's letter to the Constitutional Convention, denouncing the alleged "payola." In the second place neither was there evidence to show that he signed the document or that the money which Mate said he had seen handed to Quintero was payment for his signing the document. The Court found Mate's statement to be nothing but conclusions and inferences. An application for search warrants must set forth facts, not mere conclusions.

While the case was pending, the Marcos regime was overthrown and Quintero died in the United States where he had fled. Nonetheless, the Court decided the case on the ground that "the issues remain contentious, sharpened by the persuasive force of enlightened advocacy and which not even the impact of such supervening events had succeeded to moot."

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[73] 162 SCRA 467 (1988).

2. *Power of Immigration Commissioner to Order Arrest.* -- In HARVEY v. DEFENSOR SANTIAGO,[74] petitioners, who were among twenty-two suspected alien pedophiles, were apprehended in Pagsanjan, Laguna, by virtue of "mission orders" issued by the Commissioner of Immigration and Deportation. Petitioner Andrew Mark Harvey was found with two young boys. Richard Sherman was found with two naked boys inside his room, while the third, Van Den Elshout, had two children, ages 14 and 16, living with him. Commission on Immigration and Deportation (CID) agents seized from the petitioners photographs of young children in sexual acts, as well as posters advertising child prostitution in the Philippines.

Deportation proceedings were thereupon filed against the petitioners and subsequently a warrant of arrest was issued against them for violation of Secs. 37, 45 and 46 of the Immigration Act of 1940 and Sec. 69 of the Revised Administrative Code. Petitioners challenged the Immigration Commissioner's power to order their arrest on the ground that under Art. III, Sec. 2 of the Constitution only judges can order the arrest of persons.

The Court, per Justice Melencio-Herrera, upheld the petitioners' arrest. Although not a crime, it was held that pedophilia (defined by the Court as "psycho-sexual perversion involving children") could be the subject of a warrantless arrest if committed under the circumstances specified under Rule 113, Sec. 5 of the Rules of Court. Pedophilia could be a ground for arrest because it is contrary to the constitutional policy, expressed in Art. II, Sec. 13, to protect the moral and spiritual well-being of the youth. CID agents had reasonable grounds to believe that petitioners had committed pedophilia. On the validity of the orders of arrest issued against the petitioners, the Supreme Court held that, under Sec. 37 (a) of the Immigration Act of 1940, the Immigration Commissioner had the power to order the arrest of aliens whose stay in the Philippines is violative of any limitations or conditions under which they were admitted. It was pointed out that petitioners' arrest was ordered only after probable cause had been established.

In *Vivo v. Montesa* [75] it was held that "the issuance of warrants of arrest by the Commissioner of Immigration, solely for the purpose of investigation and before a final order of deportation is issued, conflicts with paragraph 3, section 1 of Article III [now Art. III, Sec. 2] of the Constitution." The Court in HARVEY distinguished the case of the petitioners by pointing out that deportation proceedings had been begun before their arrest was ordered and therefore the orders of arrest were not for the purpose of determining probable cause.

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[74] 162 SCRA 840 (1988).

[75] 24 SCRA 155 (1968).

The question whether administrative officials like the Immigration Commissioner can order the arrest of aliens has been a vexing problem. In *Qua Chee Gan v. Deportation Board*,[76] the Court expressed doubt whether the arrest of an individual may be ordered by any authority other than a judge if the purpose is "merely to determine the existence of a probable cause, leading to an administrative investigation." On the other hand, in *Tiu Chun Hai v. Commission on Immigration*,[77] it was held that a deportation proceeding is not a prosecution for, or a conviction of, a crime, nor is deportation a punishment. Accordingly, in *Morano v. Vivo*,[78] it was held that "the constitutional guarantee set forth in Art. III, Sec. 2 requiring that the issue of *probable cause* be determined by a judge, does not extend to deportation proceedings."

In HARVEY v. DEFENSOR SANTIAGO, the Court failed to resolve the doctrinal confusion caused by the *Qua Chee Gan* and *Tiu Chun Hai* rulings. On the contrary, it only confounded the problem by quoting from both cases. By stressing that the orders of arrest against the petitioners had been issued only after the Commissioner of Immigration and Deportation had found probable cause and that the purpose of the arrest was to implement the deportation proceedings against the petitioners, the HARVEY Court purported to follow the ruling in *Qua Chee Gan*. But by quoting *Tiu Chun Hai* that "the requirement of probable cause, to be determined by the judge, does not extend to deportation proceedings," it in effect repudiated the *Qua Chee Gan* doctrine. Indeed, in result the decision in HARVEY v. DEFENSOR SANTIAGO is closer to *Tiu Chun Hai v. Commissioner of Immigration*, and therefore what should have been done was for the Court to categorically overrule *Qua Chee Gan v. Deportation Board* and *Vivo v. Montesa*.

To begin with, it does not seem to me that the arrest without warrant of the petitioners in the HARVEY case could be justified under Rule 113, Sec. 5. The fact that the arrest orders were the result of a three-month surveillance indicates that warrants of arrest could have been obtained. In the second place, the existence of probable cause justifying such warrantless arrests could not justify the issuance of the orders of arrest by the CID if, as held in *Qua Chee Gan*, such order of arrest can only be issued "to carry out a final order of deportation." For in the HARVEY case the fact is that there was yet no final determination that petitioners were liable to deportation.

Indeed, the distinction drawn in *Qua Chee Gan v. Deportation Board* between an administrative order of arrest issued as a means of determining the existence of probable cause, which the Court said cannot

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[76] 9 SCRA 27 (1963). *Accord*, Ng Hua To v. Galang, 10 SCRA 411 (1964); Vivo v. Montesa, 24 SCRA 155 (1968).

[77] 104 Phil. 949 (1958). *Accord*, Morano v. Vivo, 20 SCRA 562 (1967).

[78] 20 SCRA 562, 569 (1967).

be made because the Constitution confides such power only in judges, and such an order for the purpose of carrying out a final order of deportation, which according to the Court could be made without offense to the Constitution, is untenable. Even under Art. III, Sec. 2 of the Constitution the issuance of a warrant of arrest "merely to determine the existence of a probable cause" is not allowed. Such warrant can be issued only after a judge finds probable cause to believe that a crime has been committed and the accused should be held for trial.

Indeed, the question is not whether the arrest of an individual, whether in connection with a crime or deportation, can be ordered only after probable cause has been shown. Regardless of the type of proceedings, such arrest can only be ordered upon a finding of probable cause. The question rather is whether the determination of probable cause can only be determined by a judge. There seems to me no warrant for the view that the determination of probable cause is exclusively the function of a judge, simply because the Constitution does not explicitly distinguish between warrants in a criminal case and those issued in administrative proceedings. For instance, legislative contempts may require the issuance of an order of arrest by the presiding officer of Congress. Only in the case of criminal prosecution does Art. III, Sec. 2 require that the determination of probable cause be made by a judge. For the fact is that administrative arrests and administrative searches and seizures are well established in our law. In *Papa v. Mago*,[79] for example, the Court sustained the authority of customs authorities to search any vessel or aircraft for goods brought into the Philippines without payment of custom duties or contrary to law.[80]

The Court in HARVEY should have categorically repudiated the doctrine of *Qua Chee Gan*, which was followed by *Vivo v. Montesa*, and upheld the grant of power to the CID to issue warrants of arrest under the Immigration Act of 1940 and should thus end the doctrinal confusion in this area of the law. The only requirement should be that, before such power is exercised, there must first be a finding of probable cause by the CID.

3. Judge Not Required to Examine Witnesses in Issuing Warrants of Arrest. -- The question was settled at an early time that to issue a warrant of arrest, a judge need not personally examine the complainant and the witnesses but that he may simply rely on the fiscal's certification that after preliminary investigation he found probable cause.[81] This procedure stands in sharp contrast to the requirement for the issuance of a search warrant that the judge must personally conduct such examination in

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[79] 22 SCRA 857 (1968).

[80] Tariff and Customs Code, Sec. 2203.

[81] Amarga v. Abbas, 98 Phil. 739 (1956).

determining probable cause.[82] This difference in requirement is reflected in the provisions of the Rules of Court.[83]

In SOLIVEN v. MAKASIAR and BELTRAN v. MAKASIAR[84] petitioners, who had been charged with libel on complaint of President Aquino, sought the annulment of warrants of arrest issued by the Regional Trial Court on the ground that the judge did not personally examine the complainant and the witnesses before issuing the warrants. Rejecting this contention, the Supreme Court, in a *per curiam* resolution, stated:

> What the constitution underscores is the exclusive and personal responsibility of the issuing judge to satisfy himself of the existence of probable cause. In satisfying himself of the existence of probable cause for the issuance of the warrant of arrest, the judge is not required to personally examine the complainant and his witnesses. Following established doctrine and procedure, he shall: (1) personally evaluate the report and the supporting documents submitted by the fiscal regarding the existence of probable cause and, on the basis thereof, issue a warrant of arrest; or (2) if on the basis thereof he finds no probable cause, he may disregard the fiscal's report and require the submission of supporting affidavits of witnesses to aid him in arriving at a conclusion as to the existence of probable cause. Sound policy dictates this procedure, otherwise judges would be unduly laden with the preliminary examination and investigation of criminal complaints instead of hearing and deciding cases filed before their courts.

4. Custodial Phase of Investigation. -- At what stage of the police investigation is a suspect entitled to the Miranda warnings? In GAMBOA v. CRUZ,[85] the accused was arrested without a warrant for vagrancy. The arrest took place on July 19, 1979 at 7 a.m. He was taken to Police Precinct No. 2 in Manila. The next day, he was included in a police line-up of five detainees and was pointed to by the complainant as a companion of the main suspect, on the basis of which the accused was ordered to stay and sit in front of the complainant, while the latter was interrogated. The accused was thereafter charged with robbery. After the prosecution had rested, the accused moved to dismiss the case against him on the ground that he had been denied the assistance of counsel during the line-up. However, his motion was denied. He then filed a petition for certiorari.

The Supreme Court, by a 12 to 3 vote, dismissed the petition. The majority opinion of Justice Padilla stated that the right to counsel attaches only upon the start of an investigation, when the police officer starts to ask questions designed to elicit information and/or confessions or admissions from the accused. As the police line-up in this case was not a part of the custodial inquest, the petitioner was not entitled to counsel, according to the majority.

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[82] *See* Bache & Co. v. (Phil.) v. Ruiz, 37 SCRA 823 (1971).

[83] *Compare* Rule 112, Sec. 6 (a) *with* Rule 126, Sec. 4.

[84] G.R. Nos. 82585 & 8287, Nov. 14, 1988.

[85] 162 SCRA 642 (1988).

Chief Justice Yap dissented, contending that the investigation had commenced the moment the accused was taken from the police line-up and made to sit in front of the complainant, while the latter made a statement to the police. The right to counsel must be afforded the accused the moment he is under custodial investigation and not only when a confession is being exacted from him, he argued.

Justice Sarmiento, joined by Justice Gancayco, also dissented. He pointed out that the accused was in custody so that his confrontation with the complainant became adversarial and not only informational. He said that while a police line-up is not *per se* critical because in most cases it is merely part of the evidence gathering process, in this case the fact that the accused stood charged with an offense (vagrancy) and had been detained made the case different.

On the other hand, Justice Cruz concurred in a separate opinion, pointing out the lack of showing that improper suggestions had been made by the police to influence the witness in the identification of the accused.

5. Trial in Absentia. -- In GIMENEZ v. NAZARENO,[86] it was held that an accused, who has been duly tried *in absentia*,[87] loses the right to present evidence on his own behalf and to confront and cross-examine the witnesses against him. It was, therefore, error for the trial court, after allowing the prosecution to present its evidence, to suspend the proceedings until the accused could be arrested. The Supreme Court, in an opinion by Justice Gancayco, said:

> The contention of the respondent judge that the right of the accused to be presumed innocent will be violated if a judgment is rendered as to him is untenable. [The accused] is still presumed innocent. Judgment of conviction must still be based upon the evidence presented in court. Such evidence must prove him guilty beyond reasonable doubt. Also, there can be no violation of due process since the accused was given the opportunity to be heard.
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> Nor can it be said that an escapee who has been tried in absentia retains his rights to cross-examine and to present evidence on his behalf. By his failure to appear during the trial of which he had notice, he virtually waived these rights.

C. The Death Penalty and other Cruel or Unusual Punishments

1. Effect of the Abolition of the Death Penalty on the Provisions of the Penal Code. -- In PEOPLE v. MUÑOZ,[88] the accused, who were bodyguards of a mayor, killed three persons whom they suspected of being

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[86] 160 SCRA 1 (1988).

[87] Art. III, Sec. 14 (2).

[88] G.R. Nos. 38968-70, Feb. 9, 1989.

cattle rustlers. The killing took place in San Carlos City, Pangasinan on June 30, 1972. After trial, the accused were found guilty of murder. Three appealed to the Supreme Court, which affirmed the trial court's findings. The penalty for murder under Art. 248 of the Revised Penal Code is *reclusion temporal* maximum to death. The question was the appropriate penalty to be imposed on the accused in view of Art III. Sec. 19 (1) of the Constitution which prohibits the death penalty from being imposed, "unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it" and provides that "any death penalty already imposed shall be reduced to *reclusion perpetua*."

In four cases[89] previously decided, the Supreme Court held that, in view of the abolition of the death penalty, the remaining penalty must be divided into three new periods, namely, the lower half of *reclusion temporal* maximum, as the minimum, the upper half of the same penalty, as the medium; and *reclusion perpetua*, as the maximum.

Through Justice Cruz, the Court overruled its prior decisions and instead held that Art. III, Sec. 19 (1) does not change the periods of the penalty prescribed by Art. 248 of the Revised Penal Code except insofar as it prohibits the imposition of the death penalty and reduces it to *reclusion perpetua*, but the range of the medium and minimum penalties remain unchanged. This interpretation could lead to inequities in some cases. For example, a person originally subject to the death penalty and another one who committed murder without the attendance of any modifying circumstances would be punishable with the same medium period of the penalty although the former is concededly more guilty than the latter. But, the Court said this could not be helped because the problem was not for the Court but for the Congress to solve. It was pointed out that penalties are prescribed by statutes and are essentially and exclusively legislative. Judges can only apply them. They have no authority to modify penalties or revise their range as determined exclusively by the legislature. In this case it was held that, as there was no generic aggravating or mitigating circumstances attending the commission of the offenses, the applicable sentence was the medium period of the penalty prescribed by Art. 248 of the Revised Penal Code which, conformably to the new doctrine announced, was *reclusion perpetua*.

Justice Melencio-Herrera filed a concurring and dissenting opinion. She concurred insofar as conviction of the appellants was concerned, but dissented as to the penalty imposed. She said that the question was whether or not the 1987 Constitution abolished the death penalty. She said that the records of the Constitutional Commission (CONCOM) leave no doubt as to the intention of that body to abolish the death penalty. She

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[89] People v. Gavarra, 155 SCRA 327 (1987); People v. Masangkay, 155 SCRA 113 (1987); People v. Atencio, 156 SCRA 242 (1987); People v. Intino, L-69934, Sept. 26, 1988.

argued that if *reclusion perpetua* is retained as the penalty for murder even in the absence of aggravating and modifying circumstances, while it is also imposed as the new maximum penalty for the crime, the presence or absence of modifying circumstances will no longer lead to the imposition of a higher or lesser penalty depending on the attending circumstances prescribed in the Penal Code. In both cases, the imposable penalty is the same. "Certainly," she wrote, "the CONCOM, in banning the imposition of capital punishment, could not have also intended to discard the underlying reason of the Penal Code in imposing three-periods for the penalty for Murder, *i.e.*, to punish the offense in different degrees of severity depending on the offender's employment of aggravating or mitigating circumstances or the lack thereof. To say that this is 'the will of the Constitution' is inaccurate for the matter was clearly left to the courts which were expected to be 'equal to the task.'"

2. *Indefinite Imprisonment.* -- In PEOPLE v. DACUYCUY,[90] the Supreme Court invalidated a penalty of indefinite imprisonment, apparently the result of oversight by Congress to fix the term, even as it held that courts cannot supply the legislative omission. The private respondents were charged in the municipal court of Hindang, Leyte with violation of the Magna Carta for Public School Teachers, for which the penalty provided in Sec. 32 of the law was "a fine of not less than one hundred pesos not more than one thousand pesos, or by imprisonment, in the discretion of the court." The private respondents moved to dismiss the case on the ground that because of the indefinite term of imprisonment the municipal court could have no jurisdiction, but their motion was denied. They filed a petition for *certiorari* in the Court of First Instance on the same ground and for the additional reason that Sec. 32 was unconstitutional because it gave the courts unlimited discretion to fix the term of the sentence. However, they again lost. The case then went to the Supreme Court on petition of both the prosecution and the defense.

Through Justice Regalado, the Court rejected the defense claim that because under the law the courts could exercise wide discretion to fix the term of imprisonment the resulting penalty would be "cruel or unusual." It reiterated the ruling in *People v. De la Cruz*[91] that the constitutional prohibition is aimed at the form or character of the punishment rather than its severity in respect of duration or amount. That the penalty that might be fixed is grossly disproportionate to the crime is an insufficient basis to declare it unconstitutional. It will only authorize courts to recommend to the Executive branch the reduction of the penalty, the Court said.

But the Court sustained the defense contention that courts are without power to fix the term of imprisonment, because this is a

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[90] G.R. No. L-45127, May 5, 1989.

[91] 92 Phil. 906 (1953).

legislative function and, obviously in this case, Congress overlooked to fix the term. "It is not for the courts to fix the term of imprisonment where no points of reference have been provided by the legislature," Justice Regalado wrote, "(w)hat valid delegation presupposes and sanctions is an exercise of discretion to fix the length of service of a term of imprisonment which must be encompassed within specific and or designated limits provided by law, the absence of which will constitute such exercise as an undue delegation, if not an outright intrusion into or assumption of, legislative power." As the only remaining penalty was the fine, the court upheld the municipal court's jurisdiction on the basis of such penalty.

The dictum in *People v. De la Cruz*,[92] which the Court quoted with approval in DACUYCUY, to the effect that "cruel or unusual punishments" refer to "punishments which never existed in America or which public sentiment had been regarded as cruel, such as those inflicted at the whipping post, or in the pillory, burning at the stake, breaking on the wheel, disemboweling and the like" should not be understood in a narrow sense as limited to the ancient barbaric practices. In Chief Justice Marshall's phrase, it should never be forgotten that it *is* a Constitution we are interpreting, intended for ages to endure.[93] What is cruel or unusual punishment is not limited to those which the framers of the fundamental law dealt with at the time of creation. The phrase "cruel or unusual," now changed to "cruel, degrading or inhuman,"[94] is a standard, not a rule, and necessarily must change with advancing standards of civilization and morality. Consequently, punishments, which before were not thought to be cruel, degrading or inhuman, may be so regarded by succeeding generations.

Nor are disproportionate penalties only subject to reduction. They may be so grossly disproportionate as to require their invalidation.

3. *Double Jeopardy.* -- In PEOPLE v. CITY COURT,[95] the respondent was charged with violation of Sec. 7 of Republic Act No. 3060 for showing a picture without approval of the Board of Censors (Case No. F-147347), and violation of Art. 201 (3) of the Revised Penal Code for exhibiting an indecent and immoral motion picture (Case No. F-147348). He pleaded not guilty to both charges in the City Court. He later withdrew his plea in Case No. 147348 (for violation of the Revised Penal Code) and instead moved for the dismissal of the case, contending that the two cases involved the same offense. The trial court granted his motion and dismissed Case No. F-147348, after which petitioner changed his plea in Case No. F-147347 and substituted it with a plea of guilty for violation of Rep. Act. No. 3060. He was thereupon sentenced to pay a fine of P600.00. The prosecution moved for a reconsideration, but, its motion was denied. It

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92 *Id.* at 908.

93 McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1918).

94 Art. III, Sec. 19 (1).

95 154 SCRA 175 (1987).

therefore filed a petition for certiorari in the Supreme Court. The question was whether the City Court erred in ordering the dismissal of Case No. F-147348 on the ground of double jeopardy.

The Supreme Court, in an opinion by Justice Padilla, sustained the prosecution and set aside the trial court's order of dismissal. It was held that the two offenses involve different elements. The gravamen of the offense defined in Rep. Act No. 3060 is the public exhibition of any motion picture which has not been previously passed by the Board of Censors for Motion Pictures. The motion picture may not be indecent or immoral, but if it has not been previously approved by the Board, its public showing constitutes a criminal offense. On the other hand, the offense punished in Art. 203 (3) of the Revised Penal Code is the public showing of indecent or immoral plays, scenes, acts, or shows, not just motion pictures. The nature of the offenses are also different. The crime punished in Rep. Act No. 3060 is a *malum prohibitum* in which criminal intent need not be proved because it is presumed, while the offense punished in Art. 201 (3) of the Revised Penal Code is a *malum in se,* in which criminal intent is an indispensable ingredient.

Justice Cruz, joined by Justice Gutierrez, concurred with reservation as to the constitutionality of Rep. Act No. 3060.

D. Freedom of Expression

1. Freedom of Expression and Defamation. – In MANUEL v. CRUZ PAÑO,[96] petitioner, a practicing attorney, was prosecuted for libel on the basis of a letter he had written to the Chairman of the Anti-Smuggling Action Center, in which he denounced certain agents of the ASAC for allegedly subjecting his client, a tourist from Hongkong, to indignities and taking her necklace and bracelet and her son's wrist watch, plus HK$70. After investigation, his complaint was dismissed and the ASAC agents were exonerated. Petitioner thereafter filed criminal charges of robbery against the agents. However, he found the prosecutors unsympathetic. He, therefore, filed a civil action for damages against the agents.

On June 10, 1976, the *Bulletin Today* published a news item based on petitioner's letter to the ASAC. The publication of the letter formed the basis of the action for libel against petitioner and his clients. Petitioner moved to quash the case, but his motion was denied. He, therefore, filed a petition for *certiorari* in the Supreme Court.

The Court, through Justice Cruz, ruled that the letter was privileged communication. It was held that, both as a lawyer in the discharge of his legal duty to his clients and as a private individual whose duty was to expose anomalies in the public service, petitioner had a

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[96] G.R. No. L-46079, April 17, 1989.

right to complain against official abuses. It was for the prosecution to prove that petitioner was motivated by actual malice.

It was contended that the case should not be dismissed outright precisely to give the prosecution a chance to introduce evidence to overcome the presumption of lack of malice. However, the Court held that, from the allegations of the information itself, it was evident that the accused acted in good faith and for justifiable ends in making the allegedly libelous imputations. There was, therefore, no need to prolong the proceedings to the prejudice of the defendant. "The vitality of republicanism," the Court pointed out, "derives from an alert citizenry. Whenever the citizen discovers official anomaly, it his duty to expose and denounce it . . . The sins of the public service are imputable not only to those who actually commit them but also to those who by their silence or inaction permit and encourage their commission."

On the other hand, in BULLETIN PUBLISHING CORP. v. NOEL,[97] what was involved was alleged libel committed against private persons. The heirs of the late Amir Mindalano sued the Bulletin Publishing Corp. for damages, charging it with libel, on the basis of the following excerpts in the June 22, 1986 issue of the *Philippine Panorama*:

> The division of Lanao into Sur and Norte in 1950 only emphasized the feudal nature of Maranaw politics. Talk of Lanao politics and you find yourself confined to a small circle of Alonto-Dimaporo, Dimakuta, Dianalan, Lucman families and a few more. These are big, royal families. About the only time that *one who was not of any royal house* became a leader of consequence in the province was during the American era when the late Amir Mindalano held some sway. This was because *Mindalano had the advantage of having lived with an American family* and was therefore fluent and literate in English. But as soon as the *datus* woke up to the blessings of the transplanted American public school system, as soon as they could speak and read and write in English, political leadership again became virtually their exclusive domain. There must be some irony in that.

The heirs claimed that it was not true that Amir Mindalano did not belong to a royal house because the truth was that he belonged to four of the sixteen royal houses of Lanao del Sur and that because of the false statement in the article they were damaged in their social standing. They further claimed that the statement that Amir Mindalano had lived with an American family was not only false but that it had a repugnant connotation in Maranaw society.

The Bulletin Publishing Corp. moved for the dismissal of the complaint on the ground that it did not state a cause of action. However, its motion was denied. It then filed a petition for certiorari and prohibition in the Supreme Court.

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[97] G.R. No. 76565, November 9, 1988.

Speaking through Justice Feliciano, the Court ruled that on the basis of the complaint there was no libel and the trial court should have dismissed the suit. The identification of Amir Mindalano was merely incidental. There was nothing defamatory, or that imputed vice or defect on Amir Mindalano or that cast dishonor, discredit or contempt on him or that blackened his memory. After noting that a community which, like the Philippines, is by constitutional principle "both republican in character (Art. II, Sec. 1) and egalitarian in inspiration (Art. II, Secs. 10-11)," Justice Feliciano stressed that "It is to the standards of the national community, not to those of the region, that a court must refer especially where a newspaper is national in reach and coverage [to determine whether the remark is defamatory]. Any other role in a national community with many diverse cultural, social, religious and other groupings is likely to produce an unwholesome 'chilling effect' upon the constitutionally-protected operation of the press and other instruments of information and education."

The cases of MANUEL and BULLETIN PUBLISHING CORP. are actually different. The first involves criticism of official conduct, while the second concerns remarks about private individuals. When official conduct is involved, the doctrine of privilege throws a mantle of protection on expression and shifts the burden on the prosecution to prove that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[98] No such privilege attaches to criticism of private conduct. In other words, in the usual case, malice is presumed from defamatory words, but the doctrine of privilege destroys that presumption.[99] But the Court disposed of the cases alike because in MANUEL v. CRUZ PAÑO, although defamation was alleged in the information, the Court found nothing in the information that in any way could destroy the privileged character of the communication and thus overcome the presumption of good faith. On the other hand, in BULLETIN PUBLISHING CORP. v. NOEL, the complainant did not allege a cause of action because the Court found the expression not to be defamatory.

A different disposition was followed in SOLIVEN v. MAKASIAR and BELTRAN v. MAKASIAR.[100] The President of the Philippines filed a complaint for libel against the petitioners, who were the publisher and columnist of the Philippine Star, based on Beltran's column of October 12, 1987, entitled "The Nervous Officials of the Aquino Administration," in which he wrote: "If you recall, during the August 29 coup attempt, the President hid under her bed, while the fighting was going on -- perhaps

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[98] New York Times v. Sullivan, 376 U.S. 254 (1964). For a statement that the *New York Times* ruling has been adopted by the Philippine Supreme Court, *see* the dissent of Justice Teehankee in Babst v. NIB, 132 SCRA 316 (1984). *See* also the dissent of Justice Dizon in Lopez v. Court of Appeals, 34 SCRA 116, 129 (1970).

[99] *See* United States v. Bustos, 37 Phil. 731, 743 (1918).

[100] *Supra*, note 84.

the first Commander-in Chief of the Armed Forces to do so." The complaint was filed with the City Fiscal of Manila. Instead of submitting his counter-affidavit, Beltran moved to dismiss the complaint. However, the Fiscal denied his motion and, after finding a prima facie case against the petitioners, filed the case in the Regional Trial Court. Thereafter warrants of arrest were issued against the petitioners. The petitioners filed a petition for certiorari and prohibition in the Supreme Court. Beltran argued that he could not be held liable for libel because of the privileged character of the publication. In dismissing the petition the Court ruled that it was not a trier of facts and the defense raised by the petitioners should be resolved by the trial court after receiving the evidence of the parties. Nor was the Court sympathetic to the claim that to allow the libel cases to proceed would produce a "chilling effect" on press freedom. The Court found no basis at that stage to rule on the question.

Justice Gutierrez concurred, although he thought the Court should have resolved the petitioners' claim that to compel them to go to trial would produce a "chilling effect" on their exercise of press freedom.

The difference in disposition between these cases and the first two cases may be explained in the sense that resort to the Supreme Court in SOLIVEN and BELTRAN was premature. For unlike in the first two cases, the trial court had no opportunity to rule on the privileged character of the writing in SOLIVEN and BELTRAN and, therefore, could not have committed a grave abuse of discretion as charged by the petitioners. The petitioners went straightaway to the Supreme Court to contest the validity of the informations and the orders of arrest against them. The ruling that petitioners should not bypass the trial court and that they should raise their defenses there is not inconsistent with the doctrine that where it appears from the parties' pleadings that the alleged libelous matter is protected by the constitutional guarantee of free expression, the defendant should not be made to stand trial.[101]

2. *Freedom of Expression and the Right of Privacy* . -- In AYER PRODUCTION v. CAPULONG,[102] the Supreme Court, per Justice Feliciano, upheld the right of an Australian film maker to produce a "docu-drama" on the February 1986 revolution in the Philippines, against the claim of the private respondent Juan Ponce Enrile that the making of the film, entitled "The Four Day Revolution," would violate his right of privacy. Ponce Enrile had forbidden the use of his name. In addition, he brought an action in the Regional Trial Court to enjoin production of the movie. The trial court issued an injunction, forbidding the film producer from filming the movie and from making any references to Ponce Enrile.

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[101] Elizalde v. Gutierrez, 76 SCRA 448 (1977).

[102] 160 SCRA 861 (1988).

The Supreme Court promptly set aside the injunction of the trial court. The Court reiterated the view that movies come within the protection of the Free Speech Clause of the Constitution. "The circumstance that the production of the motion picture is a commercial activity expected to yield profit is not a disqualification for availing of the freedom of speech and of expression." Turning to Ponce Enrile's claim of privacy, the Court ruled that the right of privacy cannot be invoked to resist publication of matters of public interest. It stated:

> Private respondent is a "public figure" precisely because, *inter alia*, of his participation as a principal actor in the culminating events of the change of government in February 1986. Because his participation therein was major in character, a film reenactment of the peaceful revolution that fails to make reference to the role played by private respondent would be grossly unhistorical. The right of privacy of a "public figure" is necessarily narrower than that of an ordinary citizen. Private respondent has not retired into the seclusion of simple private citizenship. He continues to be a "public figure." After a successful political campaign during which his participation in the EDSA Revolution was directly or indirectly referred to in the press, radio and television, he sits in a very public place, the Senate of the Philippines.

The Court also stated that the trial court's injunction amounted to a prior restraint on freedom of expression. "[A] weighty presumption of invalidity vitiates measures of prior restraint upon the exercise of such freedom," the Court said.

The Court ordered the dismissal of a similar case brought by Colonel Gringo Honasan, another figure in the EDSA Revolution, noting that by turning fugitive from justice, the colonel had forfeited any right to claim privacy.

E. Freedom of Information

In VALMONTE v. BELMONTE,[103] petitioners, who were media practitioners, requested information from respondent General Manager of the Government Service Insurance System on alleged "clean loans" granted by the GSIS to certain members of the defunct Batasang Pambansa on the guaranty of Mrs. Imelda Marcos shortly before the February 7, 1986 election. Their request was refused on the ground of confidentiality of the records. They, therefore, brought a suit for *mandamus*, which the Supreme Court granted. Speaking for the Court, Justice Cortes wrote: "The postulate of public office as a public trust, institutionalized in the Constitution (in Article XI, Sec. 1) to protect the people from abuse of governmental power, would certainly be mere empty words if access to such information of public concern is denied, except under limitations prescribed by implementing legislation adopted pursuant to the Constitution. The right to information is not merely an adjunct of and, therefore, restricted in

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[103] G.R. No. 74930, Feb. 13, 1989.

application by the exercise of the freedoms of speech and of the press. [It] goes hand-in-hand with the constitutional policies of full *public disclosure* and honesty in public service. It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in government."

The Court rejected the contention that funds of the GSIS were not public. It held that the GSIS is a trustee of contributions from the government and its employees and the administrator of various insurance programs for the benefit of the latter. Undeniably, its funds assume a public character. According to the Court, the public nature of the loanable funds of the GSIS and the public office held by the alleged borrowers made the information sought clearly a matter of public interest and concern.

On the respondent's claim that in view of the right to privacy which is equally protected by the Constitution and by existing laws the documents evidencing loan transactions of the GSIS must be deemed outside the ambit of the right to information, the Court ruled that the right cannot be invoked by juridical entities, since the basis of the right of privacy is an injury to the feelings and sensibilities. Neither can the GSIS invoke the right to privacy of its borrowers. The right is purely personal in nature. The borrowers themselves in this case, it was pointed out, may not invoke the right of privacy, considering the public offices they were holding at the time the loans were alleged to have been granted. "It cannot be denied that because of the interest they generate and their news-worthiness, public figures, most especially those holding responsible positions in government, enjoy a more limited right to privacy as compared to ordinary individuals, their actions being subject to closer public scrutiny," the Court said, citing its decision in *Ayer Productions Pty. Ltd. v. Capulong*.[104]

Finally, it was argued that the records of the GSIS, were outside the coverage of the people's right of access to official records because the GSIS, in granting loans, was exercising a proprietary function. This contention was dismissed, the Court citing the intent of members of the Constitutional Commission of 1986 to include government-owned or controlled corporations and transactions entered into by them in the coverage of the State policy of full public disclosure.

We have now come to the end of a rather long journey. I do not think the reconnaissance could have been conducted through a shorter route than that we have taken. For our subject, to borrow a figure of Professor Freund, is like a castle of the mind, which is not to be taken by a trumpet blast, much less by tooting one horn of a dilemma.[105]

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[104] *Supra*, note 102.

[105] Freund, *The Constitution and Fundamental Freedoms*, in JUDICIAL REVIEW AND THE SUPREME COURT 124, 140 (L. Levy, ed. 1967).