

**IN THE MATTER OF THE PETITION FOR HABEAS CORPUS OF
BENIGNO S. AQUINO, JR., RAMON MITRA, JR., FRANCISCO RODRIGO,
AND NAPOLEON RAMA, PETITIONERS, VS. HON. JUAN PONCE
ENRILE, SECRE...***G.R. No. L-35546. September 17, 1974*

Ponente: MAKALINTAL, C.J.

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These cases are all petitions for habeas corpus, the petitioners having been arrested and detained by the military by virtue of the President's Proclamation No. 1081, dated September 21, 1972.

At the outset a word of clarification is in order. This is not the decision of the Court in the sense that a decision represents a consensus of the required majority of its members not only on the judgment itself but also on the rationalization of the issues and the conclusions arrived at. On the final result the vote is practically unanimous; this is a statement of my individual opinion as well as a summary of the voting on the major issues. Why no particular Justice has been designated to write just one opinion for the entire Court will presently be explained.

At one point during our deliberations on these cases it was suggested that as Chief Justice I should write that opinion. The impracticability of the suggestion shortly became apparent for a number of reasons, only two of which need be mentioned. First, the discussions, as they began to touch on particular issues, revealed a lack of agreement among the Justices as to whether some of those issues should be taken up although it was not necessary to do so, they being merely convenient for the purpose of ventilating vexing questions of public interest, or whether the decision should be limited to those issues which are really material and decisive in these cases. Similarly, there was no agreement as to the manner the issues should be treated and developed. The same destination would be reached, so to speak, but through different routes and by means of different vehicles of approach. The writing of separate opinions by individual Justices was thus unavoidable, and understandably so for still another reason, namely, that although little overt reference to it was made at the time, the future verdict of history was very much a factor in the thinking of the members, no other case of such transcendental significance to the life of the nation having before confronted this Court. Second — and this to me was the insuperable obstacle — I was and am of the opinion, which was shared by six other Justices^[1] at the time the question was voted upon, that petitioner Jose W. Diokno's motion of December 28, 1973 to withdraw his petition. (G.R. No. L-35539) should be granted, and therefore I was in no position to set down the ruling of the Court on each of the arguments raised by him, except indirectly, insofar as they had been raised likewise in the other cases.

It should be explained at this point that when the Court voted on Diokno's motion to withdraw his petition he was still under detention without charges, and continued to remain so up to the time the separate opinions of the individual Justices were put in final form preparatory to their promulgation on September 12, which was the last day of Justice Zaldivar's tenure in the Court.^[2] Before they could be promulgated, however, a major development supervened: petitioner Diokno was released by the President in the morning of September 11, 1974. In view

thereof all the members of this Court except Justice Castro agreed to dismiss Diokno's petition on the ground that it had become moot, with those who originally voted to grant the motion for withdrawal citing said motion as an additional ground for such dismissal.

The petitioners in the other cases, except Benigno Aquino, Jr. (G.R. No. L-35546), either have been permitted to withdraw their petitions or have been released from detention subject to certain restrictions.[3] In the case of Aquino, formal charges of murder, subversion and illegal possession of firearms were lodged against him with a Military Commission on August 11, 1973; and on the following August 23 he challenged the jurisdiction of said Commission as well as his continued detention by virtue of those charges in a petition for certiorari and prohibition filed in this Court (G.R. No. L-37364). The question came up as to whether or not Aquino's petition for habeas corpus should be dismissed on the ground that the case as to him should more appropriately be resolved in this new petition. Of the twelve Justices, however, eight voted against such dismissal and chose to consider the case on the merits.[4]

On Diokno's motion to withdraw his petition I voted in favor of granting it for two reasons. In the first place such withdrawal would not emasculate the decisive and fundamental issues of public interest that demanded to be resolved, for they were also raised in the other cases which still remained pending. Secondly, since it was this petitioner's personal liberty that was at stake, I believed he had the right to renounce the application for habeas corpus he initiated. Even if that right were not absolute I still would respect his choice to remove the case from this Court's cognizance, regardless of the fact that I disagreed with many of his reasons for so doing. I could not escape a sense of irony in this Court's turning down the plea to withdraw on the ground, so he alleges among others, that this is no longer the Court to which he originally applied for relief because its members have taken new oaths of office under the 1973 Constitution and then ruling adversely to him on the merits of his petition.

It is true that some of the statements in the motion are an affront to the dignity of this Court and therefore should not be allowed to pass unanswered. Any answer, however, would not be foreclosed by allowing the withdrawal. For my part, since most of those statements are of a subjective character, being matters of personal belief and opinion, I see no point in refuting them in these cases. Indeed my impression is that they were beamed less to this Court than to the world outside and designed to make political capital of his personal situation, as the publicity given to them by some segments of the foreign press and by local underground propaganda newsheets subsequently confirmed. It was in fact from that perspective that I deemed it proper to respond in kind, that is, from a non-judicial forum, in an address I delivered on February 19, 1974 before the LAWASIA, the Philippine Bar Association and the Philippine Lawyers' Association.

Justice Teehankee, it may be stated, is of the opinion that a simple majority of seven votes out of twelve is legally sufficient to make the withdrawal of Diokno's petition effective, on the theory that the requirement of a majority of eight votes applies only to a decision on the merits.

In any event, as it turned out, after petitioner Diokno was released by the President on September 11 all the members of this Court except Justice Castro were agreed that his petition had become moot and therefore should no longer be considered on the merits. This notwithstanding, some of the opinions of the individual members, particularly Justices Castro and Teehankee, should be taken in the time setting in which they were prepared, that is, before the order for the release of Diokno was issued.

The Cases.

The events which form the background of these nine petitions are related, either briefly or in great detail, in the separate opinions filed by the individual Justices. The petitioners were arrested and held pursuant to General Order No. 2 of the President (September 22, 1972), "for being participants or for having given aid and comfort in

the conspiracy to seize political and state power in the country and to take over the Government by force . . ."

General Order No. 2 was issued by the President in the exercise of the powers he assumed by virtue of Proclamation No. 1081 (September 21, 1972) placing the entire country under martial law. The portions of the proclamation immediately in point read as follows:

"NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested upon me by Article VII, Section 10, Paragraph (2) of the Constitution, do hereby place the entire Philippines as defined in Article I, Section 1 of the Constitution under martial law and, in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees, orders and regulations promulgated by me personally or upon my direction.

"In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative."

The provision of the 1935 Constitution referred to in the proclamation reads: "the President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law."

1. The first major issue raised by the parties is whether this Court may inquire into the validity of Proclamation No. 1081. Stated more concretely, is the existence of conditions claimed to justify the exercise of the power to declare martial law subject to judicial inquiry? Is the question political or justiciable in character?

Justices Makasiar, Antonio, Esguerra, Fernandez, and Aquino hold that the question is political and therefore its determination is beyond the jurisdiction of this Court. The reasons are given at length in the separate opinions they have respectively signed. Justice Fernandez adds that as a member of the Convention that drafted the 1973 Constitution he believes that "the Convention put an imprimatur on the proposition that the validity of a martial law proclamation and its continuation is political and non-justiciable in character."

Justice Barredo, on the other hand, believes that political questions are not per se beyond the Court's jurisdiction, the judicial power vested in it by the Constitution being plenary and all-embracing, but that as a matter of policy implicit in the Constitution itself the Court should abstain from interfering with the Executive's Proclamation, dealing as it does with national security, for which the responsibility is vested by the charter in him alone. But the Court should act, Justice Barredo opines, when its abstention from acting would result in manifest and palpable transgression of the Constitution proven by facts of judicial notice, no reception of evidence being contemplated for purposes of such judicial action.

It may be noted that the postulate of non-justiciability as discussed in those opinions involves disparate methods

of approach. Justice Esguerra maintains that the findings of the President on the existence of the grounds for the declaration of martial law are final and conclusive upon the Court. He disagrees vehemently with the ruling in *Lansang vs. Garcia*, 42 SCRA 448, December 11, 1971, and advocates a return to *Barcelon vs. Baker*, 5 Phil. 87 (1905), and *Montenegro vs. Castañeda*, 91 Phil. 882 (1952). Justice Barredo, for his part, holds that *Lansang* need not be overturned, indeed does not control in these cases. He draws a distinction between the power of the President to suspend the privilege of the writ of habeas corpus, which was the issue in *Lansang*, and his power to proclaim martial law, calling attention to the fact that while the Bill of Rights prohibits suspension of the privilege except in the instances specified therein, it places no such prohibition or qualification with respect to the declaration of martial law.

Justice Antonio, with whom Justices Makasiar, Fernandez and Aquino concur, finds that there is no dispute as to the existence of a state of rebellion in the country, and on that premise emphasizes the factor of necessity for the exercise by the President of his power under the Constitution to declare martial law, holding that the decision as to whether or not there is such necessity is wholly confided to him and therefore is not subject to judicial inquiry, his responsibility being directly to the people.

Arrayed on the side of justiciability are Justices Castro, Fernando, Teehankee and Muñoz Palma. They hold that the constitutional sufficiency of the proclamation may be inquired into by the Court, and would thus apply the principle laid down in *Lansang* although that case refers to the power of the President to suspend the privilege of the writ of habeas corpus. The recognition of justiciability accorded to the question in *Lansang*, it should be emphasized, is there expressly distinguished from the power of judicial review in ordinary civil or criminal cases, and is limited to ascertaining "merely whether he (the President) has gone beyond the constitutional limits of his jurisdiction, not to exercise the power vested in him or to determine the wisdom of his act." The test is not whether the President's decision is correct but whether, in suspending the writ, he did or did not act arbitrarily. Applying this test, the finding by the Justices just mentioned is that there was no arbitrariness in the President's proclamation of martial law pursuant to the 1935 Constitution; and I concur with them in that finding. The factual bases for the suspension of the privilege of the writ of habeas corpus, particularly in regard to the existence of a state of rebellion in the country, had not disappeared, indeed had been exacerbated, as events shortly before said proclamation clearly demonstrated. On this point the Court is practically unanimous; Justice Teehankee merely refrains from discussing it.

Insofar as my own opinion is concerned the cleavage in the Court on the issue of justiciability is of not much more than academic interest for purposes of arriving at a judgment. I am not unduly exercised by American decisions on the subject written in another age and political climate, or by theories, of foreign authors in political science. The present state of martial law in the Philippines is peculiarly Filipino and fits into no traditional patterns or judicial precedents.

In the first place I am convinced (as are the other Justices), without need of receiving evidence as in an ordinary adversary court proceeding, that a state of rebellion existed in the country when Proclamation No. 1081 was issued. It was a matter of contemporary history within the cognizance not only of the courts but of all observant people residing here at the time. Many of the facts and events recited in detail in the different "Whereases" of the proclamation are of common knowledge. The state of rebellion continues up to the present. The argument that while armed hostilities go on in several provinces in Mindanao there are none in other regions except in isolated pockets in Luzon, and that therefore there is no need to maintain martial law all over the country, ignores the sophisticated nature and ramifications of rebellion in a modern setting. It does not consist simply of armed clashes between organized and identifiable groups on fields of their own choosing. It includes subversion of the most subtle kind, necessarily clandestine and operating precisely where there is no actual fighting. Underground

propaganda, through printed newssheets or rumors disseminated in whispers; recruitment of armed and ideological adherents, raising of funds, procurement of arms and materiel, fifth-column activities including sabotage and intelligence — all these are part of the rebellion which by their nature are usually conducted far from the battle fronts. They cannot be counteracted effectively unless recognized and dealt with in that context.

Secondly, my view, which coincides with that of other members of the Court as stated in their opinions, is that the question of validity of Proclamation No. 1081 has been foreclosed by the transitory provision of the 1973 Constitution [Art. XVII, Sec. 3(2)] that "all proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land and shall remain valid, legal, binding and effective even after . . . the ratification of this Constitution ..." To be sure, there is an attempt in these cases to resuscitate the issue of the effectivity of the new Constitution. All that, however, is behind us now. The question has been laid to rest by our decision in *Javellana vs. Executive Secretary* (L-36142, 50 SCRA 30, March 31, 1973), and of course by the existing political realities both in the conduct of national affairs and in our relations with other countries.

On the effect of the transitory provision Justice Muñoz Palma withholds her assent to any sweeping statement that the same in effect validated, in the constitutional sense, all "such proclamations, decrees, instructions, and acts promulgated, issued, or done by the incumbent President." All that she concedes is that the transitory provision merely gives them "the imprimatur of a law but not of a constitutional mandate," and as such therefore "are subject to judicial review when proper under the Constitution."

Finally, the political-or-justiciable question controversy — indeed, any inquiry by this Court in the present cases into the constitutional sufficiency of the factual bases for the proclamation of martial law — has become moot and purposeless as a consequence of the general referendum of July 27-28, 1973. The question propounded to the voters was: "Under the (1973) Constitution, the President, if he so desires, can continue in office beyond 1973. Do you want President Marcos to continue beyond 1973 and finish the reforms he initiated under Martial Law?" The overwhelming majority of those who cast their ballots, including citizens between 15 and 18 years, voted affirmatively on the proposal. The question was thereby 'removed from the area of presidential power under the Constitution and transferred to the seat of sovereignty itself. Whatever may be the nature of the exercise of that power by the President in the beginning — whether or not purely political and therefore non-justiciable — this Court is precluded from applying its judicial yardstick to the act of the sovereign.

2. With respect to the petitioners who have been released from detention but have not withdrawn their petitions because they are still subject to certain restrictions,[5] the ruling of the Court is that the petitions should be dismissed. The power to detain persons even without charges for acts related to the situation which justifies the proclamation of martial law, such as the existence of a state of rebellion, necessarily implies the power (subject, in the opinion of the Justices who consider *Lansang* applicable to the same test of arbitrariness laid down therein), to impose upon the released detainees conditions or restrictions which are germane to and necessary to carry out the purposes of the proclamation. Justice Fernando, however, "is for easing the restrictions on the right to travel of petitioner Rodrigo" and others similarly situated and so to this extent dissents from the ruling of the majority; while Justice Teehankee believes that those restrictions do not constitute deprivation of physical liberty within the meaning of the constitutional provision on the privilege of the writ of habeas corpus.

It need only be added that, to my mind, implicit in a state of martial law is the suspension of the said privilege with respect to persons arrested or detained for acts related to the basic objective of the proclamation, which is to suppress invasion, insurrection, or rebellion, or to safeguard public safety against imminent danger thereof. The preservation of society and national survival take precedence. On this particular point, that is, that the proclamation of martial law automatically suspends the privilege of the writ as to the persons referred to, the

Court is practically unanimous. Justice Fernando, however, says that to him that is still an open question; and Justice Muñoz Palma qualifiedly dissents from the majority in her separate opinion, but for the reasons she discusses therein votes for the dismissal of the petitions.

IN VIEW OF ALL THE FOREGOING AND FOR THE REASONS STATED BY THE MEMBERS OF THE COURT IN THEIR SEPARATE OPINIONS, JUDGMENT IS HEREBY RENDERED DISMISSING ALL THE PETITIONS, EXCEPT THOSE WHICH HAVE BEEN PREVIOUSLY WITHDRAWN BY THE RESPECTIVE PETITIONERS WITH THE APPROVAL OF THIS COURT, AS HEREINABOVE MENTIONED. NO COSTS.

Makasiar and Aquino, JJ., concur.

Castro, J., in a separate opinion, explains his reasons for his concurrence in the dismissal of all the petitions.

Fernando, J., concurs and dissents in a separate opinion.

Teehankee, J., files a separate opinion.

Barredo, J., concurs in the dismissals in a separate opinion.

Antonio, J., concurs in a separate opinion.

Esguerra, J., concurs in a separate opinion.

Fernandez, J., concurs in a separate opinion.

Munoz Palma, J., concurs in the dismissals in a separate opinion.

[1] Zaldivar, Fernando, Teehankee, Barredo, Muñoz Palma and Aquino, JJ.

Castro, Makasiar, Antonio, Esguerra, and Fernandez, JJ., voted for denial of the motion to withdraw.

[2] Justice Zaldivar turned 70 on September 13.

[3] The following individuals, on their own motions, were allowed "to withdraw their petitions: Veronica L. Yuyitung (Supreme Court Res. Oct. 6, 1972) and Tan Chin Hian (Res. Oct. 11, 1972) in L-35556; Amando Doronila, Hernando J. Abaya, Ernesto Granada, Luis D. Beltran, Bren Guiao, Ruben Cusipag and Willie Baun (Res. Oct. 3, 1972; Res. Oct. 11, 1972) in L-35567; Teresita M. Guiao, in behalf of Bren Guiao (who was also a petitioner in L-35567) (Res. Oct. 9, 1972) in L-35571.

The following individuals have since been released from custody: Joaquin P. Roces, Teodord M. Locsin, Sr., Rolando Fadul, Rosalind Galang, Go Eng Guan, Renato Constantino and Luis R. Mauricio, all of whom were petitioners in L-35538; Maximo V. Soliven, Napoleon G. Rama and Jose Mari Velez in L-35540; Ramon Mitra, Jr., Francisco Rodrigo and Napoleon Rama in L-35546; Enrique Voltaire Garcia 11 (deceased) in L-35547; Tan Chin Hian and Veronica Yuyitung in L-35556; Amando Doronila, Juan L. Mercado, Hernando J. Abaya, Ernesto Granada, Luis D. Beltran, Ruben Cusipag, Roberto Ordonez, Manuel Almario and Willie Baun, in L-35567; Ernesto Rondon in L-35573; and Bren Guiao in L-35571.

[4] Makalintal, C.J., Castro, Barredo, Makasiar Antonio, Esguerra, Fernandez and Aquino, JJ.

Zaldivar, Fernando, Teehankee and Muñoz Palma, JJ voted for dismissal.

[5] Francico "Soc" Rodrigo; Joaquin P. Roces, Teodoro M. Locsin, Rolando Fadul, Rosalind Galang, Go Eng Goan, Maximo V. Suliven, Renato Constantino, Luis R. Mauricio, Napoleon G. Rama, Jose Mari Velez, Ramon V. Mitra, Juan L. Mercado, Roberto Ordoñez Manuel Almario and Ernesto Rondon.

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SEPARATE OPINION

ANTONIO, J.:

These applications for writs of habeas corpus present for review Proclamation No. 1081 of the President of the Philippines, placing the country under martial law on September 21, 1972, and the legality of the arrest and detention of prisoners under the aforesaid proclamation. The issues posed have confronted every democratic government in every clime and in every age. They have always recurred in times of crisis when the nation's safety and continued existence are in peril. Involved is the problem of harmonizing two basic interests that lie at the foundation of every democratic constitutional system. The first is contained in Rousseau's formulation, "the people's first intention is that the State shall not perish," in other words, the right of the State to its existence. The second are the civil liberties guaranteed by the Constitution, which "imply the existence of an organized system maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses...." (Cox vs. New Hampshire, 312 U.S. 569 [1940]).

The petitions for habeas corpus initially raise the legality of the arrest and detention of petitioners. As the respondents, however, plead, in defense, the declaration of martial law and the consequent suspension of the privilege of habeas corpus, the validity of Proclamation No. 1081 is the ultimate constitutional issue.

Hearings were held on September 26 and 29 and October 6, 1972.[1]

Meanwhile, some of the petitioners were allowed to withdraw their petitions.[2] Most of the petitioners were subsequently released from custody under certain conditions and some of them insist that their cases have not become moot as their freedom of movement is restricted.[3] As of this date, only petitioner Benigno Aquino, Jr. (L-35546) remains in military custody.

On August 11, 1973, petitioner Benigno Aquino, Jr. was charged before the military commission with the crimes of subversion under the Anti-Subversion Act (Republic Act No. 1700), murder and illegal possession of firearms. On August 23, 1973, he filed an action for certiorari and prohibition (L-35546) with this Court, assailing the validity of his trial before the military commission, because the creation of military tribunals for the trial of offenses committed by civilians is unconstitutional in the absence of a state of war or status of belligerency; being martial law measures, they have ceased with the cessation of the emergency; and he could not expect a fair trial because the President of the Philippines had prejudged his case. That action is pending consideration and decision.

On December 28, 1973, petitioner Diokno moved to withdraw his petition (L-35539), claiming that there was delay in the disposition of his case, and that as a consequence of the decision of this Court in Javellana vs. Executive Secretary (L-36142, March 31, 1973) and of the action of the members of this Court in taking an oath to support the New Constitution, he has reason to believe that he cannot "reasonably expect to get justice in this case." Respondents oppose this motion on the ground that public interest or questions of public importance are involved and the reasons given are factually untrue and contemptuous. On September 11, 1974, petitioner Diokno was released from military custody. In view of his release, it was the consensus of the majority of the Court to consider his case as moot.

We shall now proceed to discuss the issues posed by the remaining cases.

1. Is the determination by the President of the Philippines of the necessity for the exercise of his power to

declare martial law political, hence, final and conclusive upon the courts, or is it justiciable and, therefore, his determination is subject to review by the courts?

2. Assuming Lansang to be applicable, can it be said that the President acted arbitrarily in issuing Proclamation No. 1081?

3. Assuming that the issues are justiciable, can the Supreme Court upon the facts of record and those judicially known to It now declare that the necessity for martial law has already ceased?

4. Under a regime of martial law, can the Court inquire into the legal justification for the arrest and detention as well as the other constraints upon the individual liberties of the petitioners? In the affirmative, does it have any adequate legal basis to declare that their detention is no longer authorized by the Constitution?

I

CONSTITUTION INTENDED STRONG EXECUTIVE

The right of a government to maintain its existence is the most pervasive aspect of sovereignty. To protect the nation's continued existence, from external as well as internal threats, the government "is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions" (Mr. Justice Bradley, concurring in *Legal Tender Cases* [US] 12 Wall. 457, 554, 556, 20 L.ed. 287, 314, 315). To attain this end, nearly all other considerations are to be subordinated. The constitutional power to act upon this basic principle has been recognized by all courts in every nation at different periods and diverse circumstances.

These powers which are to be exercised for the nation's protection and security have been lodged by the Constitution under Article VII, Section 10(2) thereof, on the President of the Philippines, who is clothed with exclusive authority to determine the occasion on which the powers shall be called forth.

The constitutional provision expressly vesting in the President the power to place "the Philippines or any part thereof under martial law in case of invasion, insurrection or rebellion or imminent danger thereof when the public safety requires it,"¹ is taken bodily from the Jones Law with the difference that the President of the United States had the power to modify or vacate the action taken by the Governor-General.² Although the Civil Governor, under Section 5 of the Philippine Bill of 1902, could, with the approval of the Philippine Commission, suspend the privilege of the writ of habeas corpus, no power to proclaim martial law was specifically granted. This power is not mentioned in the Federal Constitution of the United States. It simply designates the President as commander-in-chief:

"The President shall be Commander-in-Chief of the Army and Navy of the United States and of the militia of the several states when called into actual service of the United States. . . ."³

Its absence in the Federal Constitution notwithstanding, President Abraham Lincoln during the Civil War placed some parts of the country under martial law. He predicated the exercise of this power on his authority as Commander-in-Chief of the Armed Forces and on the ground of extreme necessity for the preservation of the Union. When not expressly provided in the Constitution, its justification, therefore, would be necessity. Thus some authoritative writers view it as "not a part of the Constitution but is rather a power to preserve the Constitution when constitutional methods prove inadequate to that end. It is the law of necessity."⁴ Since the meaning of the term "martial law" is obscure, as is the power exercisable by the Chief Executive under martial law, resort must be had to precedents. Thus the powers of the Chief Executive under the Commander-in-Chief clause of the Federal Constitution have been drawn not only from general and specific provisions of the

Constitution but from historical precedents of Presidential action in times of crises. Lincoln invoked his authority under the Commander-in-Chief clause of the Federal Constitution for the series of extraordinary measures which he took during the Civil War, such as the calling of volunteers for military service, the augmentation of the Army and Navy, the payment of \$2 million from the unappropriated funds in the Treasury to persons unauthorized to receive it, the closing of the Post Office to "treasonable correspondence," the blockade of Southern ports, the suspension of the writ of habeas corpus, the arrests and detentions of persons who were represented to him as being engaged in or contemplating "treasonable practices" — all this for the most part was done without the least statutory authorization from Congress. The actions of Lincoln "assert for the President," according to Corwin, "an initiative of indefinite scope and legislative in effect in meeting the domestic aspects of a war emergency."⁵ The creation of public offices is conferred by the Federal Constitution to Congress. During World War I, however, President Wilson, on the basis of his power under the "Commander-in-Chief" clause of the Federal Constitution, created "public offices," which were copied in lavish scale by President Roosevelt in World War II. "The principal canons of constitutional interpretation are in wartime set aside," according to Corwin, "so far as concerns both the scope of national power and the capacity of the President to gather unto himself all the constitutionally available powers in order the more effectively to focus them upon the task of the hour."⁶ The presidential power, "building on accumulated precedents has taken on at times, under the stimulation of emergency conditions," according to two eminent commentators, the "dimensions of executive prerogative as described by John Locke, of a power to wit, to fill needed gaps in the law, or even to supersede it so far as may be requisite to realize the fundamental law of nature and government, namely, that as much as may be all the members of society are to be preserved."⁷

There is no question that the framers of the 1935 Constitution were aware of these precedents and of the scope of the power that had been exercised by the Presidents of the United States in times of grave crisis. The framers of the Constitution "were not only idealists but also practical-minded men." "While they abjured wars of aggression they well knew that for the country to survive provisions for its defense had to be made."⁸

II

TEXTUALLY DEMONSTRABLE CONSTITUTIONAL COMMITMENT OF ISSUE TO THE PRESIDENT

Instead of making the President of the Philippines simply the commander-in-chief of all the armed forces, with authority whenever it becomes necessary to call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion, the framers of the 1935 Constitution expressly conferred upon him the exclusive power and authority to suspend the privileges of the writ of habeas corpus or place the Philippines, or any part thereof, under martial law.

"The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it he may suspend the privileges of the writ of habeas corpus or place the Philippines or any part thereof under martial law."⁹

The condition which would warrant the exercise of the power was not confined to actual invasion, insurrection or rebellion, but also to imminent danger thereof, when the public safety requires it. It is evident, therefore, that while American Presidents derived these extraordinary powers by implication from the State's right to self-preservation, the President of the Philippines was expressly granted by the Constitution with all the powers necessary to protect the nation in times of grave peril.

The safety and well-being of the nation required that the President should not be hampered by lack of authority

but was to be a "strong executive who could maintain the unity of the nation with sufficient powers and prerogatives to save the country during great crises and dangers."¹⁰

As Delegate Jose P. Laurel comprehensively explained

"xxx A strong executive he is intended to be, because a strong executive we shall need, especially in the early years of our independent, or semi-independent existence. A weak executive is synonymous with a weak government. He shall not be a 'monarch' or a dictator in time of profound and Octavian peace, but he virtually so becomes in an extraordinary emergency; and whatever may be his position, he bulwarks, normally, the fortifications of a strong constitutional government, but abnormally, in extreme cases, he is suddenly ushered in as a Minerva, full-grown and in full panoply of war, to occupy the vantage ground as the ready protector and defender of the life and honor of his nation." (Italics supplied.)¹¹

The concentration of an amplitude of power in the hand of the Commander-in-Chief of the Armed Forces of the Philippines, who is at the same time the elected civilian Chief of State, is predicated upon the fact that it is he who must initially shoulder the burden and deal with the emergency. By the nature of his position he possesses and wields the extraordinary powers of self-preservation of the democratic, constitutional state. In times of crisis there is indeed unification of responsibility and centralization of authority in the Chief Executive. "The concentration of governmental power in a democracy faced by an emergency," wrote Rossiter, "is a corrective to the crisis inefficiencies inherent in the doctrine of the separation of powers. . . . In normal times the separation of powers forms a distinct obstruction to arbitrary governmental action. By this same token, in abnormal times it may form an insurmountable barrier to decisive emergency action in behalf of the State and its independent existence. There are moments in the life of any government when all the powers must work together in unanimity of purpose and action, even if this means the temporary union of executive, legislative and judicial powers in the hands of one man. The more complete the separation of powers in a constitutional system, the more difficult and yet the more necessary will be their fusion in time of crisis." [Rossiter, *Constitutional Dictatorship*, 288-289.]

It was intended, however, that the exercise of these extraordinary powers is for the preservation of the State, its democratic institutions, and the permanent freedom of its citizens.

III

RESPONSIBILITY IMPLIES BROAD AUTHORITY AND DISCRETION

The conditions of war, of insurrection or rebellion, or of any other national emergency are as varied as the means required for meeting them and it is, therefore, within the contemplation of the Constitution that the Chief Executive, to preserve the safety of the nation on those times of national peril, should have the broadest authority compatible with the emergency in selecting the means and adopting the measures which in his honest judgment are necessary for the preservation of the nation's safety. "The circumstances that endanger the safety of nations are infinite," wrote Alexander Hamilton, "and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. . . . This is one of those truths which to a correct and unprejudiced mind carries its own evidence along with it, and may be obscured, but cannot be made plainer by argument or reasoning. . . . The means ought to be in proportion to the end; the persons from whose agency the attainment of any end is expected ought to possess the means by which it is to be attained."¹ Mr. Madison expressed the same idea in the following terms: "It is vain to impose constitutional barriers to the impulse of self-preservation. It is worse than in vain, because it plants in the Constitution itself necessary usurpations of power."²

"Unquestionably," wrote Chief Justice Taney in *Luther v. Borden* (7 How. 44, [1849], 12 L.ed. 600), "a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The

power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the Government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this Court can question its authority."

In the Prize cases (17 L.ed. 476, [1863]), the Court ascribed to the President of the United States, by virtue of his powers as Chief Executive and as Commander-in-Chief, the power which in *Luther v. Borden* is attributed to the government as a whole, to treat of insurrection as a state of war, and the scene of the insurrection as a seat or theater of war. As Justice Grier in the Prize cases significantly stated: "Whether the President in fulfilling his duties as Commander-in-Chief, in suppressing an insurrection, has met with such hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the Political Department of the government, to which this power was entrusted. 'He must determine what degree of force the crisis demands.'" (Italics supplied.)

In *Hirabayashi v. United States*, where the Court upheld the curfew regulations affecting persons of Japanese ancestry as valid military measures to prevent espionage and sabotage, there was again reaffirmance of the view that the Constitution has granted to the President and to Congress in the exercise of the war powers a "wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened danger and in the selection of the means for resisting it."

"Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. *Ex parte Quirin*, supra (317 US 28, 29, ante 12, 13, 63 S Ct 2); cf. *Prize Cases*, supra (2 Black [US] 670, 17 L ed. 477); *Martin v. Mott* (12 Wheat [US] 19, 29, 6 L ed 537, 540). Where as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

"The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942, many of which, since disclosed, were then peculiarly within the knowledge of the military authorities."³

"The measures to be taken in carrying on war and to suppress insurrection," according to Justice Swayne, in *Stewart v. Kahn*,⁴ "are not defined. The decision of all questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case, the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

The thrust of those authorities is that the President as commander-in-chief and chief executive on whom is committed the responsibility is empowered, indeed obliged, to preserve the state against domestic violence and alien attack. In the discharge of that duty, he necessarily is accorded a very broad authority and discretion in ascertaining the nature and extent of the danger that confronts the nation and in selecting the means or measures necessary for the preservation of the safety of the Republic.

The terms "insurrection" and "rebellion" are in a large measure incapable of precise or exact legal definitions and

are more or less elastic in their meanings. As to when an act or instance of revolting against civil or political authority may be classified as an "insurrection" or as a "rebellion" is a question better addressed to the President, who under the Constitution is the authority vested with the power of ascertaining the existence of such exigencies and charged with the responsibility of suppressing them. To suppress such danger to the state, he is necessarily vested with a broad authority and discretion, to be exercised under the exigencies of each particular occasion as the same may present itself to his judgment and determination. His actions in the face of such emergency must be viewed in the context of the situation as it then confronted him. It is not for any court to sit in review of the wisdom of his action as commander-in-chief or to substitute its judgment for his.

IV

NEED FOR UNQUESTIONING ADHERENCE TO POLITICAL DECISION

It is, however, insisted that even with the broad discretion granted to the President by the Constitution in ascertaining whether or not conditions exist for the declaration of martial law, his findings in support of such declaration should nevertheless be subject to judicial review.

It is important to bear in mind that We are here dealing with a plenary and exclusive power conferred upon the Chief Executive by the Constitution. The power itself is to be exercised upon sudden emergencies, and under circumstances which may be vital to the existence of the government. A prompt and unhesitating obedience to orders issued in connection therewith is indispensable as every delay and obstacle to its immediate implementation may jeopardize the public interests.

By reason of his unique position as Chief Executive and as Commander-in-Chief of the Armed Forces of the Philippines, it is he, more than any other high official of the government, who has the authority and the means of obtaining through the various facilities in the civil and military agencies of the government under his command, information promptly and effectively, from every quarter and corner of the state about the actual peace and order condition of the country. In connection with his duty and responsibility, he is necessarily accorded the wise and objective counsel of trained and experienced specialists on the subject. Even if the Court could obtain all available information, it would lack the facility of determining whether or not the insurrection or rebellion or the imminence thereof poses a danger to the public safety. Nor could the courts recreate a complete picture of the emergency in the face of which the President acted, in order to adequately judge his military action. Absent any judicially discoverable and manageable standards for resolving judicially those questions, such a task for a court to undertake may well-nigh be impossible. On the other hand, the President, who is responsible for the peace and security of the nation, is necessarily compelled by the Constitution to make those determinations and decisions. The matter is committed to him for determination by criteria of political and military expediency. There exists, therefore, no standard ascertainable by settled judicial experience by reference to which his decision can be reviewed by the courts.¹ Indeed, those are military decisions and in their very nature, "military decisions are not susceptible of intelligent and judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence, courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint."² He is necessarily constituted the judge of the existence of the exigency in the first instance and is bound to act according to his belief of the facts.

Both reason and authority, therefore, dictate that the determination of the necessity for the exercise of the power to declare martial law is within the exclusive domain of the President and his determination is final and conclusive

upon the courts and upon all persons. (cf. Fairman, *Martial Rule and the Suppression of Insurrection*, p. 771.)³ This construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the Constitution.

(a) *Barcelon vs. Baker*.

The existing doctrine at the time of the framing and adoption of the 1935 Constitution was that of *Barcelon vs. Baker* (5 Phil., 87). It enunciated the principle that when the Governor-General with the approval of the Philippine Commission, under Section 5 of the Act of Congress of July, 1, 1902, declares that a state of rebellion, insurrection or invasion exists, and by reason thereof the public safety requires the suspension of the privileges of habeas corpus, this declaration is held conclusive upon the judicial department of the government. And when the Chief Executive has decided that conditions exist justifying the suspension of the privilege of the writ of habeas corpus, courts will presume that such conditions continue to exist until the same authority has decided that such conditions no longer exist. These doctrines are rooted on pragmatic considerations and sound reasons of public policy. The "doctrine that whenever the Constitution or a statute gives a discretionary power to any person, such person is to be considered the sole and exclusive judge of the existence of those facts" has been recognized by all courts and "has never been disputed by any respectable authority." (*Barcelon vs. Baker*, supra.) The political department, according to Chief Justice Taney in *Martin vs. Mott* (12 Wheat 29-31), is the sole judge of the existence of war or insurrection, and when it declares either of these emergencies to exist, its action is not subject to review or liable to be controlled by the judicial department of the State. (Citing *Franklin vs. State Board of Examiners*, 23 Cal. 172, 178.)

The dangers and difficulties which would grow out of the adoption of a contrary rule are clearly and ably pointed out in the *Barcelon* case, thus:

"If the investigation and findings of the President, or the Governor-General with the approval of the Philippine Commission, are not conclusive and final as against the judicial department of the Government, then every officer whose duty it is to maintain order and protect the lives and property of the people may refuse to act, and apply to the judicial department of the Government for another investigation and conclusion concerning the same conditions, to the end that they may be protected against civil actions resulting from illegal acts."

"Owing to conditions at times, a state of insurrection, rebellion, or invasion may arise suddenly and may jeopardize the very existence of the State. Suppose, for example, that one of the thickly populated Governments situated near this Archipelago, anxious to extend its power and territory, should suddenly decide to invade these Islands, and should, without warning, appear in one of the remote harbors with a powerful fleet and at once begin to land troops. The governor or military commander of the particular district or province notifies the Governor-General by telegraph of this landing of troops and that the people of the district are in collusion with such invasion. Might not the Governor-General and the Commission accept this telegram as sufficient evidence and proof of the facts communicated and at once take steps, even to the extent of suspending the privilege of the writ of habeas corpus, as might appear to them to be necessary to repel such invasion? It seems that all men interested in the maintenance and stability of the Government would answer this question in the affirmative.

"But suppose some one, who has been Arrested in the district upon the ground that his detention would assist in restoring order and in repelling the invasion, applies for the writ of habeas corpus, alleging that no invasion actually exists; may the judicial department of the Government call the officers actually engaged in the field before it and away from their posts of duty for the purpose of explaining and furnishing proof to it concerning the existence or nonexistence of the facts proclaimed to exist by the legislative and executive branches of the State? If so, then the courts may effectually tie the hands of the executive, whose special duty it is to enforce the laws and maintain order, until the invaders have actually accomplished their purpose. The interpretation

contended for here by the applicants, so pregnant with detrimental results, could not have been intended by the Congress of the United States when it enacted the law.

"It is the duty of the legislative branch of the Government to make such laws and regulations as will effectually conserve peace and good order and protect the lives and property of the citizens of the State. It is the duty of the Governor-General to take such steps as he deems wise and necessary for the purpose of enforcing such laws. Every delay and hindrance and obstacle which prevents a strict enforcement of laws under the conditions mentioned necessarily tends to jeopardize public interest and the safety of the whole people. If the judicial department of the Government, or any officer in the Government, has a right to contest the orders of the President or of the Governor-General under the conditions above supposed, before complying with such orders, then the hands of the President or the Governor-General may be tied until the very object of the rebels or insurrectos or invaders has been accomplished. But it is urged that the President, or the Governor-General with the approval of the Philippine Commission, might be mistaken as to the actual conditions; that the legislative department — the Philippine Commission — might, by resolution, declare after investigation, that a state of rebellion, insurrection, or invasion exists, and that the public safety requires the suspension of the privilege of the writ of habeas corpus, when, as a matter of fact, no such conditions actually existed; that the President, or Governor-General acting upon the authority of the Philippine Commission, might by proclamation suspend the privilege of the writ of habeas corpus, without there actually existing the conditions mentioned in the act of Congress. In other words, the applicants allege in their argument in support of their application for the writ of habeas corpus, that the legislative and executive branches of the Government might reach a wrong conclusion from their investigations of the actual conditions, or might, through a desire to oppress and harass the people, declare that a state of rebellion, insurrection, or invasion existed and that public safety required the suspension of the privilege of the writ of habeas corpus, when actually and in fact no such conditions did exist. We can not assume that the legislative and executive branches will act or take any action based upon such motives.

"Moreover, it cannot be assumed that the legislative and executive branches of the Government, with all the machinery which those branches have at their command for examining into the conditions in any part of the Archipelago, will fail to obtain all existing information concerning actual conditions. It is the duty of the executive branch of the Government to constantly inform the legislative branch of the Government of the condition of the Union as to the prevalence of peace or disorder. The executive branch of the Government, through its numerous branches of the civil and military, ramifies every portion of the Archipelago, and is enabled thereby to obtain information from every quarter and corner of the State. Can the judicial department of the Government, with its very limited machinery for the purpose of investigating general conditions, be any more sure of ascertaining the true conditions throughout the Archipelago, or in any particular districts than the other branches of the Government? We think not." (5 Phil., pp. 93-96.)

(b) The Constitutional Convention of 1934.

This was the state of Philippine jurisprudence on the matter, when the Constitutional Convention met on July 20, 1934. It must be recalled that, under the Philippine Bill of 1902, the suspension of the privilege of the writ of habeas corpus by the Governor-General was subject to the approval of the Philippine Commission (Section 5, Act of Congress of July 1, 1902), while, under Section 21 of the Jones Law of 1916, the suspension of the privilege of the writ of habeas corpus as well as the proclamation of martial law by the Governor-General could be modified or vacated by the President of the United States. When the first Draft was submitted conferring the power to suspend the privilege of the writ of habeas corpus exclusively upon the President, Delegate Araneta proposed an amendment to the effect that the National Assembly should be the organ empowered to suspend the privileges of the writ of habeas corpus and, when not in session, the same may be done by the President with the consent of the majority of the Supreme Court. Under the provisions of the Draft, Delegate Araneta argued, "the Chief Executive would be the only authority to determine the existence of the reasons for the suspension of the writ of habeas

corpus: and, according to Philippine jurisprudence, the Supreme Court would refuse to review the findings of the Executive on the matter. Consequently, he added, arrests would be effected by military men who were generally arbitrary. They would be arresting persons connected with the rebellion, insurrection, invasion; some of them might also be arresting other persons without any cause whatsoever. The result would be that many persons might find themselves detained when in fact they had no connection whatsoever with the disturbances."⁴ Notwithstanding the brilliant arguments of Delegate Araneta, the Convention voted down the amendment. Evident was the clear intent of the framers of the Charter of vesting on the President the exclusive power of suspending the privilege of the writ of habeas corpus, and the conclusive power to determine whether the exigency has arisen requiring the suspension. There was no opposition in the Convention to the grant on the President of the exclusive power to place the Philippines or any part thereof under martial law.

Realizing the fragmentation of the Philippines into thousands of islands and of the war clouds that were then hovering over Europe and Asia, the aforesaid framers of the Charter opted for a strong executive.

The provision of Section 10, Paragraph 2, of Article VII of the 1935 Constitution was, therefore, adopted in the light of the Court's interpretation in *Barcelon vs. Baker*.

(c) *Montenegro vs. Castañeda*.

On August 30, 1952, or 17 years after the ratification of the 1935 Constitution, this Court in *Montenegro vs. Castañeda*, (91 Phil., 882, 887), construing the power of the President of the Philippines under Article VII, Section 10, Paragraph 2, of the Constitution, re-affirmed the doctrine in *Barcelon vs. Baker*, thus: "We agree with the Solicitor General that in the light of the view of the United States Supreme Court through Marshall, Taney and Story quoted with approval in *Barcelon vs. Baker* (5 Phil., 87, 99-100), the authority to decide whether the exigency has arisen requiring suspension belongs to the President and 'his decision is final and conclusive' upon the courts and upon all other persons."

On *Montenegro's* contention that there is no state of invasion, insurrection, rebellion or imminent danger thereof, as the "intermittent sorties and lightning attacks by organized bands in different places are occasional, localized and transitory," this Court explained that to the unpracticed eye the repeated encounters between dissident elements and military troops may seem sporadic, isolated, or casual. But the officers charged with the Nation's security, analyzed the extent and pattern of such violent clashes and arrived at the conclusion that they were warp and woof of a general scheme to overthrow the government "vi et armis, by force of arms." This Court then reiterated one of the reasons why the finding of the Chief Executive that there is "actual danger of rebellion" was accorded conclusiveness, thus: "Indeed, as Justice Johnson said in that decision, whereas the Executive branch of the Government is enabled thru its civil and military branches to obtain information about peace and order from every quarter and corner of the nation, the judicial department, with its very limited machinery can not be in better position to ascertain or evaluate the conditions prevailing in the Archipelago." (*Montenegro vs. Castañeda and Balao*, 91 Phil., 882, 886-887.)

It is true that the Supreme Court of the United States in *Sterling vs. Constantin*,⁵ asserted its authority to review the action taken by the State Governor of Texas under his proclamation of martial law. However, the Court chose not to overturn the principle expressed in *Moyer vs. Peabody* that the question of necessity is "one strictly reserved for executive discretion." It held that, while the declaration of necessity is conclusive, the measures employed are reviewable:

"It does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available,

is conclusively supported by mere executive fiat. The contrary is well-established. What are the limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. .
."

This ruling in *Sterling* should be viewed within the context of its factual environment. At issue was the validity of the attempt of the Governor to enforce by executive or military order the restriction on the production of oil wells which the District Judge had restrained pending proper judicial inquiry. The state Governor predicated his power under martial law, although it was conceded that "at no time has there been any actual uprising in the territory; at no time has any military force been exerted to put riots and mobs down." The Court disapproved the order of the Governor as it had no relation to the suppression of disorder but on the contrary it undermined the restraining order of the District Judge. The Court declared that the Governor could not bypass the processes of constitutional government by simply declaring martial law when no bona fide emergency existed. While this case shows that the judiciary can interfere when no circumstances existed which could reasonably be interpreted as constituting an emergency, it did not necessarily resolve the question whether the Court could interfere in the face of an actual emergency.

(d) *Lansang vs. Garcia*.

Our attention is, however, invited to *Lansang vs. Garcia* (G.R. No. L-33964 etc., December 11, 1971, 42 SCRA 448) where this Court declared, in connection with the suspension of the privilege of the writ of habeas corpus by the President of the Philippines on August 21, 1971, that it has the authority to inquire into the existence of the factual basis of the proclamation in order to determine the constitutional sufficiency thereof. But this assertion of authority is qualified by the Court's unequivocal statement that "the function of the Court is merely to check — not to supplant — the Executive, or to ascertain merely whether he has gone beyond the constitutional limits of his jurisdiction, not to exercise the power vested in him or to determine the wisdom of his act." And "that judicial inquiry into the basis of the questioned proclamation can go no further than to satisfy the Court not that the President's decision is correct and that public safety was endangered by the rebellion and justified the suspension of the writ, but that in suspending the writ, the President did not act arbitrarily."

In the ascertainment of the factual basis of the suspension, however, the Court had to rely implicitly on the findings of the Chief Executive. It did not conduct any independent factual inquiry for, as this Court explained in *Barcelon and Montenegro*, ". . . whereas the Executive branch of the Government is enabled thru its civil and military branches to obtain information about peace and order from every quarter and corner of the nation, the judicial department, with its very limited machinery cannot be in a better position to ascertain or evaluate the conditions prevailing in the Archipelago." Indeed, such reliance on the Executive's findings would be the more compelling when the danger posed to the public safety is one arising from Communist rebellion and subversion.

We can take judicial notice of the fact that the Communists have refined their techniques of revolution, but the ultimate object is the same — "to undermine through civil disturbances and political crises the will of the ruling class to govern, and, at a critical point, to take over State power through well-planned and ably directed insurrection."⁶ Instead of insurrection, there was to be the protracted war. The plan was to retreat and attack only at an opportune time. "The major objective is the annihilation of the enemy's fighting strength and in the holding or taking of cities and places. The holding or taking of cities and places is the result of the annihilation of the enemy's fighting strength."⁷ The Vietnam War contributed its own brand of terrorism conceived by Ho Chi Minh and Vo Nguyen Giap — the silent and simple, assassination of village officials for the destruction of the government's administrative network. Modern rebellion now is a war of sabotage and harassment, of an aggression more often concealed than open, of guerrillas striking at night, of assassins and terrorists, and of professional revolutionaries resorting to all sorts of stratagems, crafts, methods and subterfuge, to undermine and

subvert the security of the State to facilitate its violent overthrow.⁸

In the ultimate analysis even assuming that the matter is justiciable and We apply the standards set in *Lansang*, by ascertaining whether or not the President acted arbitrarily in issuing Proclamation No. 1081, the result would be the same.

For the existence of an actual rebellion and insurrection in this country by a sizable group of men who have publicly risen in arms to overthrow the government was confirmed by this Court in *Lansang*.

"... our jurisprudence attests abundantly to the Communist activities in the Philippines, especially in Manila, from the late twenties to the early thirties, then aimed principally at incitement to sedition or rebellion, as the immediate objective. Upon the establishment of the Commonwealth of the Philippines, the movement seemed to have waned notably; but, the outbreak of World War II in the Pacific and the miseries, the devastation and havoc and the proliferation of unlicensed firearms concomitant with the military occupation of the Philippines and its subsequent liberation, brought about, in the late forties, a resurgence of the Communist threat, with such vigor as to be able to organize and operate in Central Luzon an army — called HUKBALAHAP, during the occupation, and renamed Hukbong Mapagpalaya ng Bayan (HMB) after liberation — which clashed several times with the armed forces of the Republic. This prompted then President Quirino to issue Proclamation No. 210, dated October 22, 1950, suspending the privilege of the writ of habeas corpus, the validity of which was upheld in *Montenegro vs. Castañeda*. Days before the promulgation of said Proclamation, or on October 18, 1950, members of the Communist Politburo in the Philippines were apprehended in Manila. Subsequently accused and convicted of the crime of rebellion, they served their respective sentences.

"The fifties saw a comparative lull in Communist activities, insofar as peace and order were concerned. Still, on June 20, 1957, Republic Act No. 1700, otherwise known as the Anti-Subversion Act, was approved, upon the ground stated in the very preamble of said statute — that

'... the Communist Party of the Philippines, although purportedly a political party is in fact an organized conspiracy to overthrow the Government of the Republic of the Philippines not only by force and violence but also by deceit, subversion and other illegal means, for the purpose of establishing in the Philippines a totalitarian regime subject to alien domination and control;

'... the continued existence and activities of the Communist Party of the Philippines constitutes a clear, present and grave danger to the security of the Philippines; and

'... in the face of the organized, systematic and persistent subversion, national in scope but international in direction, posed by the Communist Party of the Philippines and its activities, there is urgent need for special legislation to cope with this continuing menace to the freedom and security of the country ...'

"In the language of the Report on Central Luzon, submitted, on September 4, 1971, by the Senate Ad Hoc Committee of Seven — copy of which Report was filed in these cases by the petitioners herein —

"The years following 1963 saw the successive emergence in the country of several mass organizations, notably the Lapiang Manggagawa (now the Socialist Party of the Philippines) among the workers; the Malayang Samahan ng Mga Magsasaka (MASAKA) among the peasantry; the Kabataang Makabayan (KM) among the youth/students; and the Movement for the Advancement of Nationalism (MAN) among the intellectuals/professionals. The PKP has exerted all-out effort to infiltrate, influence and utilize these organizations in promoting its radical brand of nationalism.'

"Meanwhile, the Communist leaders in the Philippines had been split into two (2) groups, one of which — composed mainly of young radicals, constituting the Maoist faction — reorganized the Communist Party of the Philippines early in 1969 and established a New People's Army. This faction adheres to the Maoist concept of

the 'Protracted People's War' or 'War of National Liberation.' Its 'Programme for a People's Democratic Revolution' states, inter alia:

'The Communist Party of the Philippines is determined to implement its general programme for a people's democratic revolution. All Filipino communists are ready to sacrifice their lives for the worthy cause of achieving the new type of democracy, of building a new Philippines that is genuinely and completely independent, democratic, united, just and prosperous . . .

* * * * *

'The central task of any revolutionary movement is to seize political power. The Communist Party of the Philippines assumes this task at time that both the international and national situations are favorable to taking the road of armed revolution. . . '

"In the year 1969, the NPA had — according to the records of the Department of National Defense — conducted raids, resorted to kidnappings and taken part in other violent incidents numbering over 230, in which it inflicted 404 casualties, and, in turn, suffered 243 losses. In 1970, its record of violent incidents was about the same, but the NPA casualties more than doubled.

"At any rate, two (2) facts are undeniable: (a) all Communists, whether they belong to the traditional group or to the Maoist faction, believe that force and violence are indispensable to the attainment of their main and ultimate objective, and act in accordance with such belief, although they may disagree on the means to be used at a given time and in a particular place; and (b) there is a New People's Army, other, of course, than the armed forces of the Republic and antagonistic thereto. Such New People's Army is per se proof of the existence of a rebellion, especially considering that its establishment was announced publicly by the reorganized CPP. Such announcement is in the nature of a public challenge to the duly constituted authorities and may be likened to a declaration of war, sufficient to establish a war status or a condition of belligerency, even before the actual commencement of hostilities.

"We entertain, therefore, no doubts about the existence of a sizable group of men who have publicly risen in arms to overthrow the government and have thus been and still are engaged in rebellion against the Government of the Philippines.

* * * * *

"The records before Us show that, on or before August 21, 1971, the Executive had information and reports — subsequently confirmed, in many respects, by the abovementioned Report of the Senate Ad-Hoc Committee of Seven — to the effect that the Communist Party of the Philippines does not merely adhere to Lenin's idea of a swift armed uprising; that it has, also, adopted Ho Chi Minh's terrorist tactics and resorted to the assassination of uncooperative local officials;

"Petitioners, similarly, fail to make into account that — as per said information and reports — the reorganized Communist Party of the Philippines has, moreover, adopted Mao's concept of protracted people's war, aimed at the paralyzation of the will to resist of the government, of the political, economic and intellectual leadership, and of the people themselves; that conformably to such concepts, the Party has placed special emphasis upon a most extensive and intensive program of subversion by the establishment of front organizations in urban centers, the organization of armed city partisans and the infiltration in student groups labor unions, and farmer and professional groups; that the CPP has managed to infiltrate or establish and control nine (9) major labor organizations; that it has exploited the youth movement and succeeded in making Communist fronts of eleven (11) major student or youth organizations; that there are, accordingly about thirty (30) mass organizations actively advancing the CPP interest, . . . ; that in 1970, the Party had recorded two hundred fifty-eight (258) major demonstrations, of which about thirty-three (33) ended in violence, resolution in fifteen (15) killed and over five hundred (500) injured; that most of these actions were organized, coordinated or led by the

aforementioned front organizations; that the violent demonstrations were generally instigated by a small but well-trained group of armed agitators; that the number of demonstrations heretofore staged in 1971 has already exceeded those of 1970; and that twenty-four (24) of these demonstrations were violent, and resulted in the death of fifteen (15) persons and the injury to many more.

"Subsequent events — as reported — have also proved that petitioners' counsel have underestimated the threat to public safety posed by the New People's Army. Indeed, it appears that, since August 21, 1971, it had in Northern Luzon six (6) encounters and staged one (1) raid, in consequence of which seven (7) soldiers lost their lives and two (2) others were wounded, whereas the insurgents suffered five (5) casualties; that on August 26, 1971, a well-armed group of NPA, trained by defector Lt. Victor Corpus, attacked the very command post of TF LAWIN in Isabel, destroying two (2) helicopters and one (1) plane, and wounding one (1) soldier; that the NPA had in Central Luzon a total of four (4) encounters, with two (2) killed and three (3) wounded on the side of the Government, one (1) BSDU killed and three (3) NPA casualties; that in an encounter at Botolan, Zambales, one (1) KM-SDK leader, an unidentified dissident, and Commander Panchito, leader of the dissident group were killed; that on August 26, 1971, there was an encounter in the barrio of San Pedro, Iriga City, Camarines Sur, between PC and the NPA, in which a PC and two (2) KM members were killed; that the current disturbances in Cotabato and the Lanao provinces have been rendered more complex by the involvement of the CPP/NPA, for, in mid-1971, a KM group, headed by Jovencio Esparagoza, contacted the Higa-onan tribes, in their settlement in Magsaysay, Misamis Oriental, and offered them books, pamphlets and brochures of Mao Tse Tung, as well as conducted teach-ins in the reservation; that Esparagoza was reportedly killed on September 22, 1971, in an operation of the PC in said reservation; and that there are now two (2) NPA cadres in Mindanao."

It is true that the suspension of the privilege of the writ was lifted on January 7, 1972, but it can not be denied that soon thereafter, lawlessness and terrorism had reached such a point that the nation was already drifting towards anarchy.

On September 21, 1972, when the President of the Philippines, pursuant to Article VII, section 10, paragraph 2, of the 1935 Constitution, placed the Philippines under martial law, the nation was in the throes of a crisis. The authority of the constitutional government was resisted openly by a coalition of forces, of large numbers of persons who were engaged in an armed conflict for its violent overthrow.⁹ The Muslim secessionist movement with the active material and financial assistance of foreign political and economic interests was engaged in an open attempt to establish by violence and force a separate and independent political state.

Forceful military action, matched with attractive benevolence and a socio-economic program, has indeed broken the back of the rebellion in some areas. There are to be sure significant gains in the economy, the unprecedented increase in production and in exports, the billion-dollar international reserve, the new high in revenue collections and other notable infrastructures of development and progress. Indeed there is a noticeable transformation in the people's sense of values, in their attitudes and motivations. But we personally take notice of the fact that even as of this late date, there is still a continuing rebellion that poses a danger to the public safety. Communist insurgency and subversion, once it takes root in any nation, is a hardy plant. A party whose strength is in selected, dedicated, indoctrinated and rigidly disciplined members, which may even now be secreted in strategic posts in industry, schools, churches and in government, can not easily be eradicated.¹⁰

The NPA (New People's Army) is pursuing a policy of strategic retreat but tactical offensive. It continues to conduct its activities through six Regional Operational Commands (ROCs) covering Northern, Central, and Southern Luzon, Western and Eastern Visayas, and Mindanao. Combat operations were conducted against the Communist insurgents by the armed forces of the government in Cagayan, Ifugao, Kalinga, Apayao, Camarines Sur, and Sorsogon. Subversive activities continue unabated in urban areas. Last January, 1974, the Maoist group known as the Moro National Liberation Front (MNLF) attacked and overran the military detachment at Bilaan,

Sulu, and the town of Parang. The town of Jolo was attacked by a rebel force of 500 men last February 6, 1974, and to cover their retreat razed two-thirds of the town. Only this August, there was fighting between government troops and Muslim rebels armed with modern and sophisticated weapons of war in some parts of Cotabato and in the outskirts of the major southern port city of Davao. It would be an incredible naivete to conclude in the face of such a reality, that the peril to public safety had already abated.

Nor is the fact that the courts are open proof that there is no ground for martial rule or its continuance. The "open court" theory has been derived from the dictum in *Ex Parte Milligan* (7 Wall 127 [1866]), viz.: "Martial rule cannot arise from a threatened invasion; the necessity must be actual and present; the invasion real such as effectually closes the courts and deposes the civil administration." This has been dismissed as unrealistic by authoritative writers on the subject as it does not present an accurate definition of the allowable limits of the martial law powers of the President of the United States. As a matter of fact, the limiting force of the *Milligan* case was materially modified a generation later in another decision of the Federal Supreme Court in *Moyer vs. Peabody* (212 U.S. 78 [1909]).

Speaking for the Court in *Moyer vs. Peabody*, Justice Holmes brushed aside as immaterial the fact, which the majority opinion in the *Milligan* case thought as absolutely crucial — viz.: martial rule can never exist where the Courts are open and in the proper and unobstructed exercise of their jurisdiction. The opinion admitted that the Courts were open but held "that the governor's declaration that a state of insurrection existed is conclusive of that fact." Although It found that the "Governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought that he could safely release him," the Court held that plaintiff *Moyer* had no cause of action. Stating that the Governor was empowered to employ the National Guard to suppress insurrection, the Court further declared that "he may kill persons who resist, and of course he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power." "So long as such arrests are made in good faith and in the 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 no reasonable ground for his belief . . . When it comes to a decision by the head of state upon a matter involving its life, the ordinary rights of the individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

"It is simply not true," wrote Clinton Rossiter in 1950,¹¹ "that martial law cannot arise from a threatened invasion or that martial law can never exist where the Courts are open. These statements do not present an accurate definition of the allowable limits of the martial powers of President and Congress in the face of alien threats or internal disorder. Nor was Davis' dictum on the specific powers of Congress in this matter any more accurate. And, however eloquent and quotable his words on the untouchability of the Constitution in times of actual crisis, they do not now, and did not then, express the realities of American Constitutional Law."

In any event, this "open court" theory does not apply to the Philippine situation. Both the 1935 and the 1973 Constitutions expressly authorize the declaration of martial law, even where the danger to the public safety arises merely from the imminence of an invasion or rebellion. The fact that the civil courts are open can not be controlling, since they might be open and undisturbed in their functions and yet wholly incompetent to avert the threatened danger and to punish those involved in the invasion or rebellion with certainty and promptitude. Certainly such a theory when applied to the situation of a modern war, and of the present day Communist insurgency and subversion would prove to be unrealistic.¹²

Nor may it be argued that the employment of government resources for the building of a New Society is inconsistent with the efforts of suppressing the rebellion and creating a legitimate public order. "Everyone

recognized the legal basis for the martial necessity," wrote President Marcos, "this was the simplest theory of all. National decline and demoralization, social and economic deterioration, anarchy and rebellion were not just statistical reports; they were documented in the mind and body and ordinary experience of every Filipino. But, as a study of revolutions and ideologists proves, martial rule could not in the long run, secure the Philippine Republic unless the social iniquities and old habits which precipitated the military necessity were stamped out. Hence, the September 21 Movement for martial rule to be of any lasting benefit to the people and the nation, to justify the national discipline, should incorporate a movement for great, perhaps even drastic, reforms in all spheres of national life. Save the Republic, yes, but to keep it safe, we have to start remaking the society."¹³ Indeed, the creation of a New Society was a realistic response to the compelling need for revolutionary change.

For centuries, most of our people were imprisoned in a socio-cultural system that placed them in perpetual dependence. "It made of the many mere pawns in the game of partisan-power politics, legitimized 'hewers of wood and drawers of water' for the landed elite, grist for the diploma mills and an alienated mass sporadically erupting in violent resentment over immemorial wrongs. Rural backwardness was built into the very social order wherein our masses could not move forward or even desire to get moving."¹⁴ The old political frameworks, transplanted from the West had proven indeed to be inadequate. The aspirations of our people for social justice had remained unfulfilled. The electoral process was no model of democracy in action. To a society that has been torn up by decades of bitter political strife and social anarchy, the problem was the rescue of the larger social order from factional interests. Implicit then was the task of creating a legitimate public order, the creation of political institutions capable of giving substance to public interests. This implied the building of coherent institutions, an effective bureaucracy and an administration capable of enlisting the enthusiasm, support and loyalty of the people. Evidently, the power to suppress rebellions or insurrections is not "limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils"¹⁵ which spawned and gave rise to the exigency.

We find confirmation of this contemporaneous construction of presidential powers in the new Constitution. It must be noted that while Art. IX, Sec. 12 of the new Constitution embodies the commander-in-chief clause of the 1935 Constitution (Art. VII, Sec. 10[2]), it expressly declares in Art. XVII, Sec. 3[2] that the proclamations, orders and decrees, instructions and acts issued or done by the incumbent President are "part of the law of the land" and are to "remain valid, legal, binding, and effective" until "modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly." Undoubtedly, the aforecited proviso refers to the present martial law regime and the measures taken under it by the President. It must be recalled that the prudent exercise by the President of the powers under martial law not only stemmed the tide of violence and subversion but also buttressed the people's faith in public authority. It is in recognition of the objective merit of the measures taken under martial law that the Constitution affirms their validity.

This is evident from the deliberations of the 166-Man Special Committee of the Constitutional Convention, formed to finally draft the Constitution, at its meeting on October 27, 1972, on the provisions of Section 4 of the draft now Section 12 of Article IX of the New Constitution,^{15a} which are quoted hereunder, to wit:

"DELEGATE DE GUZMAN (A.): The question, Your Honor, brings to the fore the nature and concept of martial law. As it is understood by recognized authorities on the subject, martial law rests upon the doctrine of paramount necessity. The controlling consideration, Your Honor, is necessity. The crucial consideration is the very existence of the State, the very existence of the Constitution and the laws upon which depend the rights of the citizens, and the condition of peace and order so basic to the continued enjoyment of such rights. Therefore, from this view of the nature of martial law, the power is to be exercised not only for the more immediate object of quelling the disturbance or meeting a public peril which, in the first place, caused the

declaration of martial law, but also to prevent the recurrence of the very causes which necessitated the declaration of martial law. Thus Your Honor, I believe that when President Marcos, to cite the domestic experience, declared that he proclaimed martial law to save the Republic and to form a New Society, he was stating the full course which martial law must have to take in order to achieve its rational end. Because in the particular case of the Philippine situation, I agree with the President that it is not enough that we be able to quell the rebellion and the lawlessness, but that we should also be able to eliminate the many ills and evils in society which have, in the first place, bred and abetted the rebellion and the lawlessness.

"DELEGATE LEVISTE (O.): I agree with you wholeheartedly, Your Honor. That's all, Mr. Chairman.

"DELEGATE ADIL: It seems, Your Honor that we are revolutionizing the traditional concept of martial law which is commonly understood as a weapon to combat lawlessness and rebellion through the use of the military authorities. If my understanding is correct, Your Honor, martial law is essentially the substitution of military power for civilian authorities in areas where such civilian authorities are unable to discharge their functions due to the disturbed peace and order conditions therein. But with your explanation Your Honor, it seems that the martial law administrator, even if he has in the meantime succeeded in quelling the immediate threats to the security of the state, could take measures no longer in the form of military operations but essentially and principally of the nature of ameliorative social action.

"DELEGATE DE GUZMAN (A.): His Honor is correct when he said that we are abandoning the narrow, traditional and classic concept of martial law. But we are abandoning the same only to humanize it. For Your Honor will recall that the old concept of martial law is that the law of the camp is the law of the land, which we are not ready to accept; and President Marcos, aware as he is, that the Filipino people will not countenance any suppressive and unjust action, rightly seeks not only to immediately quell and break the back of the rebel elements but to form a New Society, to create a new atmosphere which will not be a natural habitat of discontent. Stated otherwise, the concept of martial law, as now being practiced, is not only to restore peace and order in the streets and in the towns but to remedy the social and political environments in such a way that discontent will not once more be renewed.

"DELEGATE ORTIZ (R.): I can feel from the discussion, Mr. Chairman, that we are having difficulty in trying to ascertain the scope and limitations of martial law. To my mind, Mr. Chairman, it is constitutionally impossible for us to place in this great document, in black and white, the limits and the extent of martial law. We are framing a Constitution and not a statute; and unlike a statute, a Constitution must limit itself to providing basic concepts and policies without going into details. I have heard from some of the Delegates here their concern that we might be, by this provision and the interpretations being given to it, departing from the traditional concept of martial law. Concepts are mere concepts, Mr. Chairman; but concepts, like principles, must be tested by their application to existing conditions, whether those concepts are contained in statutes or in a Constitution. Referring specifically to the exercise of this power by President Marcos, doubts have been expressed in some quarters, whether in declaring martial law, he could exercise legislative and judicial powers. I would want to emphasize that the circumstances which provoked the President in declaring martial law may not be quantified. In fact, it is completely different from a case of invasion where the threat to national security comes from the outside. The martial law declared by the President was occasioned by the acts of rebellion, subversion, lawlessness and chaos that are widespread in the country. Their origin, therefore, is internal. There was no threat from without, but only from within. But these acts of lawlessness, rebellion, and subversion are mere manifestations of more serious upheavals that beset the deepest core of our social order. If we shall limit and constrict martial law to its traditional concept, in the sense that the military will be merely called upon to discharge civilian functions in areas where the civil functionaries are not in a position to perform their normal duties or, better still, to quell lawlessness and restore peace and order, then martial law would be a mere temporary palliative and we shall be helpless if bound by the old maxim that martial law is the public law of military necessity, that necessity calls it forth, that necessity justifies its existence, and necessity measures the extent and degrees to which it may be employed. My point here, Your Honor, is that beyond martial necessity

lies the graver problem of solving the maladies which, in the first place, brought about the conditions which precipitated the exercise of his martial powers. If the President, by the exercise of his martial authority, will be limited to merely taking a military measure to quell the rebellion and eliminating lawlessness in the country and leave him with no means or authority to effect the needed social and economic reforms to create an enduring condition of peace and order, then we shall have failed in providing in this Constitution the basic philosophy of martial law which, I am sure, we are embodying in it for the great purpose of preserving the State. I say that the preservation of the State is not limited merely to eliminating the threats that immediately confront it. More than that, the measure to preserve the State must go deeper into the root causes of the social disorder that endanger the general safety.

"DELEGATE DE GUZMAN (A.): I need not add more, Mr. Chairman, to the very convincing remarks of my good friend and colleague, Delegate Ortiz. And I take it, Mr. Chairman, that that is also the position of this Committee.

"PRESIDING OFFICER TUPAZ (A): Yes, also of this Committee.

"DELEGATE ADIL: Just one more question, Mr. Chairman, if the distinguished Delegate from La Union would oblige.

"DELEGATE DE GUZMAN (A.): All the time, Your Honor.

"DELEGATE ADIL: When martial law is proclaimed, Your Honor, would it mean that the Constitution which authorizes such proclamation, is set aside or that at least some provisions of the Constitution are suspended?

"DELEGATE DE GUZMAN (A.): The Constitution is not set aside, but the operation of some of its provisions must, of necessity, be restricted, if not suspended, because their continuance is inconsistent with the proclamation of martial law. For instance, some civil liberties will have to be suspended upon the proclamation of martial law, not because we do not value them, but simply because it is impossible to implement these civil liberties hand-in-hand with the effective and successful exercise and implementation of martial powers. There are certain individual rights which must be restricted and curtailed because their exercise and enjoyment would negate the implementation of martial authority. The preservation of the State and its Constitution stands paramount over certain individual rights and freedom. As it were, the Constitution provides martial law as its weapon for survival, and when the occasion arises, when such is at stake, prudence requires that certain individual rights must have to be sacrificed temporarily. For, indeed, the destruction of the Constitution would mean the destruction of all the rights that flow from it.

"DELEGATE ADIL: Does your Honor mean to say that when martial law is declared and I, for instance, am detained by the military authorities, I cannot avail of the normal judicial processes to obtain my liberty and question the legality of my detention?

"DELEGATE DE GUZMAN (A.): If I am not mistaken, Your Honor, you are referring to the privilege of the writ of habeas corpus.

"DELEGATE ADIL: Yes, Your Honor, that is correct.

"DELEGATE DE GUZMAN (A.): In that case, Your Honor, I take it that when martial law is proclaimed, the privilege of the writ of habeas corpus is ipso facto suspended and, therefore, if you are apprehended and detained by the military authorities, more so, when your apprehension and detention were for an offense against the security of the State, then you cannot invoke the privilege of the writ of habeas corpus and ask the courts to order your temporary release. The privilege of the writ of habeas corpus, like some other individual rights, must have to yield to the greater need of preserving the State. Here, we have to make a choice between two values, and I say that in times of great peril, when the very safety of the whole nation and this Constitution is at stake, we have to elect for the greater one. For, as I have said, individual rights assume meaning and importance only when their exercise could be guaranteed by the State, and such guaranty cannot definitely be

had unless the State is in a position to assert and enforce its authority.

"DELEGATE ADIL: Since martial law was declared by President Marcos last September 21, 1972, and announced on September 23, 1972, the President has been issuing decrees which are in the nature of statutes, regulating as they do, various and numerous norms of conduct of both the private and the public sectors. Would you say, Your honor, that such exercise of legislative powers by the President is within his martial law authority?

"DELEGATE DE GUZMAN (A): Certainly, and that is the position of this Committee. As martial law administrator and by virtue of his position as Commander-in-Chief of the Armed Forces, the President could exercise legislative and, if I may add, some judicial powers to meet the martial situation. The Chief Executive must not be hamstrung or limited to his traditional powers as Chief Executive. When martial law is declared, the declaration gives rise to the birth of powers, not strictly executive in character, but nonetheless necessary and incident to the assumption of martial law authority to the end that the State may be safe.

"DELEGATE ADIL: I am not at all questioning the constitutionality of the President's assumption of powers which are not strictly executive in character. Indeed, I can concede that when martial law is declared, the President can exercise certain judicial and legislative powers which are essential to or which have to do with the quelling of rebellion, insurrection, imminent danger thereof, or meeting an invasion. What appears disturbing to me, and which I want Your Honor to convince me further, is the exercise and assumption by the President or by the Prime Minister of powers, either legislative or judicial in character, which have nothing to do with the conditions of rebellion, insurrection, invasion or imminent danger thereof. To be more specific, Your Honor, and to cite to you an example, I have in mind the decree issued by the President proclaiming a nationwide land reform or declaring land reform throughout the Philippines. I suppose you will agree with me, Your Honor, that such a decree, or any similar decree for that matter, has nothing to do with invasion, insurrection, rebellion or imminent danger thereof. My point, Your Honor, is that this measure basically has nothing to do with the restoration of peace and order or the quelling of rebellion or insurrection. How could we validly say that the President's assumption of such powers is justified by the proclamation of martial law?

"DELEGATE DE GUZMAN (A.): As I have repeatedly stated, Your Honor, we have now to abandon the traditional concept of martial law as it is understood in some foreign textbooks. We have to look at martial law not as an immutable principle. Rather, we must view it in the light of our contemporary experience and not in isolation thereof. The quelling of rebellion or lawlessness or, in other words, the restoration of peace and order may admittedly be said to be the immediate objective of martial law, but that is to beg the question. For how could there really be an enduring peace and order if the very causes which spawned the conditions which necessitated the exercise of martial powers are not remedied? You cite as an example the decree on land reform. Your Honor will have to admit that one of the major causes of social unrest among the peasantry in our society is the deplorable treatment society has given to our peasants. As early as the 1930's, the peasants have been agitating for agrarian reforms to the extent that during the time of President Quirino they almost succeeded in overthrowing the government by force. Were we to adopt the traditional concept of martial law, we would be confined to merely putting down one peasant uprising after another, leaving unsolved the maladies that in the main brought forth those uprisings. If we are really to establish an enduring condition of peace and order and assure through the ages the stability of our Constitution and the Republic, I say that martial law, being the ultimate weapon of survival provided for in the Constitution, must penetrate deeper and seek to alleviate and cure the ills and the seething furies deep in the bowels of the social structure. In a very real sense, therefore, there is a profound relationship between the exercise by the martial law administrator of legislative and judicial powers and the ultimate objective of martial law. And I may add that in the ultimate analysis, the only known limitation to martial law powers is the convenience of the martial law administrator and the judgment and verdict of the people and, of course, the verdict of history itself.

"DELEGATE LEVISTE (O): Your Honor, just for purposes of discussion, may I know from you whether there has been an occasion in this country where any past President had made use of his martial law power?

"DELEGATE DE GUZMAN (A.): I am glad that you asked that question, Your Honor, because it seems that we are of the impression that since its incorporation into the 1935 Constitution, the martial law provision has never been availed of by any President. I recall, Your Honor, that during the Japanese occupation, President Laurel had occasion to declare martial law, and I recall that when President Laurel declared martial law, he also assumed legislative and judicial powers. We must, of course, realize that during the time of President Laurel, the threats to national security which precipitated the declaration came from the outside. The threats, therefore, were not internal in origin and character as those which prompted President Marcos to issue his historic proclamation. If, in case — as what happened during the time of President Laurel — the declaration of martial law necessitated the exercise of legislative powers by the martial law administrator, I say that greater necessity calls forth the exercise of that power when the threats to national security are posed not by invaders but by the rebellious and seditious elements, both of the left and right, from within. I say that because every rebellion, whether in this country or in other foreign countries, is usually the product of social unrest and dissatisfaction with the established order. Rebellions or the acts of rebellion are usually preceded by long suffering of those who ultimately choose to rise in arms against the government. A rebellion is not born overnight. It is the result of an accumulation of social sufferings on the part of the rebels until they can no longer stand those sufferings to the point that, like a volcano, it must sooner erupt. In this context, the stamping out of rebellion must not be the main and only objective of martial law. The martial law administrator should, nay, must, take steps to remedy the crises that lie behind the rebellious movement, even if in the process, he should exercise legislative and judicial powers. For what benefit would it be after having put down a rebellion through the exercise of martial power if another rebellion is again in the offing because the root causes which propelled the movement are ever present? One might succeed in capturing the rebel leaders and their followers, imprison them for life or, better still, kill them in the field, but someday new leaders will pick up the torch and the tattered banners and lead another movement. Great causes of every human undertaking do not usually die with the men behind those causes. Unless the root causes are themselves eliminated, there will be a resurgence of another rebellion and, logically, the endless and vicious exercise of martial law authority. This reminds me of the wise words of an old man in our town: That if you are going to clear your field of weeds and grasses, you should not merely cut them, but dig them out.

"PRESIDING OFFICER TUPAZ (A.): With the indulgence of the Gentleman from La Union, the Chair would want to have a recess for at least ten minutes.

"DELEGATE DE GUZMAN (A.): Thank you, Mr. Chairman. In fact, I was about to move for it after the grueling interpellations by some of our colleagues here, but before we recess, may I move for the approval of Section 4?

"PRESIDING OFFICER TUPAZ (A.): Are there any objections? There being none, Section 4 is approved."

Although there are authorities to the contrary, it is generally held that, in construing constitutional provisions which are ambiguous or of doubtful meaning, the courts may consider the debates in the constitutional convention as throwing light on the intent of the framers of the Constitution.¹⁶ It is true that the intent of the convention is not controlling by itself, but as its proceeding was preliminary to the adoption by the people of the Constitution the understanding of the convention as to what was meant by the terms of the constitutional provision which was the subject of the deliberation, goes a long way toward explaining the understanding of the people when they ratified it.¹⁷ More than this, the people realized that these provisions of the new Constitution were discussed in the light of the tremendous forces of change at work in the nation, since the advent of martial law. Evident in the humblest villages to the bustling metropolises at the time were the infrastructures and institutional changes made by the government in a bold experiment to create a just and compassionate society. It was with an awareness of all of these revolutionary changes, and the confidence of the people in the determination and capability of the new dispensation to carry out its historic project of eliminating the traditional sources of unrest in the Philippines, that they overwhelmingly approved the new Constitution.

V

POLITICAL QUESTION

We have adverted to one fact that our jurisprudence attests abundantly to the existence of a continuing Communist rebellion and subversion, and on this point there can hardly be any dispute. The narrow question, therefore, presented for resolution is whether the determination by the President of the Philippines of the necessity for the exercise of his constitutional power to declare martial law is subject to judicial review. In resolving the question, We re-affirm the view that the determination of the necessity for the exercise of the power to declare martial law is within the exclusive domain of the President, and his determination is final and conclusive upon the courts and upon all persons. This conclusion necessarily results from the fact that the very nature of the executive decision is political, not judicial. The decision as to whether or not there is necessity for the exercise of the power is wholly confided by our Constitution to the Chief Executive. For such decision, he is directly responsible to the people for whose welfare he is obliged to act. In view of the nature of the responsibility reposed upon him, it is essential that he be accorded freedom of action demanded by the exigency. The power is to be exercised upon sudden emergencies and under circumstances vital to the existence of the State. The issue is committed to him for determination by criteria of political and military expediency. It is not pretended to rest on evidence but on information which may not be acceptable in court. There are, therefore, no standards ascertainable by settled judicial experience or process by reference to which his decision can be judicially reviewed. In other words, his decision is of a kind for which the judiciary has neither the aptitude, facilities nor responsibility to undertake. We are unwilling to give our assent to expressions of opinion which, although not intended, tends to cripple the constitutional powers of the government in dealing promptly and effectively with the danger to the public safety posed by the rebellion and Communist subversion.

Moreover, the Court is without power to shape measures for dealing with the problems of society, much less with the suppression of rebellion or Communist subversion. The nature of judicial power is largely negative, and it is essential that the opportunity of the Chief Executive for well-directed positive action in dealing with the problem be preserved, if the Government is to serve the best interests of the people. Finally, as a consequence of the general referendum of July 27-28, 1973, where 18,052,016 citizens voted overwhelmingly for the continuance of President Marcos in office beyond 1973 to enable him to finish the reforms he had instituted under martial law, the question of the legality of the proclamation of martial law, and its continuance, had undoubtedly been removed from judicial intervention.

We conclude that the proclamation of martial law by the President of the Philippines on September 21, 1972 and its continuance until the present are valid as they are in accordance with the Constitution.

VI

COURT PRECLUDED FROM INQUIRING INTO LEGALITY OF ARREST AND DETENTION OF PETITIONERS

Having concluded that the Proclamation of Martial Law on September 21, 1972 by the President of the Philippines and its continuance are valid and constitutional, the arrest and detention of petitioners, pursuant to General Order No. 2 dated September 22, 1972 of the President, as amended by General Order No. 2-A, dated September 26, 1972, may not now be assailed as unconstitutional and arbitrary. General Order No. 2 directed the Secretary of National Defense to arrest "individuals named in the attached list, for being active participants in the conspiracy to seize political and state power in the country and to take over the government by force ... in order to prevent them from further committing acts that are inimical or injurious to our people, the government and our

national interest" and "to hold said individuals until otherwise ordered released by the President or his duly authorized representative." It is not disputed that petitioners are all included in the list attached to General Order No. 2.

It should be important to note that as a consequence of the proclamation of martial law, the privilege of the writ of habeas corpus has been impliedly suspended. Authoritative writers on the subject view the suspension of the writ of habeas corpus as an incident, but an important incident of a declaration of martial law.

"The suspension of the writ of habeas corpus is not, in itself, a declaration of martial law; it is simply an incident, though a very important incident, to such declaration. But practically, in England and the United States, the essence of martial law is the suspension of the privilege of the writ of habeas corpus, and a declaration of martial law would be utterly useless unless accompanied by the suspension of the privilege of such writ. Hence, in the United States the two, martial law and the suspension of the writ is regarded as one and the same thing. *Luther v. Borden*, 7 How. 1; *Martin v. Mott*, 12 Wheat. 19; *Story, Com. on the Constitution*, sec. 1342; *Johnson v. Duncan*, 3 Martin, N.S. 530." (12 L.ed. 582-83)

Evidently, according to Judge Smalley, there could not be any privilege of the writ of habeas corpus under martial law (*In re Field*, 9 Fed. Cas. 1 [1862]). The evident purpose of the suspension of the writ is to enable the executive, as a precautionary measure, to detain without interference persons suspected of harboring designs harmful to public safety. (*Ex Parte Zimmerman*, 32 Fed. 2nd. 442, 446). In any event, the Proclamation of Martial Law, in effect, suspended the privilege of the writ with respect to those detained for the crimes of insurrection or rebellion, etc., thus:

"In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative." (*Italics supplied*).

General Order No. 2 was issued to implement the aforecited provisions of the proclamation of Martial Law.

By the suspension of the privilege of the writ of habeas corpus, the judiciary is precluded from interfering with the orders of the Executive by inquiring into the legality of the detention of persons involved in the rebellion.

The arrest and detention of persons reasonably believed to be engaged in, or connected with, the insurgency are predicated upon the principle that in time of public disorder it is the right and duty of all citizens especially the officer entrusted with the enforcement of the law to employ such force as may be necessary to preserve the peace and restrain those who may be committing felonies. Encroachments upon personal liberty, as well as upon private property on those occasions are justified by the necessity of preserving order and the greater interests of the political community. The Chief Executive, upon whom is reposed the duty to preserve the nation in those times of national peril, has correspondingly the right to exercise broad authority and discretion compatible with the emergency in selecting the means and adopting the measures which, in his honest judgment, are necessary for the preservation of the nation's safety. In case of rebellion or insurrection, the Chief Executive may "use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment but are by way of precaution, to prevent the exercise of hostile power." (*Moyer v. Peabody*, 212 U.S. 78, 84-85 [1909] 53 L. ed. 411.)

The justification for the preventive detention of individuals is that in a crisis such as invasion or domestic insurrection "the danger to the security of nation and its institutions is so great that the government must take measures that temporarily deprive citizens of certain rights in order to ensure the survival of the political structure that protects those and other rights during ordinary times." (Developments —National Security, Vol. 85, Harvard Law Review, March 1972, No. 5, p. 1286).¹

In *Moyer v. Peabody*, supra, the Supreme Court of the United States upheld the detention of a labor leader whose mere presence in the area of a violent labor dispute was deemed likely to incite further disturbances. "So long as such arrests are made in good faith," said the erudite Justice Holmes, "and in the honest belief that they are made in order to head the insurrection off, the governor is the final judge and can not be subjected to an action after he is out of office, on the ground that he had no reasonable ground for his belief."

During World War II, persons of Japanese ancestry were evacuated from their homes in the West Coast and interned in the interior until the loyalty of each individual could be established. In *Korematsu v. United States* (323 U.S. 214 [244]), the Supreme Court of the United States upheld the exclusion of these persons on the ground that among them a substantial number were likely to be disloyal and that, therefore, the presence of the entire group created the risk of sabotage and espionage. Although the Court avoided deciding the constitutionality of the detention that followed the evacuation, its separation of the issue of exclusion from that of detention was artificial, since the separate orders were part of a single over-all policy. The reasoning behind its approval of exclusion of persons of Japanese ancestry would seem to apply with equal force to the detention despite the greater restrictions of movement that the latter entailed. In the Middle East, military authorities of Israel have detained suspected Arab terrorists without trial (Dershowitz, *Terrorism and Preventive Detention: The Case of Israel*, 50 Commentaries, Dec. 1970 at 78).

Among the most effective countermeasures adopted by governments in Southeast Asia to prevent the growth of Communist power has been the arrest and detention without trial of key united front leaders at suitable times.²

The preventive detention of persons reasonably believed to be involved in the Communist rebellion and subversion has long been recognized by all democratic governments as a necessary emergency measure for restoring order. "Because of the difficulty in piercing the secrecy of tightly knit subversive organizations in order to determine which individuals are responsible for the violence, governments have occasionally responded to emergencies marked by the threat or reality of sabotage or terrorism by detaining persons on the ground that they are dangerous and will probably engage in such actions."³

In the case at bar, petitioner Aquino (L-35546) has already been charged with the violation of the Anti-Subversion Act (L-37364) and therefore his detention is reasonably related to the quelling of the rebellion. Upon the other hand, the other petitioners have been released but their movements are subject to certain restrictions. The restrictions on the freedom of movement of these petitioners, as a condition for their release, are, however, required by considerations of national security.⁴ In the absence of war or rebellion, the right to travel within the Philippines may be considered constitutionally protected. But even under such circumstances that freedom is not absolute. Areas ravaged by floods, fire and pestilence can be quarantined, as unlimited travel to those areas may directly and materially interfere with the safety and welfare of the inhabitants of the area affected. During a rebellion or insurrection the authority of the commander to issue and enforce police regulations in the area of the rebellion or insurrection is well recognized. Such regulations may involve the limitation of the right of assembly, the right to keep arms, and restrictions on freedom of movement of civilians.⁵ Undoubtedly, measures conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder fall within the discretion of the President, in the exercise of his authority to suppress the rebellion and restore public order.

We find no basis, therefore, for concluding that petitioner Aquino's continued detention and the restrictions imposed on the movements of the other petitioners who were released, are arbitrary.

CONCLUSION

We realize the transcendental importance of these cases. Beyond the question of deprivation of liberty of petitioners is the necessity of laying at rest any doubt on the validity of the institutional changes made to bring the country out of an era of rebellion, near political anarchy and economic stagnation and to establish the foundation of a truly democratic government and a just and compassionate society. Indeed, as a respected delegate of two Constitutional Conventions observed: "The introduction of martial law has been a necessary recourse to restore order and steer the country safely through a severe economic and social crisis."⁶ The exercise of these extraordinary powers not only to restore civil order through military force but also to effect urgently needed reforms in order to root out the causes of the rebellion and Communist subversion may indeed be an experiment in government. But it was necessary if the national democratic institution was to survive in competition with the more revolutionary types of government. "National democratic constitutionalism, ancient though its origin may be," observed Dr. C.F. Strong,⁷ "is still in an experimental stage and if it is to survive in competition with more revolutionary types of government, we must be prepared to adapt to ever-changing conditions of modern existence. The basic purpose of a political institution is, after all, the same wherever it appears: to secure social peace and progress, safeguard individual rights, and promote national well-being."

These adaptations and innovations were resorted to in order to realize the social values that constitute the professed goals of the democratic polity. It was an attempt to make the political institution serve as an effective instrument of economic and social development. The need of the times was for a more effective mode of decision-making and policy-formulation to enable the nation to keep pace with the revolutionary changes that were inexorably reshaping Philippine Society. A government, observed the then Delegate Manuel Roxas, a Member of the Sub-Committee of Seven of the Sponsorship Committee of the 1934 Constitutional Convention, "is a practical science, not a theory, and a government can be successful only if in its structure due consideration is given to the habits, the customs, the character and, as McKinley said, to the idiosyncrasies of the people."⁸

WHEREFORE, We hereby conclude that (a) the proclamation of martial law (Proclamation No. 1081) on September 21, 1972 by the President of the Philippines and its continuance, are valid, as they have been done in accordance with the Constitution, and (b) as a consequence of the suspension of the privilege of the writ of habeas corpus, upon the proclamation of martial law, the Court is therefore precluded from inquiring into the legality of the arrest and detention of these petitioners or on the restrictions imposed upon their movements after their release from military custody.

Accordingly, We vote to dismiss all the petitions.

Makasiar, Fernandez, and Aquino, JJ., concur.

[1] Some of those who argued for the petitioners were Attys. Jovito Salonga, Ramon A. Gonzales, Joker D. Arroyo, Sedfrey Ordonez, Pedro Yap, and Francis Garchitorena, while Solicitor General Estelito Mendoza argued for the respondents.

[2] L-35556 — Veronica L. Yuyitung and Tan Chin Hian; L-35569 — Amando Doronila, Hernando J. Abaya, Ernesto Granada, Luis D. Beltran, Bren Guiao, Ruben Cusipag, and Willie Baun; L-3557 — Teresita M. Guiao in behalf of Bren Guiao, also petitioner in L-35569.

[3] Joaquin P. Roces, Teodoro M. Locsin, Sr., Rolando Fadul, Rosalind Galang, Go Eng Guan, Renato Constantino, and Luis R. Mauricio in L-35538; Maximo Soliven, Napoleon G. Rama, and Jose Mari Velez in L-35540; Ramon Mitra, Jr., Francisco Rodrigo, and Napoleon Rama in L-35546; Enrique Voltaire Garcia II (deceased) in L-35547; the petitioners in L-35556, L-35567, L-35571, and Ernesto Rondon in L-35573.

1 Art. VII, Sec. 10(2), 1935 Constitution.

2 Sed. 21, Jones Law of 1916.

3 Art. II, Sec. 2, par. 1, U.S. Constitution.

4 Fairman at 23-25; see also Dowel at 231-32.

5 Corwin, *The President: Office and Powers*, p. 280.

6 *Ibid*, p. 318.

7 Corwin and Koenig, *The Presidency Today*.

8 Cortes, *The Philippine Presidency*, p. 280.

9 Art. VII, Sec. 10(2), 1935 Philippine Constitution.

10 In his report to the Constitutional Convention, Delegate Mariano Jesus Cuenco, Chairman of the Committee on Executive Power, stated:

"Senor Presidente: nosotros, los miembros del comite Ejecutivo, teniendo en cuenta por un lado la fragmentacion de nuestro territorio en miles de islas, y por otro, las grandes crisis que agitan la humanidad, hemos procurado formar un ejecutivo fuerte que mantenga la unidad de la nacion, con suficientes poderes y prerogativas para salvar al pais en los momentos de grandes crisis y en los momentos de grandes peligros. Para conseguir este objetivo, nosotros hemos provisto que el jefe del poder ejecutivo sea elegido por el sufragio directo de todos los electores cualificados del pais; reconocemos su facultad de supervisar los departamentos ejecutivos, todos los negociados administrativos, las provincias y los municipios; le nombramos general en jefe del ejercito y milicias filipinas; reconocemos su derecho de vetar leyes y de proponer el nombramiento de los altos funcionarios, desde los secretarios departamentales hasta los embajadores y consules, y en los momentos de grandes crisis, cuando la nacion se vea confrontada de algunos peligros como en casos de guerra, etc. se reconoce en este proyecto el derecho del jefe del poder ejecutivo de promulgar reglas, con fuerza de ley, para llevar a cabo una politica national. . . ." (*Proceedings of the Philippine Constitutional Convention, Laurel, Vol. III, p. 216. Session of Nov. 10, 1934.*) (Italics supplied.)

As Delegate Miguel Cuaderno observed

". . . not only among the members of the Sub-Committee of Seven, but also with a majority of the delegates was the feeling quite prevalent that there was need of providing for a strong executive. And in this the lessons of contemporary history were a powerful influence. In times when rulers exercising the prerogatives of a dictator appear to give the last ray of hope to peoples suffering from chaos, one could not but entertain the feeling that the safety and well-being of our young nation require a President who would be unhampered by lack of authority, or vexatious procrastination of other governmental units in case of emergency." (*Cuaderno, The Framing of the Constitution of the Philippines*, p. 90).

11 *The Philippine Constitution*, published by the Phil. Lawyers Association, Vol. I, 1969 Ed., p. 183.

1 *Federalist* No. 23.

2 Ex Parte Jones, 45 LRA (N.S.) 1044.

3 320 US 92, 94 (1943), 87 L.ed. 1782.

4 11 Wallace 493, 506 (1870).

1 Per Mr. Justice Frankfurter, Baker vs. Carr, 369 U.S. 186, 7 L.ed. 2d. 723.

2 Mr. Justice Jackson, dissenting, Korematsu vs. U.S., 323 U.S. 245, 89 L.ed. 214.

3 "No court will review the evidence upon which the executive acted nor set up its opinion against his." (Vanderheyden vs. Young [1814] 11 Johns. [N.Y.] 150; Martin vs. Mott [1827] 12 Wheat. [U.S.] 19; Luther vs. Borden [1848] 7 How. [U.S.] 1; Ex Parte Moore [1870] 64 N.C. 802; Appeal of Hartranft [1877] 85 Pa. St. 433; In re Boyle [1899]; 6 Idaho 609; Sweeney vs. Commonwealth [1904] 118 Ky. 912; Barcelon vs. Baker [1905] 5 Phil., 87, 100; In re Moyer [1905] 35 Colo. 159; Frank's vs. Smith [1911] 142 Ky. 232; Ex Parte McDonald, supra, Note 11.

4 Aruego, The Framing of the Philippine Constitution, Vol. I, p. 431, 1949 Ed

5 278 U.S. 378-404; 77 L.ed. 375; Decided December 12, 1932.

6 Goh Keng Swee, The Nature and Appeals of Communism in Non-Communist Asian Countries, p. 43.

7 James Amme H. Garvey, Marxist-Leninist China; Military and Social Doctrine, 1960, p. 29.

8 "Finally, Lin Piao, in the same article, provides us with a definition of Mao's strategy revolutionary warfare, the strategy of people's war which comprises the following six major elements:

"(1) Leadership by a revolutionary communist party which will properly apply Marxism-Leninism in analyzing the class character of a colonial or semicolonial country, and which can formulate correct policy to wage a protracted war against imperialism, feudalism, and bureaucratic capitalism.

"(2) Correct utilization of the united front policy to build the broadest possible national united front to ensure the fullest mobilization of the basic masses as well as the unity of all the forces that can be united, in an effort to take over the leadership of the national revolution and establish the revolution on an alliance of, first, the workers and peasants and, second, an alliance of the working peoples with the bourgeoisie and other non-working people.

"(3) Reliance on the peasantry and the establishment of rural bases, because in agrarian and 'semifeudal' societies the peasants are the great majority of the population; 'subjected to threefold oppression and exploitation by imperialism, feudalism, and bureaucrat-capitalism' they will provide most of the human and material resources for the revolution. In essence, the revolution is a peasant revolution led by the communist party: 'to rely on the peasants, build rural base areas and use the countryside to encircle and finally capture the cities — such was the way to victory in the Chinese revolution.'

"(4) Creation of a communist party-led army of a new type, for a 'universal truth of Marxism-Leninism' is that 'without a people's army the people have nothing.' A new type of communist party-led army in which 'politics is the commander' must be formed, one which focuses on instilling in the minds of the population a 'proletarian revolutionary consciousness and courage' and which actively seeks the 'support and backing of the masses.'

"(5) Use of the strategy and tactics of the people's war as interpreted by Mao Tse-tung, in a protracted armed struggle to annihilate the enemy and take over state power, based on the support of a mobilized mass population and the use of guerrilla warfare, and ultimately mobile and even positional warfare as the revolution progresses."

"(6) Adherence to a policy of self-reliance, because 'revolution or people's war in any country is the business of

the masses in that country and should be carried out primarily by their own efforts; and there is no other way." (Peter Van Ness, *Revolution and Chinese Foreign Policy*, pp. 70-72.)

9 "A report of the 'Palanan Incident' submitted by defense and military authorities to the House committee on national defense said that no single incident had done so much to focus the dangers posed by the 'reestablished' Communist Party of the Philippines and the NPA than the discovery of an abandoned ship and the subsequent recovery of military hardware and documents in innocent-looking Digoyo Bay. The discovery of these 'instruments of war' which were intended for the insurgents was a cause of deep concern because of its direct bearing on the national security, the report stated.

"Under wraps. Before the Karagatan entered the picture, there had been intelligence reports of increased NPA activities in the mountain areas and shorelines of Palanan and nearby Dilasag-Casiguran in Quezon Province. Military authorities, for well-placed reasons, had kept these reports under wraps. But a few of them leaked out. For instance, a coded dispatch from Task Force Saranay mentioned a submarine unloaded some 200 men and while off Dinapigue Point, north of Palanan.

"While skeptical newsmen skimmed through the reports, they came across recorded instances of actual operations: last May 19, a big number, of NPA's arrived and encamped in the vicinity of the Divinisa River. On May 26, a ship unloaded about 200 sacks of rice, firearms and ammunition at the vicinity of Digollorin. Shipside unloading was effected and cargo ferried aboard small boats and bancas.

"Two days later on May 28, a powerboat painted red, white and blue with a Philippine flag flying astern, reconnoitered from Dinatadmo to Divinisa Point, Fishermen from barrio Maligaya, Palanan, were among those forced to unload food and military supplies. About the second week of June, another landing of supplies took place there.

"Programs of action. By this time, Brig. Gen. Tranquilino Paranis, Saranay commander, started to move some of his men from task force headquarters in Echague, Isabela, to the Palanan area. On June 18, a patrol of the task force encountered a group of NPA's in barrio Taringsing, Cordon town. Here government troops recovered CCP documents outlining programs of action for 1972. The documents according to military analysts, contained timetables calling for the intensification of sabotage, violence and attacks on military camp and other government installations from July to December. On July 3, information was received that an unidentified vessel had been seen off Digoyo point. Paranis relayed the message to Brig. Gen. Tomas Diaz at First PC Zone headquarters in Camp Olivas, Pampanga. From then on until army intelligence raided the home of a sister of one of the incorporators of the Karagatan Fishing Co., in Cainta, Rizal and stumbled on stacks of communist propaganda materials, the Karagatan had exploded on the public face in bold glaring headlines.

"What bothered army authorities most was not only the actual landing of about 3,000 rifles of the M-14 type of which 737 had already been recovered by troops who stormed Hill 225 in Palanan and also seized 60,000 rounds of ammunition and another 30 boxes of ammunition for rocket launchers. It was the presence of the rockets themselves. The 40mm rockets are high-explosive anti-tank weapons. They appear to be copies of the Soviet RPG-2 while the rocket launchers are prototypes of the Soviet RPG-2 anti-tank launchers used by the Vietcong.

"The landing of military hardware in enormous quantities have multiplied the dangers of the CCP-Maoist factions, the military said. Armed with high powered weapons and with sufficient ammunition, the insurgents have become a more potent force to contend with. This has emboldened them to intensify operations with the use of new recruits. The new recruits have been trained in the use of high explosives and were to be unleashed on the population centers of Greater Manila as part of the continuing September-October plan that includes the bombing of Congress, the Constitutional Convention, City Hall, public utilities, department stores and moviehouses. The

recruits were to seek sanctuary in safe houses installed for them by the NPA in Caloocan City, the army asserted." (Timetable for Terror, PACE, Vol. 1, No. 52, September, 1972).

10 "The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder. xxx The Communist recognizes that an established government in control of modern technology cannot be overthrown by force until it is about ready to fall of its own weight." Revolution is, therefore, "not a sudden episode but as the consummation of a long process." (Per Mr. Justice Jackson, *Dennis vs. United States*, 341 U.S. 564, 565, 95 L.ed. 1181.)

11 The Supreme Court and the Commander-in-Chief, 1951, Cornell University Press, p. 36.

12 "Not even the aerial attack upon Pearl Harbor closed the courts or of its own force deposed the civil administration, yet it would be common understanding of men that those agencies which are charged with the national defense surely must have authority to take on the spot some measures which in normal times would be ultra vires."

x x x

"When one considers certain characteristics of modern war, mobility on land, surprise from the air, sabotage, and the preparation of fifth columns — it must be apparent that the dictum that 'martial rule cannot arise from a threatened invasion' is not an adequate definition of the extent of the war power of the United States. An Army today has a dispersion in depth quite unknown in our Civil War. Thus Under Secretary of War Patterson, in stressing the need for a state guard to protect installations in the rear, pointed to 'the fact that the wars of today know no front line; that a tiny village hundreds of miles behind the theoretical front may suddenly become the scene of desperate and blazing action.' If the problem were to arise today it seems fair to assume that the Supreme Court would not hold to the letter of Justice Davis' opinion. Just as in the construction of the commerce and other grants of national power the Court of late has notably sought to make them adequate to the conditions which we face, almost certainly it would so construe the war power as to include all that is requisite 'to wage war successfully.'" (Charles Fairman, *Law of Martial Rule*, 55 *Harvard Law Review*, 1287.)

13 Notes on the New Society, pp. 29-30.

14 Dr. Abelardo Samonte, Inaugural Address, U. P. Los Banos, Jan. 11, 1974.

15 *Stewart vs. Kahn*, 11 *Wallace* 493, 506.

15a Vol. XVI, No. 8, pp. 90-93, Transcript of Proceedings of the 166-Man Special Committee, Meeting No. 8.

16 *Pollock vs. Farmer's Loan & T. Co.* (1895) 157 U.S. 429, 39 L.ed. 759; See also *Legal Tender* cases (1884) 110 U.S. 421, 28 L.ed. 204, 70 A.L.R. 30.

17 *State ex rel. Miller vs. Taylor* (1911) 22 N.D. 362, 133 N.W. 1046.

1 During the Civil War in the United States, the writ of habeas corpus was suspended and many thousands of persons suspected of disloyalty to the Union were interned. (J. Randall & D. Donald, *The Civil War and Reconstruction*, 301 [1961]. It must be noted that the Habeas Corpus Act of 1863 of the United States required that lists of political prisoners be furnished to the judges of the federal courts; limited the duration of detention to one session of the grand jury, at the end of which courts were to order the release of those prisoners who had not been indicted for a crime. However, during the Civil War the Habeas Corpus Act was virtually ignored by President Lincoln, and the arrest, confinement, and release of prisoners continued as if it had not been passed. [Lee], Randall & D. Donald, *supra*, p. 306.)

2 There are three reasons advanced why this was found necessary. "First, the evidence to satisfy the requirements of legal procedure will blow the cover of police agents who have penetrated Communist open-front organizations. Further, the possibility of prosecution assumes that participation in Communist conspiratorial activities is a legal offence, which it is not in most countries. Third, to wait for the Communist activist to engage in overtly illegal action, for example, riots and other sorts of violence before prosecution, will give them a political advantage which few governments of the new states of Asia can afford. For by then the political situation would have deteriorated to a state of acute instability, which in turn would probably have caused economic decline due to loss of confidence. Should political instability become endemic, serious doubts will creep into men's minds as to who would emerge the winner. This can make the problem of control of subversion, for which public confidence and co-operation are important, a very acute one.

"The power of arrest and detention without trial is, therefore, a necessary weapon in the fight against Communists in the newly established Asian states. It is, however, of the utmost importance that the highest standards of conduct on the part of the secret police are maintained. There should be checks, in the form of review committees consisting of lawyers and professional men, on the actions of the police. These checks should be real and not perfunctory measures. Nothing would be more favourable to the growth of Communist influence than extensive and indiscriminate use of the powers of detention. For this will generally cause widespread resentment against the authorities which the Communist underground can use to stoke the fires of revolution. Further, it is important that police action is limited to really worthwhile targets — the thinkers and the planners, the able propagandists and the organization men. Ninety-nine per cent of those who engage in Communist open-front activities are not worth detaining, not even the second echelon activists and the musclemen on whom the Communists depend to discipline their followers. They are the expendables and can be replaced without much difficulty, unlike the thinker and the plotter, and their detention serves no purpose beyond creating unnecessary disaffection among their families." (Goh Keng Swee: Minister of Defense of the Interior in Singapore, *The Nature and Appeals of Communism in Non-Communist Asia Countries*.)

3 *Developments-National Security*, Vol. 85, *Harvard Law Review*, March 1972, No. 5, p. 1313.

4 *Zemel vs. Rusk*, 381 U.S. 1 [1965] upheld the constitutionality of the Cuba area restriction.

5 Charles Fairman, *Martial Rule and the Suppression of Insurrection*.

6 Miguel Cuaderno, Sr., *Martial Law the National Economy*, 1974 Ed. Delegate to the 1934 and 1971 Constitutional Conventions, member of the Sub-Committee of Seven that finalized the draft of the 1935 Constitution.

7 *Modern Political Constitutions*, p. 55.

8 Vol. I, *The Philippine Constitution, Debates on the First Draft of the Constitution*, p. 157.

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CONCURRING OPINION

BARREDO, J.:

It is to my mind very unfortunate that, for reasons I cannot comprehend or do not deem convincing, the majority of the Court has agreed that no main opinion be prepared for the decision in these cases. Honestly, I feel that the grounds given by the Chief Justice do not justify a deviation from the regular practice of a main opinion being prepared by one Justice even when the members of the Court are not all agreed as to the grounds of the judgment as long as at least a substantial number of Justices concur in the basic ones and there are enough other Justices concurring in the result to form the required majority. I do not see such varying substantial disparity in the views of the members of the Court regarding the different issues here as to call for a summarization like the one that was done, with controversial consequences, in *Javellana*.^(a) Actually, the summarization made by the Chief Justice does not in my opinion portray accurately the spectrum of our views, if one is to assay the doctrinal value of this decision. The divergences stated are I think more apparent than real.

In any event, it is my considered view that a historical decision like this, one likely to be *sui generis*, at the same time that it is of utmost transcendental importance because it revolves around the proper construction of the constitutional provisions securing individual rights as they may be affected by those empowering the Government to defend itself against the threat of internal and external aggression, as these are actually operating in the setting of the official proclamation of the Executive that rebellion endangering public safety actually exists, deserves better treatment from the Court. Indeed, I believe that our point of seeming variance respecting the questions, before us could have been threshed out, if only enough effort in that direction had been exerted by all. The trouble is that from the very beginning many members of the Court, myself included, announced our desire to have our views recorded for history, hence, individualization rather than consensus became the order of the day. In consequence, the convenient solution was forged that as long as there would be enough votes to support a legally binding judgment, here need not be any opinion of the Court, everyone could give his own views and the Chief Justice would just try to analyze the opinions of those who would care to prepare one and then make a certification, of the final result of the voting. It was only at the last minute that, at my suggestion, supported by Justice Castro, the Chief's prepared certification was modified to assume the form of a judgment, thereby giving this decision a better semblance of respectability.

As will be seen, this separate opinion of concurrence is not due to any irreconcilable conflict of conviction between me and any other member of the Court. Truth to tell, at the early stages of our efforts to decide these cases, but after the Court had more or less already arrived at a consensus as to the result, I was made to understand that I could prepare the opinion for the Court. Apparently, however, for one reason or another, some of our colleagues felt that it is unnecessary to touch on certain matters contained in the draft I had submitted, incomplete and unedited as it was, hence, the plan was abandoned. My explanation that a decision of this import should be addressed in part to the fixture and should attempt to answer, as best we can, not only the questions raised by the parties but also the relevant ones that we are certain are bothering many of our countrymen, not to speak of those who are interested in the correct juridical implications of the unusual political developments being witnessed in the Philippines these days, failed to persuade them. I still feel very strongly, however, the need for articulating the thoughts that will enable the whole world to visualize and comprehend the exact length, breadth and depth of the juridical foundations of the current constitutional order and thus be better positioned to render its verdict thereon.

The following then is the draft of the opinion I prepared for the Court. I feel I need not adjust it to give it the tenor of an individual opinion. Something inside me dictates that I should let it stand as I had originally prepared it. I am emboldened to do this by the conviction that actually, when properly analyzed, it will be realized that whatever differences there might be in the various opinions we are submitting individually, such differences lie

only in the distinctive methods of approach we have each prepared to adopt rather than in any basically substantial and irreconcilable disagreement. If we had only striven a little more, I am confident, we could have even found a common mode of approach. I am referring, of course, only to those of Us who sincerely feel the urgency of resolving the fundamental issues herein, regardless of purely technical and strained reasons there might be to apparently justify an attitude of indifference, if not concealed antagonism, to the need for authoritative judicial clarification of the juridical aspects of the New Society in the Philippines.

On September 11, 1974, petitioner Diokno was released by order of the President, "under existing rules and regulations." The Court has, therefore, resolved that his particular case has become moot and academic, but this development has not affected the issues insofar as the other petitioners, particularly Senator Aquino, are concerned. And inasmuch as the principal arguments of petitioner Diokno, although presented only in the pleadings filed on his behalf, apply with more or less equal force to the other petitioners, I feel that my reference to and discussion of said arguments in my draft may well be preserved, if only to maintain the purported comprehensiveness of my treatment of all the important aspects of these cases.

Before proceeding any further, however, I would like to explain why I am saying we have no basic disagreements.

Except for Justices Makasiar and Esguerra who consider the recitals in the Proclamation to be absolutely conclusive upon the courts and for Justice Teehankee who considers it unnecessary to express any opinion on the matter at this point, the rest or eight of us have actually inquired into the constitutional sufficiency of the Proclamation. Where we have differed is only as to the extent and basis of the inquiry. Without committing themselves expressly as to whether the issue is justiciable or otherwise, the Chief Justice and Justice Castro unmistakably appear to have actually conducted an inquiry which as far as I can see is based on facts which are uncontradicted in the record plus additional facts of judicial notice. No independent evidence has been considered, nor is any reference made to the evidence on which the President had acted. On their part, Justices Antonio, Fernandez and Aquino are of the view that the Proclamation is not subject to inquiry by the courts, but assuming it is, they are of the conviction that the record amply supports the reasonableness, or lack of arbitrariness, of the President's action. Again, in arriving at this latter conclusion, they have relied exclusively on the same factual bases utilized by the Chief Justice and Justice Castro. Justices Fernando and Muñoz Palma categorically hold that the issue is justiciable and, on that premise, they made their own inquiry, but with no other basis than the same undisputed facts in the record and facts of judicial notice from which the others have drawn their conclusions. For myself, I am just making it very clear that the inquiry which the Constitution contemplates for the determination of the constitutional sufficiency of a proclamation of martial law by the President should not go beyond facts of judicial notice and those that may be stated in the proclamation, if these are by their very nature capable of unquestionable demonstration. In other words, eight of us virtually hold that the Executive's Proclamation is not absolutely conclusive — but it is not to be interfered with whenever it accords with facts undisputed in the record as well as those of judicial notice or capable of unquestionable demonstration. Thus, it is obvious that although we are split between upholding justiciability or non-justiciability, those who believe in the latter have nonetheless conducted an inquiry, while those who adhere to the former theory, insisting on following Lansang, have limited their inquiry to the uncontroverted facts and facts of judicial notice. Indeed, the truth is that no one has asked for inquiry into the evidence before the President which is what the real import of justiciability means. In the final analysis, none of us has gone beyond what in my humble opinion the Constitution permits in the premises. In other words, while a declaration of martial law is not absolutely conclusive, the Court's inquiry into its constitutional sufficiency may not, contrary to what is implied in Lansang, involve the reception of evidence to be weighed against those on which the President has acted, nor may it extend to the investigation of what evidence the President had before him. Such inquiry must be limited to what is undisputed in the record and to what accords or does not accord with facts of judicial notice.

Following now is my separate concurring opinion which as I have said is the draft I submitted to the Court's approval:

This is a cluster of petitions for habeas corpus seeking the release of petitioners from detention, upon the main ground that, allegedly, Proclamation 1081 issued by President Ferdinand E. Marcos on September 21, 1972 placing the whole country under martial law as well as the general orders subsequently issued also by the President by virtue of the said proclamation, pursuant to which petitioners have been apprehended and detained, two of them until the present, while the rest have been released conditionally, are unconstitutional and null and void, hence their arrest and detention have no legal basis.

The petitioners in G.R. No. L-35538 are all journalist, namely, Joaquin P. Roces, Teodoro M. Locsin, Rolando Fadul, Rosalind Galang, Go Eng Guan, Maximo M. Soliven, Renato Constantino and Luis R. Mauricio. Their petition was filed at about noon of September 23, 1972.

Almost three hours later of the same day, the petition in G.R. No. L-35539 was filed, with Carmen I. Diokno, as petitioner, acting on behalf of her husband, Jose W. Diokno, a senator, who is one of those still detained.

Two days later, early in the morning of September 25, 1972, the petition of Maximo V. Soliven, Napoleon G. Rama and Jose Mari Velez, all media men, was docketed as G.R. No. L-35540. The last two were also delegates to the Constitutional Convention of 1971.

In all the three foregoing cases, the proper writs of habeas corpus were issued returnable not later than 4:00 p.m. of September 25, 1972, and hearing of the petitions was held on September 26, 1972.[1]

Late in the afternoon of September 25, 1972, another petition was filed on behalf of Senators Benigno S. Aquino, Jr. and Ramon V. Mitra, Jr., and former Senator Francisco "Soc" Rodrigo, also a TV commentator. (Delegate Napoleon Rama also appears as petitioner in this case.) It was docketed as G.R. No. L-35546.

The next day, September 26, 1972, a petition was filed by Voltaire Garcia II, another delegate to the Constitutional Convention, as G.R. No. L-35547.[2]

In these two cases the writs prayed for were also issued and the petitions were heard together on September 29, 1972.

In G.R. No. L-35556, the petition was filed by Tan Chin Hian and Veronica L. Yuyitung on September 27, 1972, but the same was withdrawn by the latter on October 6, 1972 and the former on October 9, 1972, since they were released from custody on September 30, 1972 and October 9, 1972, respectively. The Court allowed the withdrawals by resolution on October 11, 1972.

On October 2, 1972, the petition of journalists Amando Doronila, Juan L. Mercado, Hernando J. Abaya, Ernesto Granada, Luis Beltran, Tan Chin Hian, (already a petitioner in G. R. No. L-35556) Bren Guiao, (for whom a subsequent petition was also filed by his wife in G. R. No. L-35571, but both petitions on his behalf were immediately withdrawn with the approval of the Court which was given by resolution on October 11, 1972) Ruben Cusipag, Roberto Ordoñez, Manuel Almario and Willie Baun was filed in G.R. No. L-35567. All these petitioners, except Juan L. Mercado, Manuel Almario and Roberto Ordoñez withdrew their petitions and the Court allowed the withdrawals by resolutions of October 3 and 11, 1972.

And on October 3, 1972, Ernesto Rondon, also a delegate to the Constitutional Convention and a radio commentator, filed his petition in G.R. No. L-35573.

Again, in all these last four cases, G.R. Nos. L-35556, 35567, 35571 and 35573, the corresponding writs were issued and a joint hearing of the petitions was held October 6, 1972, except as to the petitioners who had as of

then announced the withdrawal of their respective petitions.

The returns and answers of the Solicitor General in all these nine cases, filed on behalf of the principal respondents, the Secretary of National Defense, Hon. Juan Ponce Enrile, the Chief of Staff of the Armed Forces of the Philippines, General Romeo Espino, and the Chief of the Philippine Constabulary, General Fidel V. Ramos, were practically identical as follows:

"RETURN TO WRIT

and

ANSWER TO THE PETITION

COME NOW respondents, by the undersigned counsel, and appearing before this Honorable Court only for purposes of this action, as hereunder set forth, hereby state by way of return to the writ and answer to the petition, as follows:

ADMISSIONS/DENIALS

1. They ADMIT the allegations in paragraphs I and V of the Petition;
2. They ADMIT the allegations in paragraph II of the Petition that the petitioners were arrested on September 22, 1972 and are presently detained at Fort Bonifacio, Makati, Rizal, but SPECIFICALLY DENY the allegation that their detention is illegal, the truth being that stated in the Special and Affirmative Defenses of this Answer and Return;
3. They SPECIFICALLY DENY the allegations in paragraphs III, IV, VI and VII, of the Petition, the truth of the matter being that stated in the Special and Affirmative Defenses of this Answer and Return.

Respondents state by way of

SPECIAL AND AFFIRMATIVE DEFENSES

4. On September 21, 1972, the President of the Philippines, in the exercise of the powers vested in him by Article VII, section 10, paragraph 2 of the Constitution, issued Proclamation No. 1081 placing the entire Philippines under martial law;
5. Pursuant to said Proclamation, the President issued General Orders Nos. 1, 2, 3, 3-A, 4, 5, 6, and 7 and Letters of Instruction Nos. 1, 2 and 3. True copies of these documents are hereto attached and made integral parts hereof as Annexes 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. A copy of the President's statement to the country on September 23, 1972 is also attached as Annex 12;
6. Finally, the petition states no cause of action.

P R A Y E R

IN VIEW WHEREOF, it is respectfully prayed of this Honorable Supreme Court that the petition be dismissed.

Manila, Philippines, September 27, 1972."

At the hearings, the following well-known and distinguished members of the bar appeared and argued for the petitioners: Petitioner Diokno argued on his own behalf to supplement the arguments of his counsel of record; Attys. Joker D. Arroyo appeared and argued for the petitioners in L-35538 and L-35567; Francis E. Garchitorea,

assisted by Oscar Diokno Perez, appeared and argued for the petitioner in L-35539; Ramon A. Gonzales, assisted by Manuel B. Imbong, appeared and argued for the petitioners in L-35540; Senators Gerardo Roxas and Jovito R. Salonga, assisted by Attys. Pedro L. Yap, Sedfrey A. Ordonez, Custodio O. Parlade, Leopoldo L. Africa, Francisco Rodrigo Jr., Magdaleno Palacol and Dakila F. Castro, appeared and argued for the petitioners in L-35546; Atty. E. Voltaire Garcia, Sr. appeared and argued in behalf of his petitioner son in L-35547; Attys. Raul I. Goco and Teodulo R. Diño appeared for the petitioners in L-35556; Atty. Roberto P. Tolentino appeared for the petitioner in L-35571; and Atty. Aquilino Pimentel Jr. assisted by Atty. Modesto R. Galias Jr. appeared and argued for the petitioner in L-35578.

On October 31, 1972, former Senator Lorenzo M. Tañada, together with his lawyer-sons, Attorneys Renato and Wigberto Tañada, entered their appearance as counsel for all the petitioners in G.R. No. L-35538, except Fadul, Galang and Go Eng Guan, for petitioner Diokno in G.R. No. L-35539 and for petitioners Aquino, Mitra, Rodrigo and Rama in G.R. No. L-35546.

For the respondents, Solicitor General Estelito P. Mendoza, Assistant Solicitors General Bernardo P. Pardo and Rosalio A. de Leon (both of whom are judges now), Solicitor Reynato S. Puno (now Assistant Solicitor General) and Solicitors Jose A.R. Melo and Jose A. Janolo appeared in all the cases, but only the Solicitor General argued. Later, Assistant Solicitor General Vicente V. Mendoza also appeared and co-signed all the subsequent pleadings and memoranda for respondents.

After the hearing of September 26 and 29 and October 6, 1972, the parties were required to file their respective memoranda. On November 9, 1972 petitioners in all the cases filed their consolidated 109-page memorandum, together with the answers, contained in 86 pages, to some 33 questions posed by the Court in its resolution of September 29, 1972, and later, on December 1, 1972, an 88-page reply to the memorandum of respondents, with annexes. In a separate Manifestation of Compliance and Submission filed simultaneously with their reply, petitioners stressed that:

"4. That undersigned counsel for Petitioners did not ask for any extension of the period within which to file the Reply Memorandum for Petitioners, despite overwhelming pressure of work, because —

- a. everyday of delay would mean one day more of indescribable misery and anguish on the part of Petitioners and their families;
- b. any further delay would only diminish whatever time is left — more than a month's time — within which this Court can deliberate on and decide these petitions, having in mind some irreversible events which may plunge this nation into an entirely new constitutional order, namely, the approval of the draft of the proposed Constitution by the Constitutional Convention and the 'plebiscite' scheduled on January 15, 1973;
- c. the proposed Constitution, if 'ratified', might prejudice these petitions, in view of the following transitory provision:

'All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after the lifting of martial law or the ratification of this Constitution, unless modified, revoked, or superseded by subsequent proclamations, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly. (Article XVII, sec. 3, par. 2 of the proposed Constitution).

"5. In view of the fact that they were arrested and detained allegedly in keeping with the existing Constitution, it is only humane and just that these petitions . . . to be accorded preference under Rule 22, section 1 of the

Rules of Court . . . be disposed of while there is still time left, in accordance with the present Constitution and not in accordance with a new constitutional order being ushered in, under the aegis of a martial rule, the constitutionality and validity of which is the very point at issue in the instant petitions;

"6. Since, according to the unanimous view of the authorities, as cited in their Memorandum, the overriding purpose of martial law is . . . and cannot go beyond . . . the preservation of the constitutional status quo, and not to alter it or hasten its alteration, it would be extremely unjust and inhuman, to say the least, to allow these petitions for the great writ of liberty to be imperiled, by virtue of a new Constitution . . . 'submission' and 'ratification' of which are being pressed under martial law . . . that would purportedly ratify all Executive edicts issued and acts done under said regime . . . something that has never been done as far as is known in the entire history of the Anglo-American legal system;" (pp. 414--416, Rollo, L-35539.)

At this juncture, it may be stated that as of October 11, 1972, the following petitioners had already withdrawn: Amando Doronila, Hernando J. Abaya, Ernesto Granada, Luis Beltran, Bren Guiao, Ruben Cusipag, Willie Baun, Tan Chin Hian and Veronica L. Yuyitung; hence, of the original nine cases with a total of 32 petitioners,[3] only the six above-entitled cases remain with 18 petitioners.[4] The remaining petitioners are: Joaquin P. Roces, Teodoro M. Locsin, Sr., Rolando Fadul, Rosalind Galang, Go Eng Guan, Maximo V. Soliven, Renato Constantino, Luis R. Mauricio, Jose W. Diokno thru Carmen Diokno, Napoleon G. Rama, Jose Mari Velez, Benigno S. Aquino, Ramon V. Mitra, Jr., Francisco S. Rodrigo, Juan L. Mercado, Roberto Ordonez, Manuel Almario and Ernesto Rondon, but only Senators Diokno and Aquino are still in confinement, the rest having been released under conditions hereinafter to be discussed. The case of petitioner Garcia in G.R. No. L-35547 is deemed abated on account of his death.

Over the opposition of these remaining petitioners, respondents counsel was given several extensions of their period to file their memorandum, and it was not until January 10, 1973 that they were able to file their reply of 35 pages. Previously, their memorandum of 77 pages was filed on November 17, 1972. Thus, the cases were declared submitted for decision only on February 26, 1973, per resolution of even date, only to be reopened later, as will be stated anon.

In the meanwhile, practically the same counsel for petitioners in these cases engaged the government lawyers in another and separate transcendental judicial tussle of two stages relative to the New Constitution. On December 7, 1972, the first of the so-called Plebiscite Cases (G.R. No. L-35925, Charito Planas vs. Comelec, G. R. No. L-35929, Pablo C. Sanidad vs. Comelec, G. R. No. L-35940, Gerardo Roxas et al. vs. Comelec, G. R. No. L--35941, Eddie B. Monteclaro vs. Comelec, G. R. No. L--35942, Sedfrey A. Ordonez vs. Treasurer, G. R. No. L--35948. Vidal Tan vs. Comelec, G. R. No. L-35953, Jose W. Diokno et als. vs. Comelec, G. R. No. L-35961, Jacinto Jimenez vs. Comelec, G. R. No. L-35965, Raul M. Gonzales vs. Comelec and G. R. No. L-35979, Ernesto Hidalgo vs. Comelec) was filed. These cases took most of the time of the Court until January 22, 1973, when they were declared moot and academic because of the issuance of Proclamation 1102 on January 17, 1973, but on January 20, 1973, as a sequel to the Plebiscite Cases, Josue Javellana filed Case No. G. R. No. L-36142 against the Executive Secretary and the Secretaries of National Defense, Justice and Finance. This started the second series of cases known as the Ratification Cases, namely, said G. R. No. L-36142 and G. R. No. L-36164, Vidal Tan vs. The Executive Secretary et al., G.R. No. L--36165, Gerardo Roxas et al. vs. Alejandro Melchor etc. et al., G. R. No. L-36236, Eddie B. Monteclaro vs. The Executive Secretary, and G. R. No. L-36283, Napoleon V. Dilag vs. The Honorable Executive Secretary. The main thrust of these petitions was that the New Constitution had not been validly ratified, hence the Old Constitution continued in force and, therefore, whatever provisions the New Constitution might contain tending to validate the proclamations, orders, decrees, and acts of the incumbent President which are being relied upon for the apprehension and detention of petitioners, have no legal effect. In any event, the advent of a new constitution naturally entailed the consequence that any question as to the legality

of the continued detention of petitioners or of any restraint of their liberties may not be resolved without taking into account in one way or another the pertinent provisions of the new charter. Accordingly, the resolution of these two series of cases became a prejudicial matter which the Court had to resolve first. It was not until March 31, 1973 that they were decided adversely to the petitioners therein and it was only on April 17, 1973 that entry of final judgment was made therein.

From April 18, 1973, the membership of the Court was depleted to nine, in view of the retirement, effective on said date, of then Chief Justice Roberto Concepcion. With its nine remaining members, doubts were expressed as to whether or not the Court could act on constitutional matters of the nature and magnitude of those raised in these cases, the required quorum for the resolution of issues of unconstitutionality under the New Constitution being ten members. (Section 2(2), Article IX, Constitution of the Philippines of 1973). Prescinding from this point, it is a fact that even if it is not required expressly by the Constitution, by the Court's own policy which the Constitution authorizes it to adopt, all cases involving constitutional questions are heard en banc in which the quorum and at the same time the binding vote is of eight Justices. With only nine members out of a possible membership of fifteen, it was not exactly fair for all concerned that the Court should act, particularly in a case which in truth does not involve only those who are actual parties therein but the whole people as well as the Government of the Philippines. So, the Court, even as it went on informally discussing these cases from time to time, preferred to wait for the appointment and qualification of new members, which took place only on October 29, 1973, when Justices Estanislao Fernandez, Cecilia Muñoz Palma and Ramon Aquino joined the Court.

Meantime, subsequent to the resolution of February 26, 1973, declaring these cases submitted for decision, or, more particularly on June 29, 1973, counsel for petitioner Carmen I. Diokno in G.R. No. L-35539 filed a 99-page Supplemental Petition and Motion for Immediate Release which the Court had to refer to the respondents, on whose behalf, the Solicitor General filed an answer on July 30, 1973. On August 14, 1973, counsel for petitioner Diokno filed a motion asking that the said petition and motion be set for hearing, which the Court could not do, in view precisely of the question of quorum. As a matter of fact, in the related case of Benigno S. Aquino, Jr. vs. Military Commission No. 2, et al., G.R. No. L-37364, further reference to which will be made later, a preliminary hearing had to be held by the Court on Sunday, August 24, 1973, on the sole question of whether or not with its membership of nine then, the Court could act on issues of constitutionality of the acts of the President.

At this point, it may be mentioned incidentally that thru several repeated manifestations and motions, Counsel Francis E. Garchitorena of petitioner Diokno invited the attention of the Court not only to alleged denial to his client of "the essential access of and freedom to confer and communicate with counsel" but also to alleged deplorable subhuman conditions surrounding his detention. And in relation to said manifestations and motions, on February 19, 1973, said petitioner, Diokno, together with petitioner Benigno S. Aquino and joined by their common counsel, Senator Lorenzo M. Tañada, filed with this Court a petition for mandamus praying that respondents be commanded "to permit petitioner Tañada to visit and confer freely and actively with petitioners Diokno and Aquino at reasonable hours pursuant to the provisions of RA 857 and RA 1083 and in pursuance of such decision, (to direct said respondents) (1) to clear the conference room of petitioners of all representatives of the Armed Forces and all unwanted third persons, and prohibit their presence; (2) to remove or cause the removal of all listening devices and other similar electronic equipment from the conference room of petitioners, with the further direction that no such instruments be hereafter installed, and (3) to desist from the practice of examining (a) the notes taken by petitioner Tañada of his conferences with petitioners Diokno and Aquino; and (b) such other legal documents as petitioner Tañada may bring with him for discussion with said petitioners." (G. R. No. L-36315). For obvious reasons, said petition will be resolved in a separate decision. It may be stated here, however, that in said G. R. No. L-36315, in attention to the complaint made by Senator Tañada in his Reply dated April 2, 1973, that Mesdames Diokno and Aquino were not being allowed to visit their husbands, and,

worse, their very whereabouts were not being made known to them, on April 6, 1973, after hearing the explanations of counsel for therein respondents, the Court issued the following resolution:

"Upon humanitarian considerations, the Court RESOLVED unanimously to grant, pending further action by this Court, that portion of the prayer in petitioners' 'Supplement and/or Amendment to Petition' filed on April 6, 1973 that the wives and minor children of petitioners Diokno and Aquino be allowed to visit them, subject to such precautions as respondents may deem necessary."

We have taken pains to recite all the circumstances surrounding the progress of these cases from their inception in order to correct the impression, conveyed by the pleadings of petitioner Diokno, that their disposition has been unnecessarily, if not deliberately, delayed. The Court cannot yield to anyone in being concerned that individual rights and liberties guaranteed by the fundamental law of the land are duly protected and safeguarded. It is fully cognizant of how important not only to the petitioners but also to the maintenance of the rule of law is the issue of legality of the continued constraints on the freedoms of petitioners. Under ordinary circumstances, it does not really take the Court much time to determine whether a deprivation of personal liberty is legal or illegal. But, aside from the unusual procedural setbacks related above, it just happens that the basic issues to resolve here do not affect only the individual rights of petitioners. Indeed, the importance of these cases transcends the interest of those who, like petitioners, have come to the Court. Actually, what is directly involved here is the issue of the legality of the existing government itself. Accordingly, We have to act with utmost care. Besides, in a sense, the legality of the Court's own existence is also involved here, and We do not want anyone to even suspect We have hurried precipitately to uphold Ourselves.

In addition to these considerations, it must be borne in mind that there are thousands of other cases in the Court needing its continued attention. With its clogged docket, the Court, could ill afford to give petitioners any preference that would entail corresponding injustice to other litigants before it.

What is more, under the New Constitution, the administrative jurisdiction over all lower courts, including the Court of Appeals, has been transferred from the Department of Justice to the Supreme Court, and because that Department refrained from attending to any administrative function over the courts since January 17, 1973, on April 18, 1973, after the Ratification Cases became final, We found in Our hands a vast accumulation of administrative matters which had to be acted upon without further delay, if the smooth and orderly functioning of the courts had to be maintained. And, of course, the Court has to continuously attend to its new administrative work from day to day, what with all kinds of complaints and charges being filed daily against judges, clerks of courts and other officers and employees of the different courts all over the country, which the Court en banc has to tackle. It should not be surprising at all that a great portion of our sessions en banc has to be devoted to the consideration and disposition of such administrative matters.

Furthermore, in this same connection account must also be taken of the fact that the transfer of the administrative functions of the Department to the Court naturally entailed problems and difficulties which consumed Our time, if only because some of the personnel had to acquaint themselves with the new functions entrusted to them, while corresponding adjustments had to be made in the duties and functions of the personnel affected by the transfer.

PRELIMINARY ISSUES

Now, before proceeding to the discussion and resolution of the issues in the pending petitions, two preliminary matters call for disposition, namely, first, the motion of petitioner Jose W. Diokno, thru counsel Senator Tañada, to be allowed to withdraw his basic petition and second, the objection of petitioner, Francisco "Soc" Rodrigo, to the Court's considering his petition as moot and academic as a consequence of his having been released from his place of confinement in Fort Bonifacio. Related to the latter is the express manifestation of the other petitioners:

Joaquin P. Roces, Teodoro M. Locsin, Sr., Rolando Fadul, Rosalind Galang, Go Eng Guan, Maximo V. Soliven, Renato Constantino, Luis R. Mauricio, Napoleon G. Rama, Jose Mari Velez, Ramon. V. Mitra, Jr., Juan L. Mercardo, Roberto Ordoñez, Manuel Almario and Ernesto Rondon, to the effect that they remain as petitioners, notwithstanding their having been released (under the same conditions as those imposed on petitioner Rodrigo), thereby implying that they are not withdrawing, as, in fact, they have not withdrawn their petitions and would wish them resolved on their merits. (Manifestation of counsel for petitioners dated March 15, 1974.)

I

Anent petitioner Diokno's motion to withdraw, only seven members of the Court, namely, Chief Justice Makalintal, and Justices Zaldivar, Fernando, Teehankee, Muñoz Palma, Aquino and the writer of this opinion, voted to grant the same. Said number being short of the eight votes required for binding action of the Court en banc even in an incident, pursuant to Section 11 of Rule 56, the said motion is denied, without prejudice to the right of each member of the Court to render his individual opinion in regard to said motion.[5]

One of the reasons vigorously advanced by petitioner Diokno in his motion to withdraw is that he cannot submit his case to the Supreme Court as it is presently constituted, because it is different from the one in which he filed his petition, and that, furthermore, he is invoking, not the present or New Constitution of the Philippines the incumbent justices have now sworn to protect and defend but the Constitution of 1935[6] under which they were serving before. Indeed, in the "Manifestation of Compliance and Submission" filed by his counsel as early as December 1, 1973, a similar feeling was already indicated, as may be gathered from the portions thereof quoted earlier in this opinion.

Had petitioner reiterated and insisted on the position asserted by him in said manifestation shortly after the ratification of the New Constitution on January 17, 1973 or even later, after the decision of this Court in the Ratification Cases became final on April 17, 1973, perhaps, there could have been some kind of justification for Our then and there declaring his petition moot and academic, considering his personal attitude of refusing to recognize the passing out of the 1935 Constitution and of the Supreme Court under it. But the fact is that as late as June 29, 1973, more than six months after the ratification of the New Constitution and more than two months after this Court had declared that "there is no more judicial obstacle to the New Constitution being considered as in force and effect", petitioner Diokno, thru counsel Tañada, filed a "Supplemental Petition and Motion for Immediate Release" wherein nary a word may be found suggesting the point that both the Constitution he is invoking and the Court he has submitted his petition to have already passed into inexistence. On the contrary, he insisted in this last motion that "an order be issued (by this Court) directing respondents to immediately file charges against him if they have evidence supporting the same." Be it noted, in this connection, that by resolution of the Court of June 1, 1973, it had already implemented the provisions on the Judiciary of the New Constitution and had constituted itself with nine members into the first Division, thereby making it unmistakably clear that it was already operating as the Supreme Court under the New Constitution. The fact now capitalized by petitioner that the Justices took the oath only on October 29, 1973 is of no significance, the truth being that neither the Justices continuation in office after the New Constitution took effect nor the validity or propriety of the Court's resolution of June 1, 1973 just mentioned were questioned by him before. Accordingly, the allegation in his motion to withdraw relative to the New Constitution and the present Supreme Court appear to be obvious afterthoughts intended only to lend color to his refusal to have the issue of alleged illegality of his detention duly resolved, realizing perchance the untenability thereof and the inevitability of the denial of his petition, albeit none of this will ever be admitted, as may be gathered from his manifestation that he would not want to have anything to do with any ruling of the Court adverse to his pretensions. Just the same, the new oaths of the Justices and the applicability hereto of the Old and the New Constitution will be discussed in another part of this opinion, if only

to satisfy the curiosity of petitioner.

Although the other petitioners have not joined the subject withdrawal motion, it might just as well be stated, for whatever relevant purpose it may serve, that with particular reference to petitioner Rodrigo, as late as November 27, 1973, after three new justices were added to the membership of the Court in partial obedience to the mandate of the New Constitution increasing its total membership to fifteen, and after the Court had, by resolution of November 15, 1973, already constituted itself into two divisions of six Justices each, said petitioner filed a Manifestation "for the purpose of showing that, insofar as (he) herein petitioner is concerned, his petition for habeas corpus is not moot and academic." Notably, this manifestation deals specifically with the matter of his "conditional release" as being still a ground for habeas corpus but does not even suggest the fundamental change of circumstances relied upon in petitioner Diokno's motion to withdraw. On the contrary, said manifestation indicates unconditional submission of said petitioner to the jurisdiction of this Court as presently constituted. Of similar tenor is the manifestation of counsel for the remaining petitioners in these cases dated March 15, 1974. In other words, it appears quite clearly that petitioners should be deemed as having submitted to the jurisdiction of the Supreme Court as it is presently constituted in order that it may resolve their petitions for habeas corpus even in the light of the provisions of the New Constitution.

II

Coming now to the conditions attached to the release of the petitioners other than Senators Diokno and Aquino, it is to be noted that they were all given identical release papers reading as follows:

"HEADQUARTERS

5TH MILITARY INTELLIGENCE GROUP, ISAFP

Camp General Emilio Aguinaldo

Quezon City

M56P

5 December 1972

SUBJECT: Conditional Release

TO: Francisco Soc Rodrigo

1. After having been arrested and detained for subversion pursuant to Proclamation No. 1081 of the President of the Philippines in his capacity as Commander-in-Chief of the Armed Forces of the Philippines, dated 21 September 1972, you are hereby conditionally released.
2. You are advised to abide strictly with the provisions of Proclamation No. 1081 and the ensuing LOIs. Any violation of these provisions would subject you to immediate arrest and confinement.
3. Your investigation will continue following a schedule which you will later on be informed. You are advised to follow this schedule strictly.
- "4. You are not allowed to leave the confines of Greater Manila Area unless specifically authorized by this Office indicating the provincial address and expected duration of stay thereat. Contact this Office through telephone No. 97-17-56 when necessary.
5. You are prohibited from giving or participating in any interview conducted by any local or foreign mass media representative for purpose of publication and/or radio/TV broadcast.

6. Be guided accordingly.

(SGD.) MARIANO G. MIRANDA

Lt. Colonel PA

Group Commander

PLEDGE

THIS IS TO CERTIFY that I have read and understood the foregoing conditional release.

I HEREBY PLEDGE to conduct myself accordingly and will not engage in any subversive activity. I will immediately report any subversive activity that will come to my knowledge.

(SGD.) F. RODRIGO

Address: 60 Juana Rodriguez

Quezon City

Tel. No.: 70-25-66; 70-49-20

70-27-55"

It is the submission of these petitioners that their release under the foregoing conditions is not absolute, hence their present cases before the Court have not become moot and academic and should not be dismissed without consideration of the merits thereof. They claim that in truth they have not been freed, because actually, what has been done to them is only to enlarge or expand the area of their confinement in order to include the whole Greater Manila area instead of being limited by the boundaries of the army camps wherein they were previously detained. They say that although they are allowed to go elsewhere, they can do so only if expressly and specifically permitted by the army authorities, and this is nothing new, since they could also go out of the camps before with proper passes. They maintain that they never accepted the above conditions voluntarily. In other words, it is their position that they are in actual fact being still so detained and restrained of their liberty against their will as to entitle them in law to the remedy of habeas corpus.

We find merit in this particular submittal regarding the reach of habeas corpus. We readily agree that the fundamental law of the land does not countenance the diminution or restriction of their individual freedoms of any person in the Philippines without due process of law. No one in this country may suffer, against his will, any kind or degree of constraint upon his right to go to any place not prohibited by law, without being entitled to this great writ of liberty, for it has not been designed only against illegal and involuntary detention in jails, prisons and concentration camps, but for all forms and degrees of restraint, without authority of law or the consent of the person concerned, upon his freedom to move freely, irrespective of whether the area within which he is small or large, as long as it is not co-extensive with that which may be freely reached by anybody else, given the desire and the means. More than half a century ago in 1919, this Court already drew the broad and all-encompassing scope of habeas corpus in these unequivocal words: "A prime specification of an application for a writ of habeas corpus is restraint of liberty. The essential object and purpose of the writ of habeas corpus is to inquire into all manners of involuntary restraint as distinguished from voluntary, and to relieve a person therefrom if such restraint is illegal. Any restraint which will preclude freedom of action is sufficient."^{6a} There is no reason at all at this time, hopefully there will never be any in the future, to detract a whit from this noble attitude. Definitely, the conditions under which petitioners have been released fall short of restoring to them the freedom to which they are constitutionally entitled. Only a showing that the imposition of said conditions is authorized by law can stand

in the way of an order that they be immediately and completely withdrawn by the proper authorities so that the petitioners may again be free men as we are.

And so, We mime to the basic question in these cases: Are petitioners being detained or otherwise restrained of liberty, evidently against their will, without authority of law and due process?

THE FACTS

Aside from those already made reference to above, the other background facts of these cases are as follows:

On September 21 1972, President Ferdinand E. Marcos⁷ signed the following proclamation:

"PROCLAMATION NO. 1081

PROCLAIMING A STATE OF MARTIAL LAW IN THE PHILIPPINES

WHEREAS, on the basis of carefully evaluated and verified information, it is definitely established that lawless elements who are moved by a common or similar ideological conviction, design, strategy and goal and enjoying the active moral and material support of a foreign power and being guided and directed by intensely devoted, well trained, determined and ruthless groups of men and seeking refuge under the protection of our constitutional liberties to promote and attain their ends, have entered into a conspiracy and have in fact joined and banded their resources and forces together for the prime purpose of, and in fact they have been and are actually staging, undertaking and waging an armed insurrection and rebellion against the Government of the Republic of the Philippines in order to forcibly seize political and state power in this country, overthrow the duly constituted Government, and supplant our existing political, social, economic and legal order with an entirely new one whose form of government, whose system of laws, whose conception of God and religion, whose notion of individual rights and family relations, and whose political, social, economic, legal and moral precepts are based on the Marxist-Leninist-Maoist teachings and beliefs;

WHEREAS, these lawless elements, acting in concert through seemingly innocent and harmless, although actually destructive, front organizations which have been infiltrated or deliberately formed by them, have continuously and systematically strengthened and broadened their memberships through sustained and careful recruiting and enlistment of new adherents from among our peasantry, laborers, professionals, intellectuals, students, and mass media personnel, and through such sustained and careful recruitment and enlistment have succeeded in spreading and expanding their control and influence over almost every segment and level of our society throughout the land in their ceaseless effort to erode and weaken the political, social, economic, legal and moral foundations of our existing Government, and to influence, manipulate and move peasant, labor, student and terroristic organizations under their influence or control to commit, as in fact they have committed and still are committing, acts of violence, depredations, sabotage and injuries against our duly constituted authorities, against the members of our law enforcement agencies, and worst of all, against the peaceful members of our society;

WHEREAS, in the fanatical pursuit of their conspiracy and widespread acts of violence, depredations, sabotage and injuries against our people, and in order to provide the essential instrument to direct and carry out their criminal design and unlawful activities, and to achieve their ultimate sinister objectives, these lawless elements have in fact organized, established and are now maintaining a Central Committee, composed of young and dedicated radical students and intellectuals, which is charged with guiding and directing the armed struggle and propaganda assaults against our duly constituted Government, and this Central Committee is now imposing its will and asserting its sham authority on certain segments of our population, especially in the rural areas, through varied means of subterfuge, deceit, coercion, threats, intimidations, machinations, treachery, violence and other modes of terror, and has been and is illegally exacting financial and other forms of tributes

from our people to raise funds and material resources to support its insurrectionary and propaganda activities against our duly constituted Government and against our peace-loving people;

WHEREAS, in order to carry out, as in fact they have carried out, their premeditated plan to stage, undertake and wage a full scale armed insurrection and rebellion in this country, these lawless elements have organized, established and are now maintaining a well trained, well armed and highly indoctrinated and greatly expanded insurrectionary force, popularly known as the 'New People's Army,' which has since vigorously pursued and still is vigorously pursuing a relentless and ruthless armed struggle against our duly constituted Government and whose unmitigated forays, raids, ambushes, assaults and reign of terror and acts of lawlessness in the rural areas and in our urban centers brought about the treacherous and cold-blooded assassination of innocent civilians, military personnel of the Government and local public officials in many parts of the country, notably in the Cagayan Valley, in Central Luzon, in the Southern Tagalog Region, in the Bicol Area, in the Visayas and in Mindanao, and whose daring and wanton guerrilla activities have generated and sown fear and panic among our people, have created a climate of chaos and disorder, produced a state of political, social, psychological, and economic instability in our land, and have inflicted great suffering and irreparable injury to persons and property in our society;

WHEREAS, these lawless elements, their cadres, fellow-travellers, friends, sympathizers and supporters have for many years up to the present time been mounting sustained, massive and destructive propaganda assaults against our duly constituted Government its instrumentalities, agencies and officials, and also against our social, political, economic and religious institutions, through the publications, broadcasts and disseminations of deliberately slanted and overly exaggerated news stories and news commentaries as well as false, vile, foul and scurrilous statements, utterances, writings and pictures through the press-radio-television media and through leaflets, college campus newspapers and some newspapers published and still being published by these lawless elements, notably the 'Ang Bayan,' 'Pulang Bandila' and the 'Ang Komunista,' all of which are clearly well-conceived, intended and calculated to malign and discredit our duly constituted Government, its instrumentalities, agencies and officials before our people, making it appear to the people that our government has become so weak and so impotent to perform and discharge its functions and responsibilities in our society and to our people, and thus undermine and destroy the faith and loyalty and allegiance of our people in and alienate their support for their duly constituted Government, its instrumentalities, agencies and officials, and thereby gradually erode and weaken as in fact they had so eroded and weakened the will of our people to sustain and defend our Government and our democratic way of life;

WHEREAS, these lawless elements having taken up arms against our duly constituted Government and against our people, and having committed and are still committing acts of armed insurrection and rebellion consisting of armed raids, forays, sorties, ambushes, wanton acts of murders, spoilage, plunder, looting, arsons, destruction of public and private buildings, and attacks against innocent and defenseless civilian lives and property, all of which activities have seriously endangered and continue to endanger public order and safety and the security of the nation, and acting with cunning and manifest precision and deliberation and without regard to the health, safety and well-being of the people, are now implementing their plan to cause widespread, massive and systematic destruction and paralyzation of vital public utilities and services, particularly water systems, sources of electrical power, communication and transportation facilities, to the great detriment, suffering, injury and prejudice of our people and the nation and to generate a deep psychological fear and panic among our people;

WHEREAS, the Supreme Court in the cases brought before it, docketed as G.R. Nos. L-33964, L-33965, L-33973, L-33982, L-34004, L-34013, L-34039, L-34265, and L-34339, as a consequence of the suspension of the privilege of the writ of habeas corpus by me as President of the Philippines in my Proclamation No. 889, dated August 21, 1971, as amended, has found that in truth and in fact there exists an actual insurrection and rebellion in the country by a sizeable group of men who have publicly risen in arms to overthrow the Government. Here is what the Supreme Court said in its decision promulgated on December 11, 1971:

'... our jurisprudence attests abundantly to the Communist activities in the Philippines, especially in Manila, from the late twenties to the early thirties, then aimed principally at incitement to sedition or rebellion, as the immediate objective. Upon the establishment of the Commonwealth of the Philippines, the movement seemed to have waned notably; but, the outbreak of World War II in the Pacific and the miseries, the devastation and havoc, and the proliferation of unlicensed firearms concomitant with the military occupation of the Philippines and its subsequent liberation, brought about, in the late forties, a resurgence of the Communist threat, with such vigor as to be able to organize and operate in Central Luzon an army — called HUKBALAHAP, during the occupation, and renamed Hukbong Mapagpalaya ng Bayan (HMB) after liberation — which clashed several times with the Armed Forces of the Republic. This prompted then President Quirino to issue Proclamation No. 210, dated October 22, 1950, suspending the privilege of the writ of habeas corpus the validity of which was upheld in *Montenegro vs. Castaneda*. Days before the promulgation of said Proclamation, or on October 18, 1950, members of the Communist Politburo in the Philippines were apprehended in Manila. Subsequently accused and convicted of the crime of rebellion, they served their respective sentences.

'The fifties saw a comparative lull in Communist activities, insofar as peace and order were concerned. Still, on June 20, 1957, Republic Act No. 1700, otherwise known as the Anti-Subversion Act, was approved, upon the grounds stated in the very preamble of said statute — that

'... the Communist Party of the Philippines, although purportedly a political party, is in fact an organized conspiracy to overthrow the Government of the Republic of the Philippines, not only by force and violence but also by deceit, subversion and other illegal means, for the purpose of establishing in the Philippines a totalitarian regime subject to alien domination and control;

'... the continued existence and activities of the Communist Party of the Philippines constitutes a clear, present and grave danger to the security of the Philippines; and

'... in the face of the organized, systematic and persistent subversion, national in scope but international in direction, posed by the Communist Party of the Philippines and its activities, there is urgent need for special legislation to cope with this continuing menace to the freedom and security of the country. ...'

'In the language of the Report on Central Luzon, submitted, on September 4, 1971, by the Senate Ad Hoc Committee of Seven — copy of which Report was filed in these case by the petitioners herein —

'The years following 1963 saw the successive emergence in the country of several mass organizations, notably the Lapiang Manggagawa (now the Socialist Party of the Philippines) among the workers, the Malayang Samahan ng mga Magsasaka (MASAKA) among the peasantry; the Kabataang Makabayan (KM) among the youth/students; and the Movement for the Advancement of Nationalism (MAN) among the intellectuals/professionals, the PKP has exerted all-out effort to infiltrate, influence and utilize these organizations in promoting its radical brand of nationalism.'

'Meanwhile, the Communist leaders in the Philippines had been split into two (2) groups, one of which — composed mainly of young radicals, constituting the Maoist faction — reorganized the Communist Party of the Philippines early in 1969 and established a New People's Army. This faction adheres to the Maoist concept of the 'Protracted People's War' or 'War of National Liberation.' Its 'Programme for a People's Democratic Revolution' states, *inter alia*:

'The Communist Party of the Philippines is determined to implement its general programme for a people's democratic revolution. All Filipino communists are ready to sacrifice their lives for the worthy cause of achieving the new type of democracy, of building a new Philippines that is genuinely and completely independent,

democratic, united, just and prosperous . . .

'The central task of any revolutionary movement is to seize political power. The Communist Party of the Philippines assumes this task at a time that both the international and national situation are favorable, to taking the road of armed revolution . . .'

'In the year 1969, the NPA had — according to the records of the Department of National Defense — conducted raids, resorted to kidnappings and taken part in other violent incidents numbering over 230, in which it inflicted 404 casualties, and, in turn, suffered 243 losses. In 1970, its record of violent incidents was about the same, but the NPA casualties more than doubled.

'At any rate, two (2) facts are undeniable: (a) all Communists, whether they belong to the traditional group or to the Maoist faction, believe that force and violence are indispensable to the attainment of their main and ultimate objective, and act in accordance with such belief, although they disagree on the means to be used at a given time and in a particular place; and (b) there is a New People's Army, other, of course, than the Armed Forces of the Republic and antagonistic thereto. Such New People's Army is per se proof of the existence of a rebellion especially considering that its establishment was announced publicly by the reorganized CPP. Such announcement is in the nature of a public challenge to the duly constituted authorities and may be likened to a declaration of war, sufficient to establish a war status or a condition of belligerency, even before the actual commencement of hostilities.

'We entertain, therefore, no doubts about the existence of a sizeable group of men who have publicly risen in arms to overthrow the Government and have thus been and still are engage in rebellion against the Government of the Philippines.'

"WHEREAS, these lawless elements have to a considerable extent succeeded in impeding our duly constituted authorities from performing their functions and discharging their duties and responsibilities in accordance with our laws and our Constitution to the great damage, prejudice and detriment of the people and the nation;

"WHEREAS, it is evident that there is throughout the land a state of anarchy and lawlessness, chaos and disorder, turmoil and destruction of a magnitude equivalent to an actual war between the forces of our duly constituted Government and the New People's Army and their satellite organizations because of the unmitigated forays, raids, ambushes, assaults, violence, murders, assassinations, acts of terror, deceptions, coercions, threats, intimidations, treachery, machinations, arsons, plunders and depredations committed and being committed by the aforesaid lawless elements who have pledged to the whole nation that they will not stop their dastardly effort and scheme until and unless they have fully attained their primary and ultimate purpose of forcibly seizing political and state power in this country by overthrowing our present duly constituted Government, by destroying our democratic way of life and our established secular and religious institutions and beliefs, and by supplanting our existing political, social, economic, legal and moral order with an entirely new one whose form of government, whose notion of individual rights and family relations, and whose political, social, economic and moral precepts are based on the Marxist-Leninist-Maoist teachings and beliefs;

"WHEREAS, the Supreme Court in its said decision concluded that the unlawful activities of the aforesaid lawless elements actually pose a clear, present and grave danger to public safety and the security of the nation and in support of that conclusion found that:

'. . . the Executive had information and reports — subsequently confirmed, in many respects, by the above-mentioned Report of the Senate Ad Hoc Committee of Seven — to the effect that the Communist Party of the Philippines does not merely adhere to Lenin's idea of a swift armed uprising; that it has, also, adopted Ho Chi Minh's terrorist tactics and resorted to the assassination of uncooperative local officials; that, in line with this

policy, the insurgents have killed 5 mayors, 20 barrio captains and 3 chiefs of police; that there were fourteen (14) meaningful bombing incidents in the Greater Manila Area in 1970; that the Constitutional Convention Hall was bombed on June 12, 1971, that, soon after the Plaza Miranda incident, the NAWASA main pipe at the Quezon City-San Juan boundary, was bombed; that this was followed closely by the bombing of the Manila City Hall, the COMELEC Building, the Congress Building and the MERALCO sub-station at Cubao, Quezon City; and that the respective residences of Senator Jose J. Roy and Congressman Eduardo Cojuangco were, likewise, bombed, as were the MERALCO main office premises, along Ortigas Avenue, and the Doctor's Pharmaceuticals, Inc. Building, in Caloocan City.

' . . . the reorganized Communist Party of the Philippines has, moreover, adopted Mao's concept of protracted people's war, aimed at the paralyzation of the will to resist of the Government, of the political, economic and intellectual leadership, and of the people themselves; that conformably to such concept, the Party has placed special emphasis upon a most extensive and intensive program of subversion by the establishment of front organizations in urban centers, the organization of armed city partisans and the infiltration in student groups, labor unions, and farmer and professional groups; that the CPP has managed to infiltrate or establish and control nine (9) major labor organizations; that it has exploited the youth movement and succeeded in making Communist fronts of eleven (11) major student or youth organizations; that there are, accordingly, about thirty (30) mass organizations actively advancing the CPP interests, among which are the Malayang Samahan ng Magsasaka (MASAKA), the Kabataang Makabayan (KM), the Movement for the Advancement of Nationalism (MAN), the Samahang Demokratiko ng Kabataan (SDK), the Samahang Molave (SM), and the Malayang Pagkakaisa ng Kabataang Pilipino (MPKP); that, as of August, 1971, the KM had two hundred forty-five (245) operational chapters throughout the Philippines of which seventy-three were in the Greater Manila Area, sixty (60) in Northern Luzon, forty-nine (49) in Central Luzon, forty-two (42) in the Visayas and twenty-one (21) in Mindanao and Sulu; that in 1970, the Party had recorded two hundred fifty-eight (258) major demonstrations, of which about thirty-three (33) ended in violence, resulting in fifteen (15) killed and over five hundred (500) injured; that most of these actions were organized, coordinated or led by the aforementioned front organizations; that the violent demonstrations were generally instigated by a small, but well-trained group of armed agitators; that the number of demonstrations heretofore staged in 1971 has already exceeded those of 1970; and that twenty-four (24) of these demonstrations were violent, and resulted in the death of fifteen (15) persons and the injury of many more.

'Subsequent events . . . have also proven . . . the threat to public safety posed by the New People's Army. Indeed, it appears that, since August 21, 1971, it had in Northern Luzon six (6) encounters and staged one (1) raid, in consequence of which seven (7) soldiers lost their lives and two (2) others were wounded, whereas the insurgents suffered five (5) casualties; that on August 26, 1971, a well-armed group of NPA, trained by defector Lt. Victor Corpus, attacked the very command post of TF LAWIN in Isabela, destroying two (2) helicopters and one (1) plane, and wounding one (1) soldier; that the NPA had in Central Luzon a total of four (4) encounters, with two (2) killed and three (3) wounded on the side of the Government, one (1) BSDU killed and three (3) KM-SDK leader, an unidentified dissident, and Commander Panchito leader of the dissident group were killed; that on August 26, 1971, there was an encounter in the barrio of San Pedro, Iriga City, Camarines Sur, between the PC and the NPA, in which a PC and two (2) KM members were killed; that the current disturbances in Cotabato and the Lanao provinces have been rendered more complex by the involvement of the CPP/NPA, for, in mid-1971, a KM group, headed by Jovencio Esparagoza, contacted the Higaonan tribes, in their settlement in Magsaysay, Misamis Oriental, and offered them books, pamphlets and brochures of Mao Tse Tung, as well as conducted teach-ins in the reservation; that Esparagoza was reportedly killed on September 22, 1971, in an operation of the PC in said reservation; and that there are now two (2) NPA cadres in Mindanao.

'It should, also be noted that adherents of the CPP and its front organizations are, according to intelligence

findings, definitely capable of preparing powerful explosives out of locally available materials; that the bomb used in the Constitutional Convention Hall was a 'Claymore' mine, a powerful explosive device used by the U.S. Army, believed to have been one of many pilfered from the Subic Naval Base a few days before; that the President had received intelligence information to the effect that there was a July-August Plan involving a wave of assassinations, kidnappings, terrorism and mass destruction of property and that an extraordinary occurrence would signal the beginning of said event; that the rather serious condition of peace and order in Mindanao, particularly in Cotabato and Lanao, demanded the presence therein of forces sufficient to cope with the situation; that a sizeable part of our armed forces discharges other functions, and that the expansion of the CPP activities from Central Luzon to other parts of the country, particularly Manila and its suburbs, the Cagayan Valley, Ifugao, Zambales, Laguna, Quezon and the Bicol Region, required that the rest of our armed forces be spread thin over a wide area.'

"WHEREAS, in the unwavering prosecution of their revolutionary war against the Filipino people and their duly constituted Government, the aforesaid lawless elements have, in the months of May, June and July, 1972, succeeded in bringing and introducing into the country at Digoyo Point, Palanan, Isabela and at other undetermined points along the Pacific coastline of Luzon, a substantial quantity of war material consisting of M-14 rifles estimated to be some 3,500 pieces, several dozens of 40 mm rocket launchers which are said to be Chicom copies of a Russian prototype rocket launcher, large quantities of 80 mm rockets and ammunitions, and other combat paraphernalia, of which war material some had been discovered and captured by government military forces, and the bringing and introduction of such quantity and type of war material into the country is a mute but eloquent proof of the sinister plan of the aforesaid lawless elements to hasten the escalation of their present revolutionary war against the Filipino people and their legitimate Government;

"WHEREAS, in the execution of their overall revolutionary plan, the aforesaid lawless elements have prepared and released to their various field commanders and Party workers a document captioned 'REGIONAL PROGRAM OF ACTION 1972,' a copy of which was captured by elements of the 116th and 119th Philippine Constabulary Companies on June 18, 1972 at Barrio Taringsing, Cordon, Isabela the text of which reads as follows:

REGIONAL PROGRAM OF ACTION 1972

'The following Regional Program of Action 1972 is prepared to be carried out as part of the overall plan of the party to foment discontent and precipitate the tide of nationwide mass revolution. The fascist Marcos and his reactionary members of Congress is expected to prepare themselves for the 1973 hence:

'January — June:

'1. Intensify recruitment of new party members especially from the workers-farmers class. Cadres are being trained in order to organize the different regional bureaus. These bureaus must concentrate on mass action and organization to promote advancement of the mass revolutionary movement. Reference is made to the Borador ng Programa sa Pagkilos at Ulat ng 'Panlipunang Pagsisiyasat' as approved by the Central Committee.

'2. Recruit and train armed city partisans and urban guerrillas and organize them into units under Party cadres and activities of mass organizations. These units must undergo specialized training on explosives and demolition and other forms of sabotage.

'3. Intensify recruitment and training of new members of the New People's Army in preparation for limited offensive in selected areas in the regions.

'4. Support a more aggressive program of agitation and propaganda against the reactionary armed forces against the Con-Con.

'July — August:

'During this period the Party expects the puppet Marcos government to allow increase in bus rates thus aggravating further the plight of students, workers and the farmers.

'1. All Regional Party Committees must plan for a general strike movement. The Regional Operational Commands must plan for armed support if the fascist armed forces of Marcos will try to intimidate the oppressed Filipino masses.

'2. Conduct sabotage against schools, colleges and universities hiking tuition fees.

'3. Conduct sabotage and agitation against puppet judges and courts hearing cases against top party leaders.

'4. Create regional chaos and disorders to dramatize the inability of the fascist Marcos Government to keep and maintain peace and order thru: —

'a.) Robbery and hold-up of banks controlled by American imperialists and those belonging to the enemies of the people.

'b) Attack military camps, US bases and towns.

'c) More violent strikes and demonstrations.

'September — October:

'Increase intensity of violence, disorder and confusion:

'1. Intensify sabotage and bombing of government buildings and embassies and other utilities:

'a) Congress

'b) Supreme Court

'c) Con-Con

'd) City Hall

'e) US Embassy

'f) Facilities of US Bases

'g) Provincial Capitols

'h) Power Plants

'i) PLDT

'j) Radio Stations

'2. Sporadic attacks on camps, towns and cities.

'3. Assassinate high Government officials of Congress, Judiciary, Con-Con and private individuals sympathetic to puppet Marcos.

'4. Establish provisional revolutionary government in towns and cities with the support of the masses.

'5. With the sympathetic support of our allies, establish provisional provincial revolutionary governments.

CENTRAL COMMITTEE

COMMUNIST PARTY OF THE

PHILIPPINES

"WHEREAS in line with their REGIONAL PROGRAM OF ACTION 1972, the aforesaid lawless elements have of late been conducting intensified acts of violence and terrorisms during the current year in the Greater Manila Area such as the bombing of the Arca building at Taft Avenue, Pasay City, on March 15; of the Filipinas Orient Airways board room at Domestic Road, Pasay City on April 23; of the Vietnamese Embassy on May 30; of the Court of Industrial Relations on June 23; of the Philippine Trust Company branch office Cubao, Quezon City on June 24; of the Philamlife building at United Nations Avenue, Manila, on July 3; of the Tabacalera Cigar & Cigarette Factory Compound at Marquez de Comillas, Manila on July 27; of the PLDT exchange office at East Avenue, Quezon City, and of the Philippine Sugar Institute building at North Avenue, Diliman, Quezon City, both on August 15; of the Department of Social Welfare building at San Rafael Street, Sampaloc, Manila, on August 17; of a water main on Aurora Boulevard and Madison Avenue, Quezon City on August 19; of the Philamlife building again on August 30; this time causing severe destruction on the Far East Bank and Trust Company building nearby; of the armored car and building of the Philippine Banking Corporation as well as the buildings of the Investment Development Inc. and the Daily Star Publications when another explosion took place on Railroad Street, Port Area, Manila also on August 30; of Joe's Department Store on Carriedo Street, Quiapo, Manila, on September 5, causing death to one woman and injuries to some 38 individuals; and of the City Hall of Manila on September 8; of the watermain in San Juan, Rizal on September 12, of the San Miguel Building in Makati, Rizal on September 14; and of the Quezon City Hall on September 18, 1972, as well as the attempted bombing of the Congress Building on July 18, when an unexploded bomb was found in the Senate Publication Division and the attempted bombing of the Department of Foreign Affairs on August 30;

"WHEREAS, in line with the same 'REGIONAL PROGRAM OF ACTION 1972,' the aforesaid lawless elements have also fielded in the Greater Manila area several of their 'Sparrow Units' or 'Simbad Units' to undertake liquidation missions against ranking government officials, military personnel and prominent citizens and to further heighten the destructions and depredations already inflicted by them upon our innocent people, all of which are being deliberately done to sow terror, fear and chaos amongst our population and to make the Government look so helpless and incapable of protecting the lives and property of our people;

"WHEREAS, in addition to the above described social disorder, there is also the equally serious disorder in Mindanao and Sulu resulting from the unsettled conflict between certain elements of the Christian and Muslim population of Mindanao and Sulu, between the Christian 'Ilagas' and the Muslim 'Barracudas,' and between our government troops, and certain lawless organizations such as the Mindanao Independence Movement;

"WHEREAS, the Mindanao Independence Movement with the active material and financial assistance of foreign political and economic interests, is engaged in an open and unconcealed attempt to establish by violence and force a separate and independent political state out of the islands of Mindanao and Sulu which are historically, politically and by law parts of the territories and within the jurisdiction and sovereignty of the Republic of the Philippines;

"WHEREAS, because of the aforesaid disorder resulting from armed clashes, killings, massacres, arsons, rapes, pillages, destruction of whole villages and towns and the inevitable cessation of agricultural and industrial operations, all of which have been brought about by the violence inflicted by the Christians, the Muslims, the 'Ilagas,' the 'Barracudas,' and the Mindanao Independence Movement against each other and against our government troops, a great many parts of the Islands of Mindanao and Sulu are virtually now in a state of actual war;

"WHEREAS, the violent disorder in Mindanao and Sulu has to date resulted in the killing of over 1,000 civilians and about 2,000 armed Muslims and Christians, not to mention the more than five hundred thousand of injured, displaced and homeless persons as well as the great number of casualties among our government

troops, and the paralyzation of the economy of Mindanao and Sulu;

"WHEREAS, because of the foregoing acts of armed insurrection, wanton destruction of human lives and property, unabated and unrestrained propaganda attacks against the Government and its institutions, instrumentalities, agencies and officials, and the rapidly expanding ranks of the aforesaid lawless elements, and because of the spreading lawlessness and anarchy throughout the land, all of which have prevented the Government to exercise its authority, extend to its citizenry the protection of its laws and in general exercise its sovereignty over all of its territories, caused serious demoralization among our people and have made the public apprehensive and fearful, and finally because public order and safety and the security of this nation demand that immediate, swift, decisive and effective action be taken to protect and insure the peace, order and security of the country and its population and to maintain the authority of the Government;

"WHEREAS, in cases of invasion, insurrection or rebellion or imminent danger thereof, I, as President of the Philippines, have, under the Constitution three courses of action open to me, namely: (a) call out the armed forces to suppress the present lawless violence; (b) suspend the privilege of the writ of habeas corpus to make the arrest and apprehension of these lawless elements easier and more effective; or (c) place the Philippines or any part thereof under martial law;

"WHEREAS, I have already utilized the first two courses of action, first, by calling upon the armed forces to suppress the aforesaid lawless violence, committing to that specific job almost 50% of the entire armed forces of the country and creating several task forces for that purpose such as Task Force Saranay, Task Force Palanan, Task Force Isarog, Task Force Pagkakaisa and Task Force Lancaf, and, second, by suspending, the privilege of the writ of habeas corpus on August 21, 1971 up to January 11, 1972, but in spite of all that, both courses of action were found inadequate and ineffective to contain, much less solve, the present rebellion and lawlessness in the country as shown by the fact that:

1. The radical left has increased the number and area of operation of its from organizations and has intensified the recruitment and training of new adherents in the urban and rural areas especially from among the youth;
2. The Kabataang Makabayan (KM), the most militant and outspoken front organization of the radical left, has increased the number of its chapters from 200 as of the end of 1970 to 317 as of July 31, 1972 and its membership from 10,000 as of the end of 1970 to 13,000 as of the end of July, 1972, showing very clearly the rapid growth of the communist movement in this country.
3. The Samahang Demokratiko ng Kabataan (SDK), another militant and outspoken front organization of the radical left, has also increased the number of its chapters from an insignificant number at the end of 1970 to 159 as of the end of July, 1972 and has now a membership of some 1,495 highly indoctrinated, intensely committed and almost fanatically devoted individuals;
4. The New People's Army, the most active and the most violent and ruthless military arm of the radical left, has increased its total strength from an estimated 6,500 (composed of 560 regulars, 1,500 combat support and 4,400 service support) as of January 1, 1972 to about 7,900 (composed of 1,028 regulars, 1,800 combat support and 5,025 service support) as of July 31, 1972, showing a marked increased in its regular troops of over 100% in such a short period of six months;
5. The establishment of sanctuaries for the insurgents in Isabela, in Zambales, in Camarines Sur, and in some parts of Mindanao, a development heretofore unknown in our campaign against subversion and insurgency in this country;
6. The disappearance and dropping out of school of some 3,000 high school and college students and who are reported to have joined with the insurgents for training in the handling of firearms and explosives;

7. The bringing and introduction into the country of substantial war material consisting of military hardware and supplies through the MV Karagatan at Digoyo Point, Palanan, Isabela, and the fact that many of these military hardware and supplies are now in the hands of the insurgents and are being used against our Government troops;
8. The infiltration and control of the media by persons who are sympathetic to the insurgents and — the consequent intensification of their propaganda assault against the Government and the military establishment of the Government;
9. The formation at the grass-root level of 'political power organs,' heretofore unknown in the history of the Communist movement in this country, composed of Barrio Organizing Committees (BOCs) to mobilize the barrio people for active involvement in the revolution; the Barrio Revolutionary Committees (BRCs) to act as 'local governments' in barrios considered as CPP/NPA bailiwicks; the Workers Organizing Committees (WOCs) to organize workers from all sectors; the School Organizing Committees (SOCs) to conduct agitation and propaganda activities and help in the expansion of front groups among the studentry; and the Community Organizing Committees (COCs) which operate in the urban areas in the same manner as the BOCs;

"WHEREAS, the rebellion and armed action undertaken by these lawless elements of the communist and other armed aggrupations organized to overthrow the Republic of the Philippines by armed violence and force have assumed the magnitude of an actual state of war against our people and the Republic of the Philippines;

"NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested upon me by Article VII, Section 10; Paragraph (2) of the Constitution, do hereby place the entire Philippines as defined in Article I, Section 1 of the Constitution under martial law and, in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees, orders and regulations promulgated by me personally or upon my direction.

"In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative.

"IN WITNESS WHEREOF. I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

"Done in the City of Manila, this 21st day of September, in the year of Our Lord, nineteen hundred and seventy-two.

"(SGD.) FERDINAND E. MARCOS

President

Republic of the Philippines"

On September 22, 1972 at 9 o'clock in the evening, clearance for the implementation of the proclamation was granted, and forthwith, the following general order, among others, was issued:

"GENERAL ORDER NO. 2

(ORDERING THE SECRETARY OF NATIONAL DEFENSE TO ARREST THE PERSONS NAMED IN THE ATTACHED LIST, AS WELL AS OTHER PERSONS WHO MAY HAVE COMMITTED CRIMES AND OFFENSES ENUMERATED IN THE ORDER).

Pursuant to Proclamation No. 1081, dated September 21, 1972, and in my capacity as Commander-in-Chief of all the Armed Forces of the Philippines and for being active participants in the conspiracy to seize political and state power in the country and to take over the Government by force, the extent of which has now assumed the proportion of an actual war against our people and their legitimate Government and in order to prevent them from further committing acts that are inimical or injurious to our people, the Government and our national interest, I hereby order you as Secretary of National Defense to forthwith arrest or cause the arrest and take into your custody the individuals named in the attached list and to hold them until otherwise so ordered by me or by duly designated representative.

Likewise, I do hereby order you to arrest or cause the arrest and take into custody and to hold them until otherwise ordered released by me or by my duly authorized representative, such persons as may have committed crimes and offenses in furtherance or on the occasion of or incident to or in connection with the crimes of insurrection or rebellion as well as persons who have committed crimes against national security and the law of nations crimes against the fundamental law of the state, crimes against public order, crimes involving usurpation of authority, title improper use of name, uniform and insignia including persons guilty of crimes as public officers, as well as those persons who may have violated any decree or order promulgated by me personally or promulgated upon my direction.

Done in the City of Manila, this 22nd day of September, in the year of Our Lord, nineteen hundred and seventy-two.

(SGD.) FERDINAND E. MARCOS

President

REPUBLIC OF THE PHILIPPINES"

In the list referred to in this order were the names, among others, of all the petitioners herein. Thus, from shortly after midnight of September 22, 1972 until they were all apprehended, petitioners were taken one by one, either from their homes or places of work, by officers and men of the Armed Forces of the Philippines, without the usual warrant of arrest, and only upon orders of the Respondent Secretary of National Defense directed to his co-respondent, the Chief of Staff of the Armed Forces. They have been since then confined either at Camp Bonifacio, Camp Crame or some other military camp, until, as earlier adverted to, they were released subject to certain conditions, with the exception of petitioners Diokno and Aquino, who are still in custody up to the present.

The particular case of

petitioner Aquino

As regards petitioner Aquino, it appears from his allegations in his petition and supplemental petition for prohibition in G. R. No. L-37364, already referred to earlier, (1) that on August 11, 1973, six criminal charges, for illegal possession of firearms, etc., murder and violation of RA 1700 or the Anti-Subversion Act, were filed against him with Military Commission No. 2, created under General Order Nos. 8, 12 and 39, (2) that on August 28, 1973, the President created, thru Administrative Order No. 355, a special committee to undertake the preliminary investigation or reinvestigation of said charges, and (3) that he questions the legality of his prosecution in a military commission instead of in a regular civilian court as well as the creation of the special committee, not only

because of alleged invalidity of Proclamation 1081 and General Order No. 2 and the orders authorizing the creation of military commissions but also because Administrative Order No. 355 constitutes allegedly a denial of the equal protection of the laws to him and to the others affected thereby.

From the procedural standpoint, these developments did not warrant the filing of a separate petition. A supplemental petition in G. R. No. L-35546, wherein he is one of the petitioners, would have sufficed. But inasmuch as petitioner Aquino has chosen to file an independent special civil action for prohibition in said G.R. No. L-37364 without withdrawing his petition for habeas corpus in G. R. No. L-35546, We wish to make it clear that in this decision, the Court is going to resolve, for purposes of the habeas corpus petition of said petitioner, only the issues he has raised that are common with those of the rest of the petitioners in all these cases, thereby leaving for resolution in G.R. No. L-37364 all the issues that are peculiar only to him. In other words, insofar as petitioner Aquino is concerned, the Court will resolve in this decision the question of legality of his detention by virtue of Proclamation 1081 and General Order No. 2, such that in G. R. No. L-37364, what will be resolved will be only the constitutional issues related to the filing of charges against him with Military Commission No. 2, premised already on whatever will be the Court's resolution in the instant cases regarding Proclamation 1081 and General Order No. 2.

With respect to the other petitioners, none of them stands charged with any offense before any court or military commission. In fact, they all contend that they have not committed any act for which they can be held criminally liable.

Going back to the facts, it may be mentioned, at this juncture, that on the day Proclamation 1081 was signed, the Congress of the Philippines was actually holding a special session scheduled to end on September 22, 1972. It had been in uninterrupted session since its regular opening in January, 1972. Its regular session was adjourned on May 18, 1972, followed by three special sessions of thirty days each,⁸ from May 19 to June 22, June 23 to July 27 and July 28 to August 31, and one special session of twenty days, from September 1 to September 22. As a matter of fact, petitioner Aquino was in a conference of a joint committee of the Senate and the House of Representatives when he was arrested in one of the rooms of the Hilton Hotel in Manila.

It must also be stilted at this point that on November 30, 1972, the Constitutional Convention of 1971, which convened on June 1, 1971 and had been in continuous session since then, approved a New Constitution; that on January 17, 1973, Proclamation 1102 was issued proclaiming the ratification thereof; and that in the Ratification Cases aforementioned, the Supreme Court rendered on March 31, 1973, a judgment holding that "there is no further judicial obstacle to the New Constitution being considered in force and effect." Among the pertinent provisions of the New Constitution is Section 3 (2) of Article XVII which reads thus:

"(2) All proclamations, orders, decrees, instructions, and acts promulgated, issued or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after lifting of martial law or the ratification of this Constitution, unless modified, revoked, superseded by subsequent proclamations, orders, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly."

Before closing this narration of facts, it is relevant to state that relative to petitioner Diokno's motion to withdraw, respondents filed under dated of May 13, 1974 the following Manifestation:

"COME NOW respondents, by the undersigned counsel, and to this Honorable Court respectfully submit this manifestation:

1. In a Motion dated December 29, 1973 petitioner, through counsel, prayed for the withdrawal of the above-entitled case more particularly the pleadings tiled therein. Respondents' Comments dated January 17,

1974, petitioners' Reply dated March 7, 1974, and respondents' Rejoinder dated March 27, 1974 were subsequently submitted to this Honorable Court;

2. The motion to withdraw has been used for propaganda purposes against the Government, including the Supreme Court. Lately, the propaganda has been intensified and the detention of petitioner and the pendency of his case in this Court have been exploited;

3. We are aware that the issues raised in this case are of the utmost gravity and delicacy. This is the reason we said that the decision in these cases should be postponed until the emergency, which called for the proclamation of martial law, is over. While this position is amply supported by precedents and is based on sound policy consideration, we now feel that to protect the integrity of government Institutions, including this Court, from scurrilous propaganda now being waged with relentlessness, it would be in the greater interest of the Nation to have the motion to withdraw resolved and if denied, to have the petition itself decided;

4. This is not to say that the emergency is over, but only to express a judgment that in view of recent tactics employed in the propaganda against the Government, it is preferable in the national interest to have the issues stirred by this litigation settled in this forum. For, indeed, we must state and reiterate that:

a. Pursuant to the Presidents' constitutional powers, functions, and responsibilities in a state of martial law, he periodically requires to be conducted a continuing assessment of the factual situation which necessitated the promulgation of Proclamation No. 1081 on September 21, 1972 and the continuation of martial law through Proclamation No. 1104, dated January 17, 1973;

b. The Government's current and latest assessment of the situation, including evidence of the subversive activities of various groups and individuals, indicates that there are still pockets of actual armed insurrection and rebellion in certain parts of the country. While in the major areas of the active rebellion the military challenge to the Republic and its duly constituted Government has been overcome and effective steps have been and are being taken to redress the centuries-old and deep-seated causes upon which the fires of insurrection and rebellion have fed, the essential process of rehabilitation and renaissance is a slow and delicate process. On the basis of said current assessment and of consultations with the people, the President believes that the exigencies of the situation, the continued threat to peace, order, and security, the danger to stable government and to democratic processes and institutions, the requirements of public safety, and the actual imminent danger of insurrection and rebellion all require the continuation of the exercise of powers incident to martial law;

c. The majority of persons who had to be detained upon the proclamation of martial law have been released and are now engaged in their normal pursuits. However, the President has deemed that, considering the overall situation described above and in view of adequate evidence which can not now be declassified, the continued detention of certain individuals without the filing of formal charges in court for subversive and other criminal acts is necessary in the interest of national security and defense to enable the Government to successfully meet the grave threats of rebellion and insurrection. In this regard, the Secretary of National Defense and his authorized representatives have acted in accordance with guidelines relating to national security which the President has prescribed.

Respectfully submitted.

Manila, Philippines, May 13, 1974."

(Vol. II, Rollo, L-35539.)

and that earlier, in connection with the issue of jurisdiction of the Supreme Court over the instant cases, the respondents invoked General Orders Nos. 3 and 3-A reading as follows:

"GENERAL ORDER NO. 3

WHEREAS, martial law having been declared under Proclamation No. 1081, dated September 21, 1972 and is now in effect throughout the land;

WHEREAS, martial law, having been declared because of wanton destruction of lives and property, widespread lawlessness and anarchy, and chaos and disorder now prevailing throughout the country, which condition has been brought about by groups of men who are actively engaged in a criminal conspiracy to seize political and state power in the Philippines in order to take over the Government by force and violence, the extent of which has now assumed the proportion of an actual war against our people and their legitimate Government; and

WHEREAS, in order to make more effective the implementation of the aforesaid Proclamation No. 1081 without unduly affecting the operations of the Government, and in order to end the present national emergency within the shortest possible time;

NOW, THEREFORE, I, FERDINAND E. MARCOS, Commander-in-Chief of all the Armed Forces of the Philippines, and pursuant to Proclamation No. 1081, dated September 21, 1972, do hereby order that henceforth all executive departments, bureaus, offices, agencies and instrumentalities of the National Government, government-owned or controlled corporations, as well as all governments of all the provinces, cities, municipalities and barrios throughout the land shall continue to function under their present officers and employees and in accordance with existing laws, until otherwise ordered by me or by my duly designated representative.

I do hereby further order that the Judiciary shall continue to function in accordance with its present organization and personnel, and shall try and decide in accordance with existing laws all criminal and civil cases, except the following cases:

1. Those involving the validity, legality or constitutionality of any decree, order or acts issued, promulgated or performed by me or by my duly designated representative pursuant to Proclamation No. 1081, dated September 21, 1972.
2. Those involving the validity or constitutionality of any rules, orders, or acts issued, promulgated or performed by public servants pursuant to decrees, orders, rules and regulations issued and promulgated by me or by my duly designated representative pursuant to Proclamation No. 1081, dated September 21, 1972.
3. Those involving crimes against national security and the law of nations.
4. Those involving crimes against the fundamental laws of the State.
5. Those involving crimes against public order.
6. Those crimes involving usurpation of authority, rank, title, and improper use of names, uniforms, and insignia.
7. Those involving crimes committed by public officers.

Done in the City of Manila, this 22nd day of September, in the year of Our Lord, nineteen hundred and seventy-two.

(SGD.) FERDINAND E. MARCOS

President

Republic of the Philippines"

"GENERAL ORDER NO. 3-A

Sub-paragraph 1 of the second paragraph of the dispositive portion of General Order No. 3, dated September 22, 1972, is hereby amended to read as follows:

* * *

1. Those involving the validity, legality, or constitutionality of Proclamation No. 1081, dated September 21, 1972, or of any decree, order or acts issued, promulgated or performed by me or by my duly designated representative pursuant thereto.

* * *

Done in the City of Manila, this 24th day of September, in the year of Our Lord, nineteen hundred and seventy-two.

(SGD.) FERDINAND E. MARCOS

President

Republic of the Philippines"

Likewise relevant are the issuance by the President on January 17, 1973 of Proclamation 1104 reading thus:

"PROCLAMATION NO. 1104

DECLARING THE CONTINUATION OF MARTIAL LAW.

WHEREAS, Barangays (Citizens Assemblies) were created in barrios in municipalities and in districts/wards in chartered cities pursuant to Presidential Decree No. 86, dated December 31, 1972, composed of all persons who are residents of the barrio, district or ward for at Least six months, fifteen years of age or over, citizens of the Philippines and who are registered in the list of Citizen Assembly members kept by the barrio, district or ward secretary;

WHEREAS, the said Barangays were established precisely to broaden the base of citizen participation in the democratic process and to afford ample opportunities for the citizenry to express their views on important national issues;

WHEREAS, pursuant to Presidential Decree No. 86-A, dated January 5, 1973 and Presidential Decree No. 86-B, dated January 7, 1973, the question was posed before the Barangays: Do you want martial law to continue?

WHEREAS, fifteen million two hundred twenty-four thousand five hundred eighteen (15,224,518) voted for the continuation of martial law as against only eight hundred forty-three thousand fifty-one (843,051) who voted against it;

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers in me vested by the Constitution, do hereby declare that martial law shall continue in accordance with the needs of the time and the desire of the Filipino people.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done in the City of Manila, this 17th day of January, in the year of Our Lord, nineteen hundred and seventy-three.

(SGD.) FERDINAND E. MARCOS

President

Republic of the Philippines"

and the holding of a referendum on July 27-28, 1973 which as evidenced by the COMELEC proclamation of August 3, 1973 resulted in the following:

"Under the present constitution the President, if he so desires, can continue in office beyond 1973.

Do you want President Marcos to continue beyond 1973 and finish the reforms he has initiated under Martial Law?

18,052,016 - YES

1,856,744 - NO"

(Phil. Daily Express, August 4, 1973)

THE FUNDAMENTAL ISSUES

First of all, petitioners challenge the factual premises and constitutional sufficiency of Proclamation 1081. Invoking the Constitution of 1935 under which it was issued, they vigorously maintain that "while there may be rebellion in some remote places, as in Isabela, there is no basis for the nationwide imposition of martial law, since: (a) no large scale rebellion or insurrection exists in the Philippines; (b) public safety does not require it, inasmuch as no department of the civil government — is shown to have been unable to open or function because of or due to, the activities of the lawless elements described in the Proclamation; (c) the Executive has given the nation to understand — and there exists no evidence to the contrary — that the armed forces can handle the situation without 'utilizing the extraordinary powers of the President etc;' and (d) problem in the Greater Manila Area . . . where petitioners were seized and arrested was, at the time martial law was proclaimed, plain lawlessness and criminality." (pp. 69-70, Petitioners' Memorandum). In his supplemental petition, petitioner Diokno individually posits that especially these days, with the improved conditions of peace and order, there is no more constitutional justification for the continuance of martial law. In other words, petitioners question not only the constitutional sufficiency both in fact and in law of the proclamation but also the legality of their detention and constraints, independently of any finding of validity of the proclamation, while in his supplemental petition petitioner Diokno individually submits that the Court should declare that it has already become illegal to continue the present martial law regime because the emergency for which it was proclaimed, if it ever existed, has already ceased, as attested by various public and official declarations of no less than the President himself. On the other hand, respondents would want the Court to lay its hands off the instant petitions, claiming that under General Orders Nos. 3 and 3-A, aforequoted, the President has ordered that the Judiciary shall not try and decide cases "involving the validity, legality or constitutionality" of Proclamation 1081 and any order, decree or acts issued or done pursuant to said Proclamation. They contend most vehemently that this Court has no jurisdiction to inquire into the factual bases of the proclamation, any question as to the propriety or constitutional sufficiency of its issuance being, according to them, political and nonjusticiable. They point out, in this connection, that in the above-mentioned referendum of January 10-15, 1973 and more so in that of July 27-28, 1973; the sovereign people impressed their seal of approval on the continuation of martial law for as long as the President may deem it wise to maintain the same. And on the assumption the Court can make an inquiry into the factual bases of the Proclamation, they claim there was more than sufficient justification for its issuance, in the light of the criterion of arbitrariness sanctioned by Us in *Lansang vs. Garcia*, 42 SCRA 448. Respondents further maintain that it is only

by another official proclamation by the President, not by a judicial declaration, that martial law may be lifted. Additionally, in their answer of July 26, 1973 to petitioner Diokno's supplemental petition, respondents contend that the express provisions of the above-quoted transitory provision of the New Constitution, have made indubitable that Proclamation 1081 as well as all the impugned General Orders are constitutional and valid.

Thus, the fundamental questions presented for the Court's resolution are:

1. Does the Supreme Court have jurisdiction to resolve the merits of the instant petitions? Put differently, are not the issues herein related to the propriety or constitutional sufficiency of the issuance of the Proclamation purely political, which are not for the judiciary, but for the people and the political departments of the government to determine? And viewed from existing jurisprudence in the Philippines, is not the doctrine laid down by this Court in *Lansang vs. Garcia*, *supra*, applicable to these cases?
2. Even assuming *Lansang* to be applicable, and on the basis of the criterion of arbitrariness sanctioned therein, can it be said that the President acted arbitrarily, capriciously or whimsically in issuing Proclamation 1081?
3. Even assuming also that said proclamation was constitutionally issued, may not the Supreme Court declare upon the facts of record and those judicially known to it now that the necessity for martial law originally found by the President to exist has already ceased so as to make further continuance of the present martial law regime unconstitutional?
4. Even assuming again that the placing of the country under martial law is constitutional until the President himself declares otherwise, is there any legal justification for the arrest and detention as well as the other constraints upon the individual liberties of the petitioners, and, in the affirmative, does such justification continue up to the present, almost two years from the time of their apprehension, there being no criminal charges of any kind against them nor any warrants of arrest for their apprehension duly issued pursuant to the procedure prescribed by law?
5. Finally, can there still be any doubt regarding the constitutionality of the issuance of Proclamation 1081 and all the other proclamations and orders, decrees, instructions and acts of the President issued or done by him pursuant to said Proclamation, considering that by the terms of Section 3 (2) of Article XVII of the Constitution of the Philippines of 1973, "all proclamations, orders, decrees, instructions and acts promulgated, issued or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding and effective" until revoked or superseded by the incumbent President himself or by the regular National Assembly established under the same Constitution?

I

THE ISSUE OF JURISDICTION

By its very nature, the issue of jurisdiction vigorously urged by the Solicitor General calls for prior resolution. Indeed, whenever the authority of the Court to act is seriously challenged, it should not proceed any further until that authority is clearly established. And it goes without saying that such authority may be found only in the existing laws and/or the Constitution.

For a moment, however, there was a feeling among some members of the Court that the import of the transitory provisions of the New Constitution referred to in the fifth question above has made the issue of jurisdiction posed by the respondents of secondary importance, if not entirely academic. Until, upon further reflection, a consensus emerged that for Us to declare that the transitory provision invoked has rendered moot and academic any controversy as to the legality of the impugned acts of the President is to assume that the issue is justiciable,

thereby by passing the very issue of jurisdiction We are asked to resolve. We feel that while perhaps, such reliance on the transitory provision referred to may legally suffice to dispose of the cases at bar, it cannot answer persistent queries regarding the powers of the Supreme Court in a martial law situation. It would still leave unsettled a host of controversies related to the continued exercise of extraordinary powers by the President. Withal, such assumption of justiciability would leave the Court open to successive petitions asking that martial law be lifted, without Our having resolved first the correctness of such assumption. Indeed, nothing short of a categorical and definite ruling of this Court is imperative regarding the pretended non-justiciability of the issues herein, if the people are to know, as they must, whether the present governmental order has legitimate constitutional foundations or it is supported by nothing more than naked force and self-created stilts to keep it above the murky waters of unconstitutionality. Thus, it is but proper that We tackle first the questions about the authority of the Court to entertain and decide these cases before discussing the materiality and effects of the transitory provision relied upon by respondents.

As a matter of fact, it is not alone the matter of jurisdiction that We should decide. Beyond the purely legal issues placed before Us by the parties, more fundamental problems are involved in these proceedings. There are all-important matters which a historical decision like this cannot ignore on the pretext that Our duty in the premises is exclusively judicial. Whether all the members of the Court like it or not, the Court has to play its indispensable and decisive role in resolving the problems confronting our people in the critical circumstances in which they find themselves. After all, we cannot dissociate ourselves from them, for we are Filipinos who must share the common fate to which the denouement of the current situation will consign our nation. The priority issue before Us is whether We will subject the assailed acts of the President to judicial scrutiny as to its factual bases or We will defer to his findings predicated on evidence which are in the very nature of things officially available only to him, but in either case, our people must know that Our decision has democratic foundations and conforms with the great principles for which our nation exists.

The New Constitution itself is in a large sense a product of the political convulsion now shaking precariously the unity of the nation. Upon the other hand, that those presently in authority had a hand in one way or another in its formulation, approval and ratification can hardly be denied. To justify, therefore, the restraint upon the liberties of petitioners through an exclusive reliance on the mandates of the new charter, albeit logically and technically tenable, may not suffice to keep our people united in the faith that there is genuine democracy in the existing order and that the rule of law still prevails in our land. Somehow the disturbing thought may keep lingering with some, if not with many, of our countrymen that by predicating Our decision on the basis alone of what the New Constitution ordains, We are in effect allowing those presently in authority the dubious privilege of legalizing their acts and exculpating themselves from their supposed constitutional transgressions through a device which might yet have been of their own furtive making.

Besides, We should not be as naive as to ignore that in troublous times like the present, simplistic solutions, however solidly based, of constitutional controversies likely to have grave political consequences would not sound cogent enough unless they ring in complete harmony with the tune set by the founders of our nation when they solemnly consecrated it to the ideology they considered best conducive to the contentment and prosperity of all our people. And the commitment of the Philippines to the ideals of democracy and freedom is ever evident and indubitable. It is writ in the martyrdom of our revolutionary forbears when they violently overthrew the yoke of Spanish despotism. It is an indelible part of the history of our passionate and zealous observance of democratic principles and practices during the more than four decades that America was with us. It is reaffirmed in bright crimson in the blood and the lives of the countless Filipinos who fought and died in order that our country may not be subjugated under the militarism and totalitarianism of the Japanese then, who were even enticing us with the idea of a Greater East Asia Co-Prosperty Sphere. And today, that our people are showing considerable

disposition to suffer the imposition of martial law can only be explained by their belief that it is the last recourse to save themselves from the inroads of ideologies antithetic to those they cherish and uphold.

Withal, the eyes of all the peoples of the world on both sides of the bamboo and iron curtains are focused and what has been happening in our country since September 21, 1972. Martial law in any country has such awesome implications that any nation under it is naturally an interesting study subject for the rest of mankind. Those who consider themselves to be our ideological allies must be keeping apprehensive watch on how steadfastly we shall remain living and cherishing our common fundamental political tenets and ways of life, whereas those of the opposite ideology must be eagerly anticipating how soon we will join them in the conviction that, after all, real progress and development cannot be achieved without giving up individual freedom and liberty and unless there is concentration of power in the exercise of government authority. It is true the Philippines continues to enjoy recognition of all the states with whom it had diplomatic relations before martial law was proclaimed, but it is not difficult to imagine that as soon as it has become definite or anyway apparent to those concerned that the Philippines has ceased to adhere to the immutable concepts of freedom and democracy enshrined in its own fundamental law, corresponding reactions would manifest themselves in the treatment that will be given us by these states.

In our chosen form of government, the Supreme Court is the department that most authoritatively speaks the language of the Constitution. Hence, how the present martial law and the constraints upon the liberties of petitioners can be justified under our Constitution which provides for a republican democratic government will be read by the whole world in the considerations of this decision. From them they will know whither we are going as a nation. More importantly, by the same token, history and the future generations of Filipinos will render their own judgment on all of us who by the will of Divine Providence have to play our respective roles in this epochal chapter of our national life. By this decision, everyone concerned will determine how truly or otherwise, the Philippines of today is keeping faith with the fundamental precepts of democracy and liberty to which the nation has been irrevocably committed by our heroes and martyrs since its birth.

And we should not gloss over the fact that petitioners have come to this Court for the protection of their rights under the provisions of the Old Charter that have remained unaltered by the New Constitution. It would not be fair to them, if the provisions invoked by them still mean what they had always meant before, to determine the fate of their petitions on the basis merely of a transitory provision whose consistency with democratic principles they vigorously challenge.

In this delicate period of our national life, when faith in each other and unity among all of the component elements of our people are indispensable, We cannot treat the attitude and feelings of the petitioners, especially Senator Diokno* who is still under detention without formal charges, with apathy and indifferent unconcern. Their pleadings evince quite distinctly an apprehensive, nay a fast dwindling faith in the capacity of this Court to render them justice. Bluntly put, their pose is that the justice they seek may be found only in the correct construction of the 1935 Constitution, and they make no secret of their fears that because the incumbent members of the Court have taken an oath to defend and protect the New Constitution, their hopes of due protection under the Bill of Rights of the Old Charter may fall on deaf ears. Petitioner Diokno, in particular, with the undisguised concurrence of his chief counsel, former Senator Tañada despairingly bewails that although they are "convinced beyond any nagging doubt that (they are) on the side of right and reason and law and justice, (they are) equally convinced that (they) cannot reasonably expect either right or reason, law or justice, to prevail in (these) case(s)."

To be sure, We do not feel bound to soothe the subjective despondency nor to cool down the infuriated feelings of litigants and lawyers by means other than the sheer objectiveness and demonstrated technical accuracy of our decisions. Under the peculiar milieu of these cases, however, it is perhaps best that We do not spare any effort to

make everyone see that in discharging the grave responsibility incumbent upon Us in the best light that God has given Us to see it, We have explored every angle the parties have indicated and that We have exhausted all jurisprudential resources within our command before arriving at our conclusions and rendering our verdict. In a way, it could indeed be part of the nobility that should never be lost in any court of justice that no party before it is left sulking with the thought that he lost because not all his important arguments in which he sincerely believes have been duly considered or weighed in the balance.

But, of course, petitioners' emotional misgivings are manifestly baseless. It is too evident for anyone to ignore that the provisions of the Old Constitution petitioners are invoking remain unaltered in the New Constitution and that when it comes to the basic precepts underlying the main portions of both fundamental laws, there is no disparity, much less any antagonism between them, for in truth, they are the same identical tenets to which our country, our government and our people have always been ineradicably committed. Insofar, therefore, as said provisions and their underlying principles are concerned, the new oath taken by the members of the Court must be understood, not in the disturbing sense petitioners take them, but rather as a continuing guarantee of the Justices' unswerving fealty and steadfast adherence to the self-same tenets and ideals of democracy and liberty embodied in the oaths of loyalty they took with reference to the 1935 Constitution.

Contrary to what is obviously the erroneous impression of petitioner Diokno, the fundamental reason that impelled the members of the Court to take the new oaths that are causing him unwarranted agony was precisely to regain their independence from the Executive, inasmuch as the transitory provisions of the 1973 Constitution had, as a matter of course, subjected the judiciary to the usual rules attendant in the reorganization of governments under a new charter. Under Sections 9 and 10 of Article XVII, "incumbent members of the Judiciary may continue in office until they reach the age of seventy years, unless sooner replaced" by the President, but "all officials whose appointments are by this Constitution vested in the (President) shall vacate their offices upon the appointment and qualification of their successors." In other words, under said provisions, the Justices ceased to be permanent. And that is precisely why our new oaths containing the phrase "na pinagpapatuloy sa panunungkulan", which petitioner Diokno uncharitably ridicules ignoring its real import, was prepared by the Secretary of Justice in consultation with the Court, and not by the President or any other subordinate in the Executive office, purposely to make sure that the oath taking ceremony which was to be presided by the President himself would connote and signify that thereby, in fact and in contemplation of law, the President has already exercised the power conferred upon him by the aforequoted transitory constitutional provisions to replace anyone of us with a successor at anytime.

There was no Presidential edict at all for the Justices to take such an oath. The President informed the Court that he was determined to restore the permanence of the respective tenures of its members, but there was a feeling that to extend new appointments to them as successors to themselves would sound somehow absurd. And so, in a conference among the President, the Secretary of Justice and all the Justices, a mutually acceptable construction of the pertinent transitory provision was adopted to the effect that an official public announcement was to be made that the incumbent Justices would be continued in their respective offices without any new appointment, but they would take a fittingly worded oath the text of which was to be prepared in consultation between the Secretary of Justice and the Court. Thus, by that oath taking, all the members of the Court, other than the Chief Justice and the three new Associate Justices, who because of their new appointments are not affected by the transitory provisions, are now equally permanent with them in their constitutional tenures, as officially and publicly announced by the President himself on that occasion. Otherwise stated, the reorganization of the Supreme Court contemplated in the transitory provisions referred to, which, incidentally was also a feature of the transitory provisions of the 1935 Constitution, albeit, limited then expressly to one year, (Section 4, Article XVI) has already been accomplished, and all the Justices are now unreachably beyond the presidential prerogative either explicit or implicit in the terms

of the new transitory provisions.

It is, therefore, in these faith and spirit and with this understanding, supported with prayers for guidance of Divine Providence, that We have deliberated and voted on the issues in these cases — certainly, without any claim of monopoly of wisdom and patriotism and of loyalty to all that is sacred to the Philippines and the Filipino people.

II

As already stated, the Governments insistent posture that the Supreme Court should abstain from inquiring into the constitutional sufficiency of Proclamation 1081 is predicated on two fundamental grounds, namely, (1) that under General Order No. 3, as amended by General Order No. 3-A, "the Judiciary (which includes the Supreme Court) shall continue to function in accordance with its present organization and personnel, and shall try and decide in accordance with existing laws all criminal and civil cases, except the following: 1. Those involving the validity, legality or constitutionality of Proclamation 1081 dated September 21, 1972 or of any decree, order or acts issued, promulgated or performed by (the President) or by (his) duly designated representative pursuant thereto," and (2) the questions involved in these cases are political and non-justiciable and, therefore, outside the domain of judicial inquiry.

A

GENERAL ORDERS NOS. 3 AND 3-A HAVE CEASED TO BE OPERATIVE INsofar AS THEY ENJOIN THE JUDICIARY OF JURISDICTION OVER CASES INVOLVING THE VALIDITY OF THE PROCLAMATIONS, ORDERS OR ACTS OF THE PRESIDENT.

Anent the first ground thus invoked by the respondents, it is not without importance to note that the Solicitor General relies barely on the provisions of the general orders cited without elaborating as to how the Supreme Court can be bound thereby. Considering that the totality of the judicial power is vested in the Court by no less than the Constitution, both the Old and the New, the absence of any independent showing of how the President may by his own fiat constitutionally declare or order otherwise is certainly significant. It may be that the Solicitor General considered it more prudent to tone down any possible frontal clash with the Court, but as We see it, the simplistic tenor of the Solicitor General's defense must be due to the fact too well known to require any evidential proof that by the President's own acts, publicized here and abroad, he had made it plainly understood that General Orders Nos. 3 and 3-A are no longer operative insofar as they were intended to divest the Judiciary of jurisdiction to pass on the validity, legality or constitutionality of his acts under the aegis of martial law. In fact, according to the President, it was upon his instructions given as early as September 24, 1972, soon after the filing of the present petitions, that the Solicitor General submitted his return and answer to the writs We have issued herein. It is a matter of public knowledge that the President's repeated avowal of the Government's submission to the Court is being proudly acclaimed as the distinctive characteristic of the so-called "martial law — Philippine style", since such attitude endows it with the democratic flavor so dismally absent in the martial law prevailing in other countries of the world.

Accordingly, even if it were to be assumed at this juncture that by virtue of the transitory provision of the New Constitution making all orders of the incumbent President part of the law of the land, General Orders Nos. 3 and 3-A are valid, the position of the respondents on the present issue of jurisdiction based on said orders has been rendered untenable by the very acts of the President, which in the words of the same transitory provision have "modified, revoked or superseded" them. And in this connection, it is important to note that the transitory provision just referred to textually says that the acts of the incumbent President shall "remain valid, legal, binding and effective . . . unless modified, revoked or superseded by subsequent proclamations, orders, decrees,

instructions or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly", thereby implying that the modificatory or revocatory acts of the President need not be as express and explicit as in the case of the National Assembly. In other words, when it comes to acts of the President, mere demonstrated inconsistency of his posterior acts with earlier ones would be enough for implied modification or revocation to be effective, even if no statement is made by him to such effect.

Rationalizing his attitude in regard to the Supreme Court during martial law, President Marcos has the following to say in his book entitled "Notes on the New Society of the Philippines":

"Our martial law is unique in that it is based on the supremacy of the civilian authority over the military and on complete submission to the decision of the Supreme Court, and most important of all, the people. . . ." (p. 103)

* * *

"Thus, upon the approval by the Constitutional Convention of a new Constitution, I organized the barangays or village councils or citizens assemblies in the barrios (a barrio is the smallest political unit in the Philippines). I directed the new Constitution to be submitted to the barangays or citizens assemblies in a formal plebiscite from January 10 to 15, 1973. The barangays voted almost unanimously to ratify the Constitution, continue with martial law and with the reforms of the New Society.

This action was questioned in a petition filed before our Supreme Court in the cases entitled Javellana vs. Executive Secretary et al, G.R. No. L-36143, 36164, 36165, 36236 and 36283. The issue raised was whether I had the power to call a plebiscite; whether I could proclaim the ratification of the new Constitution. In raising this issue, the petitioners (who, incidentally, were Liberals or political opposition leaders) raised the fundamental issue of the power of the President under a proclamation of martial law to issue decrees.

Inasmuch as the issues in turn raised the question of the legitimacy of the entire Government and also to meet the insistent suggestion that, in the event of an adverse decision, I proclaim a revolutionary government, I decided to submit to the jurisdiction of the Supreme Court as I had done in the Lansang vs. Garcia case (already quoted) in 1971 when almost the same parties in interest questioned my powers as President to suspend the privilege of the writ of habeas corpus. (Refer to pp. 13-17.)

This would, at the same time, calm the fears of every cynic who had any misgivings about my intentions and claimed that I was ready to set up a dictatorship. For who is the dictator who would submit himself to a higher body like the Supreme Court on the question of the constitutionality or validity of his actions?" (pp. 103-104.)

* * *

"It will be noted that I had submitted myself to the jurisdiction of the Supreme Court in all cases questioning my authority in 1971 in the case of Lansang vs. Garcia on the question of the suspension of the privilege of the writ of habeas corpus, and in the case just cited on the proclamation of martial law as well as the other related cases." (pp. 105-106.)

Nothing could be more indicative, than these words of the President himself, of his resolute intent to render General Orders Nos. 3 and 3-A inoperative insofar as the Supreme Court's jurisdiction over cases involving the validity, legality or constitutionality of his acts are concerned. Actually, the tenor and purpose of the said general orders are standard in martial law proclamations, and the President's attitude is more of an exception to the general practice. Be that as it may, with this development, petitioners have no reason to charge that there is a "disrobing" of the Supreme Court. But even as the President unequivocally reaffirms, over and above martial law, his respect for the Supreme Court's constitutionally assigned role as the guardian of the Constitution and as the final authority as to its correct interpretation and construction, it is entirely up to the Court to determine and define its own constitutional prerogatives vis-a-vis the Proclamation and the existing martial law situation, given the

reasons for the declaration and its avowed objectives.

B

MAY THE SUPREME COURT INQUIRE INTO THE FACTUAL BASES OF THE ISSUANCE OF PROCLAMATION 1081 TO DETERMINE ITS CONSTITUTIONAL SUFFICIENCY?

The second ground vigorously urged by the Solicitor General is more fundamental, since, prescinding from the force of the general orders just discussed, it strikes at the very core of the judicial power vested in the Court by the people thru the Constitution. It is claimed that insofar as the instant petitions impugn the issuance of Proclamation 1081 as having been issued by the President in excess of his constitutional authority, they raise a political question not subject to inquiry by the courts. And with reference to the plea of the petitioners that their arrest, detention and other restraints, without any charges or warrants duly issued by the proper judge, constitute clear violations of their rights guaranteed by the fundamental law, the stand of the respondents is that the privilege of the writ of habeas corpus has been suspended automatically in consequence of the imposition of martial law, the propriety of which is left by the Constitution to the exclusive discretion of the President, such that for the proper exercise of that discretion he is accountable only to the sovereign people, either directly at the polls or thru their representatives by impeachment.

Never before has the Supreme Court of the Philippines been confronted with a problem of such transcendental consequences and implications as the present one entails. There is here an exertion of extreme state power involving the proclaimed assumption of the totality of government authority by the Executive, predicated on his own declaration that a state of rebellion assuming "the magnitude of an actual state of war against our people and the Republic of the Philippines" exists (22nd whereas of Proclamation 1081) and that "the public order and safety and the security of this nation demand that immediate, swift, decisive and effective action be taken to protect and insure the peace, order and security of the country and its population and to maintain the authority of the government." (19th whereas, id.) Upon the other hand, petitioners deny the factual bases of the Proclamation and insist that it is incumbent upon the Court, in the name of democracy, liberty and the Constitution, to inquire into the veracity thereof and to declare, upon finding them to be untrue, that the Proclamation is unconstitutional and void. Respondents counter, however, that the very nature of the Proclamation demands that the Court should refrain from making any such inquiry, considering that, as already stated, the discretion as to whether or not martial law should be imposed is lodged by the Constitution in the President exclusively.

As We enter upon the extremely delicate task of resolving the grave issues thus thrust upon Us, We are immediately encountered by absolute verities to guide Us all the way. The first and most important of them is that the Constitution⁹ is the supreme law of the land. This means among other things that all the powers of the government and of all its officials from the President down to the lowest emanate from it. None of them may exercise any power unless it can be traced thereto either textually or by natural and logical implication.

The second is that is settled that the Judiciary provisions of the Constitution point to the Supreme Court as the ultimate arbiter of all conflicts as to what the Constitution or any part thereof means. While the other Departments may adopt their own construction thereof, when such construction is challenged by the proper party in an appropriate case wherein a decision would be impossible without determining the correct construction, the Supreme Court's word on the matter controls.

The third is that in the same way that the Supreme Court is the designated guardian of the Constitution, the President is the specifically assigned protector of the safety, tranquility and territorial integrity of the nation. This responsibility of the President is his alone and may not be shared by any other Department.

The fourth is that, to the end just stated, the Constitution expressly provides that "in case of invasion, insurrection or rebellion or imminent danger thereof, when the public safety requires it, he (the Executive) — "may (as a last resort) . . . place the Philippines or any part thereof under martial law".¹⁰

The fifth is that in the same manner that the Executive power conferred upon the Executive by the Constitution is complete, total and unlimited, so also, the judicial power vested in the Supreme Court and the inferior courts, is the very whole of that power, without any limitation or qualification.

The sixth is that although the Bill of Rights in the Constitution strictly ordains that "no person shall be deprived of life, liberty or property without due process of law",¹¹ even this basic guarantee of protection readily reveals that the Constitution's concern for individual rights and liberties is not entirely above that for the national interests, since the deprivation it enjoins is only that which is without due process of law, and laws are always enacted in the national interest or to promote and safeguard the general welfare. Of course, it is understood that the law thus passed, whether procedural or substantive, must afford the party concerned the basic elements of justice, such as the right to be heard, confrontation, and counsel, *inter alia*.

And the seventh is that whereas the Bill of Rights of the 1935 Constitution explicitly enjoins that "(T)he privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, or rebellion, when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist",¹² there is no similar injunction whether expressed or implied against the declaration of martial law.

From these incontrovertible postulates, it results, first of all, that the main question before Us is not in reality one of jurisdiction, for there can be no conceivable controversy, especially one involving a conflict as to the correct construction of the Constitution, that is not contemplated to be within the judicial authority of the courts to hear and decide. The judicial power of the courts being unlimited and unqualified, it extends over all situations that call for the ascertainment and protection of the rights of any party allegedly violated, even when the alleged violator is the highest official of the land or the government itself. It is, therefore, evident that the Court's jurisdiction to take cognizance of and to decide the instant petitions on their merits is beyond challenge.

In this connection, however, it must be borne in mind that in the form of government envisaged by the framers of the Constitution and adopted by our people, the Court's indisputable and plenary authority to decide does not necessarily impose upon it the duty to interpose its fiat as the only means of settling the conflicting claims of the parties before it. It is ingrained in the distribution of powers in the fundamental law that hand in hand with the vesting of the judicial power upon the Court, the Constitution has coevally conferred upon it the discretion to determine, in consideration of the constitutional prerogatives granted to the other Departments, when to refrain from imposing judicial solutions and instead defer to the judgment of the latter. It is in the very nature of republican governments that certain matters are left in the residual power of the people themselves to resolve, either directly at the polls or thru their elected representatives in the political Departments of the government. And these reserved matters are easily distinguishable by their very nature, when one studiously considers the basic functions and responsibilities entrusted by the charter to each of the great Departments of the government. To cite an obvious example, the protection, defense and preservation of the state against internal or external aggression threatening its very existence is far from being within the ambit of judicial responsibility. The distinct role then of the Supreme Court of being the final arbiter in the determination of constitutional controversies does not have to be asserted in such contemplated situations, thereby to give way to the ultimate prerogative of the people articulated thru suffrage or thru the acts of their political representatives they have elected for the purpose.

Indeed, these fundamental considerations are the ones that lie at the base of what is known in American

constitutional law as the political question doctrine, which in that jurisdiction is unquestionably deemed to be part and parcel of the rule of law, exactly like its apparently more attractive or popular opposite, judicial activism, which is the fullest exertion of judicial power, upon the theory that unless the courts intervene injustice might prevail. It has been invoked and applied by this Court in varied forms and modes of projection in several momentous instances in the past;¹³ and it is the main support of the stand of the Solicitor General on the issue of jurisdiction in the cases at bar. It is also referred to as the doctrine of judicial self-restraint or abstention. But as the nomenclatures themselves imply, activism and self-restraint are both subjective attitudes, not inherent imperatives. The choice of alternatives in any particular eventuality is naturally dictated by what in the Court's considered opinion is what the Constitution envisions should be done in order to accomplish the objectives of government and of nationhood. And perhaps it may be added here to avoid confusion of concepts, that We are not losing sight of the traditional approach based on the doctrine of separation of powers. In truth, We perceive that even under such mode of rationalization, the existence of power is secondary, respect for the acts of a co-ordinate, co-equal and co-independent Department being the general rule, particularly when the issue is not encroachment of delimited areas of functions but alleged abuse of a Department's own basic prerogatives.

In the final analysis, therefore, We need not indulge in any further discussion as to whether or not the Court has jurisdiction over the merits of the instant petitions. It is definite that it has. Rather, the real question before Us is whether or not the Court should act on them. Stated differently, do We have here that appropriate occasion for activism on the part of the Court, or, do the imperatives of the situation demand, in the light of the reservations in the fundamental law just discussed, that We defer to the political decision of the Executive? After mature deliberation, and taking all relevant circumstances into account, We are convinced that the Court should abstain in regard to what is in all probability the most important issue raised in them, namely, whether or not the Court should inquire into the constitutional sufficiency of Proclamation 1081 by receiving evidence tending to belie the factual premises thereof. It is Our considered view that under the Constitution, the discretion to determine ultimately whether or not the Philippines or any part thereof should be placed under martial law and for how long is lodged exclusively in the Executive, and for this reason, it is best that We defer to his judgment as regards the existence of the grounds therefor, since, after all, it is not expected that the Supreme Court should share with him the delicate constitutional responsibility of defending the safety, security, tranquility and territorial integrity of the nation in the face of a rebellion or invasion. This is not abdication of judicial power, much less a violation of Our oaths "to support and defend the Constitution"; rather, this is deference to an act of the Executive which, in Our well-considered view, the Constitution contemplates the Court should refrain from reviewing or interfering with. To Our mind, the following considerations, inter alia, impel no other conclusion:

1

It has been said that martial law has no generally accepted definition, much less a precise meaning. But as We see it, no matter how variously it has been described, a common element is plainly recognizable in whatever has been said about it — it does not involve executive power alone. To be more exact, martial law is state power which involves the totality of government authority, irrespective of the Department or official by whom it is administered. This is because, as admitted by all, martial law is every government's substitute for the established governmental machinery rendered inoperative by the emergency that brings it forth, in order to maintain whatever legal and social order is possible during the period of emergency, while the government is engaged in battle with the enemy. Otherwise, with the breakdown of the regular government authority or the inability of the usual offices and officials to perform their functions without endangering the safety of all concerned, anarchy and chaos are bound to prevail and protection of life and property would be nil. What is worse, the confusion and disorder would detract the defense efforts. It is indispensable therefore that some kind of government must go on, and martial law appears to be the logical alternative. Hence, from the point of view of safeguarding the people against

possible governmental abuses, it is not the declaration of martial law and who actually administers it that is of supreme importance. Someone has of necessity to be in command as surrogate of the whole embattled government. It is what is actually done by the administrator affecting individual rights and liberties that must pass constitutional standards, even as these are correspondingly adjusted to suit the necessities of the situation. But this is not to say that redress of constitutional offenses would immediately and necessarily be available, for even the procedure for securing redress, its form and time must depend on what such necessities will permit. Viewed in depth, this is all that can be visualized as contemplated in the supposedly fundamental principle invoked by petitioners to the effect that necessity and necessity alone is the justification and the measure of the powers that may be exercised under martial law.

2

In countries where there is no constitutional provision sanctioning the imposition of martial law, the power to declare or proclaim the same is nevertheless conceded to be the most vital inherent prerogative of the state because it is axiomatic that the right of the state to defend itself against disintegration or subjugation by another cannot be less than an individual's natural right of self-defense. The resulting repression or restraint of individual rights is therefore justified as the natural contribution that the individual owes to the state, so that the government under which he lives may survive. After all, such subordination to the general interest is supposed to be temporary, coincident only with the requirements of the emergency.

At the same time, under the general practice in those countries, it is considered as nothing but logical that the declaration or proclamation should be made by the Executive. So it is that none of the cases cited by petitioners, including those of *Hearon vs. Calus*, 183, S.E. 24 and *Allen vs. Oklahoma City*, 52 Pac. Rep. 2nd Series, pp. 1054-1059, may be deemed as a binding precedent sustaining definitely that it is in the power of the courts to declare an Executive's proclamation or declaration of martial law in case of rebellion or insurrection to be unconstitutional and unauthorized. Our own research has not yielded any jurisprudence upholding the contention of petitioners on this point. What is clear and incontrovertible from all the cases cited by both parties is that the power of the Executive to proclaim martial law in case of rebellion has never been challenged, not to say outlawed. It has always been assumed, even if the extent of the authority that may be exercised under it has been subjected to the applicable provision of the constitution, with some courts holding that the enforceability of the fundamental law within the area of the martial law regime is unqualified, and the others maintaining that such enforceability must be commensurate with the demands of the emergency situation. In other words, there is actually no authoritative jurisprudential rule for Us to follow in respect to the specific question of whether or not the Executive's determination of the necessity to impose martial law during a rebellion is reviewable by the judiciary. If We have to go via the precedential route, the most that We can find is that the legality of an Executive's exercise of the power to proclaim martial law has never been passed upon by any court in a categorical manner so as to leave no room for doubt or speculation.

3

In the Philippines. We do not have to resort to assumptions regarding any inherent power of the government to proclaim a state of martial law. What is an implied inherent prerogative of the government in other countries is explicitly conferred by our people to the government in unequivocal terms in the fundamental law. More importantly in this connection, it is to the Executive that the authority is specifically granted "in cases of invasion, insurrection or rebellion, when public safety requires it", to "place the Philippines or any part thereof under Martial Law". To be sure, petitioners admit that much. But they insist on trying to show that the factual premises of the Proclamation are not entirely true and are, in any event, constitutionally insufficient. They urge the Court to pass on the merits of this particular proposition of fact and of law in their petitions and to order thereafter the

nullification and setting aside thereof.

We do not believe the Court should interfere.

The pertinent constitutional provision is explicit and unequivocal. It reads as follows:

"(2) The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law." (Section 10(2), Article VII, 1935 Constitution.)

"SEC. 12. The Prime Minister shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines of any part thereof under martial law." (Section 12, Article IX, 1973 Constitution.)

Except for the reference to the Prime Minister in the New Constitution instead of to the President as in the Old, the wording of the provision has remained unaltered *ipssissimis verbis*. Accordingly, the two Constitutions cannot vary in meaning; they should be construed and applied in the light of exactly the same considerations. In this sense at least, petitioners' invocation of the 1935 Constitution has not been rendered academic by the enforcement of the new charter. For the purposes of these cases, We will in the main consider their arguments as if there has been no *Javellana* decision.

Now, since in those countries where martial law is an extra-constitutional concept, the Executive's proclamation thereof, as observed above, has never been considered as offensive to the fundamental law, whether written or unwritten, and, in fact, not even challenged, what reason can there be that here in the Philippines, wherein the Constitution directly and definitely commits the power to the Executive, another rule should obtain? Are we Filipinos so incapable of electing an Executive we can trust not to unceremoniously cast aside his constitutionally worded oath solemnly and emphatically imposing upon him the duty "to defend and protect the Constitution"? Or is the Court to be persuaded by possible partisan prejudice or the subjective rationalization informing personal ambitions?

Reserving for further discussion the effect of *Lansang* upon the compelling force of the opinions in *Barcelon vs. Baker*, 5 Phil. 87 and *Montenegro vs. Castaneda*, 91 Phil. 862, relative to the issue at hand, We cannot lightly disregard the ponderous reasons discussed in said opinions supporting the view that the Executive's choice of means in dealing with a rebellion should be conclusive. In *Barcelon*, this Court said:

"Thus the question is squarely presented whether or not the judicial department of the Government may investigate the facts upon which the legislative and executive branches of the Government acted in providing for the suspension and in actually suspending the privilege of the writ of habeas corpus in said provinces. Has the Governor-General, with the consent of the Commission, the right to suspend the privilege of the writ of habeas corpus? If so, did the Governor-General suspend the writ of habeas corpus in the Provinces of Cavite and Batangas in accordance with such authority?

A paragraph of section 5 of the act of Congress of July 1, 1902, provides:

"That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor-General with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist."

This provision of the act of Congress is the only provision giving the Governor-General and the Philippine Commission authority to suspend the privilege of the writ of habeas corpus. No question has been raised with reference to the authority of Congress to confer this authority upon the President or the Governor-General of these Islands, with the approval of the Philippine Commission.

This provision of the act of Congress makes two conditions necessary in order that the President or the Governor-General with the approval of the Philippine Commission may suspend the privilege of the writ of habeas corpus. They are as follows:

- (1) When there exists rebellion, insurrection, or invasion; and
- (2) When public safety may require it.

In other words, in order that the privilege of the writ of habeas corpus may be suspended, there must exist rebellion, insurrection, or invasion, and the public safety must require it. This fact is admitted, but the question is, Who shall determine whether there exists a state of rebellion, insurrection, or invasion, and that by reason thereof the public safety requires the suspension of the privilege of the writ of habeas corpus?

It has been argued and admitted that the Governor-General, with the approval of the Philippine Commission, has discretion, when insurrection, rebellion, or invasion actually exist, to decide whether the public safety requires the suspension of the privilege of the writ of habeas corpus; but the fact whether insurrection, rebellion, or invasion does actually exist is an open question, which the judicial department of the Government may inquire into and that the conclusions of the legislative and executive departments (the Philippine Commission and the Governor-General) of the Government are not conclusive upon that question.

In other words, it is contended that the judicial department of the Government may consider an application for the writ of habeas corpus, even though the privileges of the same have been suspended, in the manner provided by law, for the purposes of taking proof upon the question whether there actually exists a state of insurrection, rebellion, or invasion.

The applicants here admit that if a state of rebellion, insurrection, or invasion exists, and the public safety is in danger, then the President, or Governor-General with the approval of the Philippine Commission, may suspend the privilege of the writ of habeas corpus.

Inasmuch as the President, or Governor-General with the approval of the Philippine Commission, can suspend the privilege of the writ of habeas corpus only under the conditions mentioned in the said statute, it becomes their duty to make an investigation of the existing conditions in the Archipelago, or any part thereof, to ascertain whether there actually exists a state of rebellion, insurrection, or invasion, and that the public safety requires the suspension of the privilege of the writ of habeas corpus. When this investigation is concluded, the President, or the Governor-General with the consent of the Philippine Commission, declares that there exist these conditions, and that the public safety requires the suspension of the privilege of the writ of habeas corpus can the judicial department of the Government investigate the same facts and declare that no such conditions exist?

The act of Congress, above quoted, wisely provides for the investigation by two departments of the Government — the legislative and executive — of the existing conditions, and joint action by the two before the privilege of the writ of habeas corpus can be suspended in these Islands.

If the investigation and findings of the President, or the Governor-General with the approval of the Philippine Commission, are not conclusive and final as against the judicial department of the Government, then every officer whose duty it is to maintain order and protect the lives and property of the people may refuse to act, and apply to the judicial department of the Government for another investigation and conclusion concerning the same conditions, to the end that they may be protected against civil actions resulting from illegal acts.

Owing to conditions at times, a state of insurrection, rebellion, or invasion may arise suddenly and may jeopardize the very existence of the State. Suppose, for example, that one of the thickly populated Governments situated near this Archipelago, anxious to extend its power and territory, should suddenly decide to invade these Islands, and should, without warning, appear in one of the remote harbors with a powerful fleet and at once begin to land troops. The governor or military commander of the particular district or province notifies the Governor-General by telegraph of this landing of troops and that the people of the district are in collusion with such invasion. Might not the Governor-General and the Commission accept this telegram as sufficient evidence and proof of the facts communicated and at once take steps, even to the extent of suspending the privilege of the writ of habeas corpus, as might appear to them to be necessary to repel such invasion? It seems that all men interested in the maintenance and stability of the Government would answer this question in the affirmative.

But suppose someone, who has been arrested in the district upon the ground that his detention would assist in restoring order and in repelling the invasion, applies for the writ of habeas corpus, alleging that no invasion actually exists; may the judicial department of the Government call the officers actually engaged in the field before it and away from their posts of duty for the purpose of explaining and furnishing proof to it concerning the existence or non-existence of the facts proclaimed to exist by the legislative and executive branches of the State? If so, then the courts may effectually tie the hands of the executive, whose special duty it is to enforce the laws and maintain order, until the invaders have actually accomplished their purpose. The interpretation contended for here by the applicants, so pregnant with detrimental results, could not have been intended by the Congress of the United States when it enacted the law.

It is the duty of the legislative branch of the Government to make such laws and regulations as will effectually conserve peace and good order and protect the lives and property of the citizens of the State. It is the duty of the Governor-General to take such steps as he deems wise and necessary for the purpose of enforcing such laws. Every delay and hindrance and obstacle which prevents a strict enforcement of laws under the conditions mentioned necessarily tends to jeopardize public interests and the safety of the whole people. If the judicial department of the Government, or any officer in the Government, has a right to contest the orders of the President or of the Governor-General under the conditions above supposed, before complying with such orders, then the hands of the President or the Governor-General may be tied until the very object of the rebels or insurrectos or invaders has been accomplished. But it is urged that the President, or the Governor-General with the approval of the Philippine Commission, might be mistaken as to the actual conditions; that the legislative department — the Philippine Commission — might, by resolution, declare after investigation, that a state of rebellion, insurrection, or invasion exists, and that the public safety requires the suspension of the privilege of the writ of habeas corpus, when, as a matter of fact, no such conditions actually existed; that the President, or Governor-General acting upon the authority of the Philippine Commission, might by proclamation suspend the privilege of the writ of habeas corpus without there actually existing the conditions mentioned in the act of Congress. In other words, the applicants allege in their argument in support of their application for the writ of habeas corpus, that the legislative and executive branches of the Government might reach a wrong conclusion from their investigations of the actual conditions, or might, through a desire to oppress and harass the people, declare that a state of rebellion, insurrection, or invasion existed and that public safety required the suspension of the privilege of the writ of habeas corpus when actually and in fact no such conditions did exist. We can not assume that the legislative and executive branches will act or take any action based upon such motives.

Moreover it can not be assumed that the legislative and executive branches of the Government, with all the machinery which those branches have at their command for examining into the conditions in any part of the Archipelago, will fail to obtain all existing information concerning actual conditions. It is the duty of the executive branch of the Government to constantly inform the legislative branch of the Government of the condition of the Union as to the prevalence of peace or disorder. The executive branch of the Government, through its numerous branches of the civil and military, ramifies every portion of the Archipelago, and is

enabled thereby to obtain information from every quarter and corner of the State. Can the judicial department of the Government, with its very limited machinery for the purpose of investigating general conditions, be any more sure of ascertaining the true conditions throughout the Archipelago, or in any particular district, than the other branches of the Government? We think not." (At p. 91-96.)

* * *

"The same general question presented here was presented to the Supreme Court of the United States in the case of *Martin vs. Mott*, in January, 1821. An act of Congress of 1795 provided —

'That whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose to such officer or officers of the militia as he shall think proper.'

In this case (*Martin vs. Mott*) the question was presented to the court whether or not the President's action in calling out the militia was conclusive against the courts. The Supreme Court of the United States, in answering this question, said:

'The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without corresponding responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, By whom is the exigency to be adjudged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President and his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state and under circumstances which may be vital to the existence of the Union. . . . If a superior officer has a right to contest the orders of the President, upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier . . . Such a course would be subversive of all discipline and expose the best disposed officer to the chances of erroneous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state which the public interest and even safety might imperiously demand to be kept in concealment.

'Whenever the statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion, that such is the true construction of the act of 1795. It is no answer that such power may be abused, for there is no power which is not susceptible of abuse.' (*Martin vs. Mott*, 12 Wheat., 19 (25 U.S); *Vanderheyden vs. Young*, 11 Johns., N.Y., 150.)

Justice Joseph Story, for many years a member of the Supreme Court of the United States, in discussing the question who may suspend the privilege of the writ of habeas corpus, under the Constitution of the United States, said:

'It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion, insurrection, or invasion, that the right to judge whether the exigency has arisen must conclusively belong to that body.' (Story on the Constitution, 5th ed., sec. 1342.)

Justice James Ket, for many years a justice of the supreme court of the State of New York, in discussing the same question, cites the case of *Martin vs. Mott*, and says:

'In that case it was decided and settled by the Supreme Court of the United States that it belonged exclusively to the President to judge when the exigency arises in which he had authority, under the Constitution, to call forth the militia, and that his decision was conclusive upon all other persons.' (Kent's Commentaries, 14th ed., vol. 1, bottom p. 323.)

John Randolph Tucker, for many years a professor of constitutional and international law in Washington and Lee University, in discussing this question, said:

'By an act passed in 1795 Congress gave to the President power to call out the militia for certain purposes, and by subsequent acts, in 1807, power was given to him to be exercised whenever he should deem it necessary, for the purposes stated in the Constitution; and the Supreme Court (United States) has decided that this executive discretion in making the call (for State militia) could not be judicially questioned.' (Tucker on the Constitution, Vol. II, p. 581.)

John Norton Pomeroy, an eminent law writer upon constitutional questions said:

'In *Martin vs. Mott* it was decided that under the authority given to the President by the statute of 1795, calling forth the militia under certain circumstances, the power is exclusively vested in him to determine whether those circumstances exist; and when he has determined by issuing his call, no court can question his decision.' (Pomeroy's Constitutional Law, sec. 476.)

Henry Campbell Black, a well-known writer on the Constitution, says:

'By an early act of Congress it was provided that in case of an insurrection in any State against the government thereof it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive (when the legislature can not be convened), to call forth such a number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection. By this act the power of deciding whether the exigency has arisen upon which the Government of the United States is bound to interfere is given to the President.' (Black's Constitutional Law, p. 102.)

Judge Thomas M. Cooley, in discussing the right of the judicial department of the Government to interfere with the discretionary action of the other departments of the Government, in his work on constitutional law, said:

'Congress may confer upon the President the power to call them (the militia) forth, and this makes him the exclusive judge whether the exigency has arisen for the exercise of the authority and renders one who refuses to obey the call liable to punishment under military law.' (Cooley's Principles of Constitutional Law, p. 100.)

But it may be argued by those who contend for the contrary doctrine, to wit, that the acts of the Governor-General, with the approval of the Philippine Commission, are not conclusive upon the courts and that none of the foregoing citations are exactly in point, that none of these cases or authors treat of a case exactly like the one presented. We are fortunate, however, in being able to cite, in answer to that contention, the case of *Henry William Boyle*, where exactly the same question was presented to the supreme court of the State of Idaho, which the applicants present here and where the courts held the doctrine of the cases applied. In the case of *Boyle*, he had been arrested after the privilege of the writ of habeas corpus had been suspended. He

applied for a writ of habeas corpus to the supreme court of Idaho, alleging, among other things, in his application:

First. That 'no insurrection, riot, or rebellion now exists in Shoshone County;' and

Second. That 'the Governor has no authority to proclaim martial law or suspend the writ of habeas corpus.'

In reply to this contention on the part of the applicant, Boyle, the court said:

'Counsel have argued ably and ingeniously upon the question as to whether the authority to suspend the writ of habeas corpus rests with the legislative and executive powers of the Government, but, from our views of this case, that question cuts no figure. We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demand it, with the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it if issued. The statutes of this State (Idaho) make it the duty of the governor, whenever such a state or condition exists as the proclamation of the governor shows does exist in Shoshone County, to proclaim such locality in a state of insurrection and to call in the aid of the military of the State or of the Federal Government to suppress such insurrection and reestablish permanently the ascendancy of the law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negative and set at naught by the judiciary or that the action of the executive may be interfered with or impugned by the judiciary. If the courts are to be made a sanctuary, a seat of refuge whereunto malefactors may fall for protection from punishment justly due for the commission of crime they will soon cease to be that palladium of the rights of the citizen so ably described by counsel.

'On application for a writ of habeas corpus, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed. The action of the governor in declaring Shoshone County to be in state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put in force, to a limited extent, martial law in said county. Such action is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of government. In such case the Government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can assemble themselves and destroy property and kill and injure citizens, thus defeating the ends of government, and the Government is unable to take all lawful and necessary steps to restore law and maintain order, the State will then be impotent if not entirely destroyed, and anarchy placed in its stead.

'It having been demonstrated to the satisfaction of the governor, after some six or seven years of experience, that the execution of the laws in Shoshone County through the ordinary and established means and methods was rendered practicably impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law and insuring the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and it is not the province of the courts to interfere, delay, or place obstructions in the path of duty prescribed by law for the executive, but rather to render him all the aid and assistance in their power, in his efforts to bring about the consummation most devoutly prayed for by every good, law-abiding citizen in the State.' (In re Boyle, 45 L.R.A., 1899, 832.);)" (At pp. 99-104.)

These observations are followed on pages 104 to 115 by a compilation of decided cases centrally holding that "whenever the Constitution or a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, such person is to be considered the sole and exclusive judge of the existence of those facts." For the sake of brevity, We shall not quote the discussion anymore. We are confident there can be no

dissent insofar as the general proposition stated is concerned.

Notably, in the unanimous decision of this Court in *Montenegro*, these views are totally adopted in a very brief passage thus:

"B. In his second proposition appellant insists there is no state of invasion, insurrection, rebellion or imminent danger thereof. 'There are' he admits 'intermittent sorties and lightning attacks by organized bands in different places'; but, he argues, 'such sorties are occasional, localized and transitory. And the proclamation speaks no more than of overt acts of insurrection and rebellion, not of cases of invasion, insurrection or rebellion or imminent danger thereof.' On this subject is noted that the President concluded from the facts recited in the proclamation, and others connected therewith, that 'there is actual danger of rebellion which may extend throughout the country.' Such official declaration implying much more than imminent danger of rebellion amply justifies the suspension of the writ.

To the petitioner's unpracticed eye the repeated encounters between dissident elements and military troops may seem sporadic, isolated, or casual. But the officers charged with the Nation's security, analyzed the extent and pattern of such violent clashes and arrived at the conclusion that they are warp and woof of a general scheme to overthrow this government *vi et armis*, by force and arms.

And we agree with the Solicitor General that in the light of the views of the United States Supreme Court thru Marshall, Taney and Story quoted with approval in *Barcelon vs. Baker* (5 Phil., 87, pp. 98 and 100) the authority to decide whether the exigency has arisen requiring suspension belongs to the President and 'his decision is final and conclusive' upon the courts and upon all other persons.

Indeed as Justice Johnson said in that decision, whereas the Executive branch of the Government is enabled thru its civil and military branches to obtain information about peace and order from every quarter and corner of the nation, the judicial department, with its very limited machinery can not be in better position to ascertain or evaluate the conditions prevailing in the Archipelago." (At pp. 886-887.)

There are actually many more judicial precedents and opinions of knowledgeable and authoritative text writers, that can be copied here, maintaining with inexorable logic why the Executive is incomparably best equipped and prepared to cope with internal and external aggression and that, indeed, the protection of the country against such contingencies is his sole responsibility not supposed to be shared by the Judiciary. But the proposition appears to Us so plain and ineluctable that to summon all of them to Our assistance could only open Us to the suspicion that the Philippine Supreme Court has to depend on borrowed thinking to resolve the most critical issues between individual rights, on the one hand, and state power exerted as a matter of self-defense against rebellion and subversion imperiling the country's own survival, on the other. Empathically, We don't have to. Thank God We have enough native genius and indigenous means and resources to cope with the most delicate problems of statehood. Let others listen to and abide by the platitudinous and elegantly phrased dicta in *Milligan*, *supra*, *Duncan and White*,¹⁴ they who are in and of the wealthiest and mightiest power in the world, that only actual military combat and related operations can justify martial law, but We, who are in and of a small and weak developing nation, let us hearken and follow the home-spun advice of our barrio folks cautioning everyone thus:

"Kung ang bahay mo ay pawid at kawayan, pagdilim ng ulap at lumalakas na ang hangin, magsara ka na ng bintana at suhayan mo and iyong bahay." (When your house is made of nipa and bamboo, and you see the clouds darkening and the winds start blowing, it is time for you to close your windows and strengthen the support of your house.)

This could explain why under the Constitution, martial law can be declared not only in case of actual rebellion, but even only when there is imminent danger thereof. And that is why the open court rule established in *Milligan* and reiterated in *Duncan and White* is not controlling in this jurisdiction.

Besides, inasmuch as our people have included in the Constitution an express commitment of the power to the President, why do We have to resort to the pronouncements of other courts of other countries wherein said power is only implied? Regardless of what other courts believe their Executive may do in emergencies, our task is not to slavishly adopt what those courts have said, for there is no evidence that such was the intent of our constitutional fathers. Rather, We should determine for Ourselves what is best for our own circumstances in the Philippines, even if We have to give due consideration to the experience other peoples have gone through under more or less similar crises in the past.

In any event, regardless of their weight insofar as the suspension of the privilege of the writ of habeas corpus is concerned, We consider the reasons given in the above-quoted opinions in *Barcelon* and *Montenegro* of particular relevance when it comes to the imposition of martial law.

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It may be that the existence or non-existence or imminence of a rebellion of the magnitude that would justify the imposition of martial law is an objective fact capable of judicial notice, for a rebellion that is not of general knowledge to the public cannot conceivably be dangerous to public safety. But precisely because it is capable of judicial notice, no inquiry is needed to determine the propriety of the Executive's action.

Again, while the existence of a rebellion may be widely known, its real extent and the dangers it may actually pose to the public safety are not always easily perceptible to the unpracticed eye. In the present day practices of rebellion, its inseparable subversion aspect has proven to be more effective and important than "the rising (of persons) publicly and taking arms against the Government" by which the Revised Penal Code characterizes rebellion as a crime under its sanction (Art. 134, Revised Penal Code). Subversion is such a covert kind of anti-government activity that it is very difficult even for army intelligence to determine its exact area of influence and effect, not to mention the details of its forces and resources. By subversion, the rebels can extend their field of action unnoticed even up to the highest levels of the government, where no one can always be certain of the political complexion of the man next to him, and this does not exclude the courts. Arms, ammunitions and all kinds of war equipment travel and are transferred in deep secrecy to strategic locations, which can be one's neighborhood without him having any idea of what is going on. There are so many insidious ways in which subversives act, in fact too many to enumerate, but the point that immediately suggests itself is that they are mostly incapable of being proven in court, so how are We to make a judicial inquiry about them that can satisfy our judicial conscience?

The Constitution definitely commits it to the Executive to determine the factual bases and to forthwith act as promptly as possible to meet the emergencies of rebellion and invasion which may be crucial to the life of the nation. He must do this with unwavering conviction, or any hesitancy or indecision on his part will surely detract from the needed precision in his choice of the means he would employ to repel the aggression. The apprehension that his decision might be held by the Supreme Court to be a transgression of the fundamental law he has sworn to "defend and preserve" would deter him from acting when precisely it is most urgent and critical that he should act, since the enemy is about to strike the mortal blow. Different men can honestly and reasonably vary in assessing the evidentiary value of the same circumstance, and the prospect of being considered as a constitutional felon rather than a saviour of the country should the Justices disagree with him, would put the Executive in an unenviable predicament, certainly unwise and imprudent for any Constitution to contemplate he should be in. But what is worse is that the Court is not equipped in any way with the means to adequately appreciate the insidious practices of subversion, not to say that it cannot do it with more or at least equal accuracy as the Executive. Besides, the Court would then be acting already with considerable hindsight considerations which can imperceptibly influence its judgment in overriding the Executive's finding.

More than ever before, when rebellion was purely a surface action, and viewing the matter from all angles, it appears ineludible that the Court should refrain from interfering with the Executive's delicate decision. After all, the sacred rights of individuals enshrined in the Bill of Rights and the other constitutional processes ever valuable to the people, but which admittedly cannot, by the way, be more important than the very survival of the nation, are not necessarily swept away by a state of martial law, for, as already pointed out earlier, the validity of the Proclamation is one thing, the administration of the government under it is something else that has to be done with the closest adherence to the fundamental law that the obvious necessities of the situation will permit. As We see it, it is in this sense that the Constitution is the supreme law equally in times of peace and of war and for all classes of men, if We must refer again to petitioners' reliance on Milligan. At the same time, let us not overlook, in connection with this favorite authority of petitioners, that the Federal Supreme Court's postulation therein, that it was "happily proved by the result of the great effort to throw off (the) just authority" of the United States during the Civil War that the constitution of that country contains within itself all that is necessary for its preservation, is not factually accurate, for all the world knows that if the American Union survived the ordeal of possible disintegration and is the great nation that she is today, it was not because President Lincoln confined himself strictly to the powers vested in the presidency by the constitution, but because he was wise enough to resort to inherent extra constitutional state prerogatives, exercisable by the Executive alone, which President Marcos did not have to do, considering that our Constitution expressly confers upon him the authority to utilize such state power in defense of the nation.

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The historical development of the powers of the Philippine Executive unmistakably points to the same direction. Practically all the constitutions that came into being during the revolutionary period before the turn of the last century, of which the Malolos Constitution is typical, either entrusted executive power to a commission or made the Executive largely dependent on the legislature. When the Americans ended their military occupation, after subduing the Aguinaldo forces of independence, they had their own version of governmental powers. In the Philippine Bill of 1902, nothing was mentioned about martial law, and the power of the Governor General to suspend the privilege of the writ of habeas corpus was conditioned on, among other things, the concurrence of the Philippine Commission of which, notably, the Governor General was the head. When in 1905, the Governor General suspended the Privilege in the provinces of Cavite and Batangas, the case of *Barcelon vs. Baker*, supra, arose. Over the dissent of Justice Willard who invoked Milligan, the Supreme Court held that the proclamation ordering such suspension was not reviewable by the Judiciary.

With a little touch of irony, in 1916, when the United States Congress, with the avowed intent of granting greater political autonomy to the Philippines, enacted the Jones Law, it removed the need for legislative concurrence in regards to the suspension of the Privilege, because the legislature was to be in Filipino hands, and in addition to preserving such power of suspension, granted the Governor-General the sole authority to declare martial law, subject only to revocation by the President of the United States. Without forgetting that at that time, the Governor-General being then an American, those powers served as weapons of the colonizer to consolidate its hold on the subject people, such plenitude of power in the Executive was to appear later to the Filipino leaders as something that should be adopted in our fundamental law. So it was that in the Constitutional Convention of 1934, the first the Philippines ever held in peace time, the delegates, drawing heavily from the experience of the country during the autonomous period of the Jones Law, and perchance persuaded in no small measure by the personality of President Manuel L. Quezon, lost no time in adopting the concept of a strong executive. Their decision was studied and deliberate. Indeed, it is the unanimous observation of all students of our Constitution, that under it, we have in the Philippines the strongest executive in the world. Fully aware of this feature and appearing rather elated by the apparent success of the delegates to reconcile the possible evils of dictatorship with the need of an

executive who "will not only know how to govern, but will actually govern", President Claro M. Recto of the Convention remarked in his valedictory address adjourning the Assembly as follows:

"During the debate on the Executive Power it was the almost unanimous opinion that we had invested the Executive with rather extraordinary prerogatives. There is much truth in this assertion. But it is because we cannot be insensible to the events that are transpiring around us, events which, when all is said and done, are nothing but history repeating itself. In fact, we have seen how dictatorships, whether black or red, capitalistic or proletarian, fascistic or communistic, ancient or modern, have served as the last refuge of peoples when their parliaments fail and they are already powerless to save themselves from misgovernment and chaos. Learning our lesson from the truth of history, and determined to spare our people the evils of dictatorship and anarchy, we have thought it prudent to establish an executive power which, subject to the fiscalization of the Assembly, and of public opinion, will not only know how to govern, but will actually govern, with a firm and steady hand, unembarrassed by vexations, interferences by other departments, or by unholy alliances with this and that social group. Thus, possessed with the necessary gifts of honesty and competence, this Executive will be able to give his people an orderly and progressive government, without need of usurping or abdicating powers, and cunning subterfuges will not avail to extenuate his failures before the bar of public opinion." ("The Philippine Constitution — Sources, Making, Meaning, and Application" published by the Philippine Lawyers' Association, p. 540.)

Of particular relevance to the present discussion is the fact that when an attempt was made by a few delegates led by Delegate Salvador Araneta of Manila to subject the Executive's power to suspend the privilege of the writ of habeas corpus to concurrence or review by the National Assembly and the Supreme Court, the effort did not prosper, thereby strongly indicating, if it did not make it indubitably definite, that the intent of the framers of the fundamental law is that the Executive should be the sole judge of the circumstances warranting the exercise of the power thus granted. In any event, the only evidence of any thinking within the convention advocating the revocation of the *Barcelon* doctrine of which together with *Milligan*, they were or ought to have been aware, what with the best known lawyers in the Philippines in their midst, collapsed with the rejection of the Araneta proposal.

It was in the light of this historical development of the Executive Power that in 1951, the Supreme Court decided unanimously the case of *Montenegro vs. Castañeda*, *supra*, reiterating the doctrine of conclusiveness of the Executive's findings in the *Barcelon* case.

For all that it may be worthy of mention here, if only because practically the same Filipino minds, led by President Jose P. Laurel, were largely responsible for its formulation, the Constitution of the Second Philippine Republic born under aegis of the Japanese occupation of the Philippines during the Second World War, provided also for a strong executive. On this point, President Laurel himself had the following to say:

"The fundamental reason and necessity for the creation of a political center of gravity under the Republic is that, in any form of government — and this is especially true in an emergency, in a national crisis — there must be a man responsible for the security of the state, there must be a man with adequate powers, to face any given situation and meet the problems of the nation. There must be no shifting of responsibility; there must be no evasion of responsibility; and if a government is to be a real government and a scientific government there must be no two centers of gravity but one. (2 O.G. [J.M.A.], 873 [1943].)" (The Philippine Presidency by Irene R. Cortes, p. 14.)

The foregoing is a logical follow-up of what Laurel had said in the 1934 Convention thus:

"x x x A strong executive he is intended to be, because a strong executive we shall need, especially in the early years of our independent, or semi-independent existence. A weak executive is synonymous with a weak government. He shall not be a 'monarch' or a dictator in time of profound and Octavian peace, but he virtually so becomes in an extraordinary emergency; and whatever may be his position, he bulwarks, normally, the

fortifications of a strong constitutional government, but abnormally, in extreme cases, he is suddenly ushered in as a Minerva, full-grown and in full panoply of war, to occupy the vantage ground as the ready protector and defender of the life and honor of his nation." (Italics supplied.) (The Philippine Constitution, published by the Phil. Lawyers Association, Vol. I, 1969 Ed., p. 183.)

Thus, it is not surprising at all that without changing one word in the provision granting to the Executive the power to cope with the emergencies under discussion, the 1971 Convention fortified thru related provisions in the transitory portion of the Constitution the applicability of the Barcelon and Montenegro concepts of the Executive's power, as applied to the imposition of martial law, thereby weakening pro tanto as will be seen in the following pages, the impact of Our Lansang doctrine, for the purposes of the precise issue now before Us.

At this juncture, it may be pointed out that the power granted to the Executive to place the country or any part thereof under martial law is independent of the legislative grant to him of emergency powers authorized under the following provision of the 1935 Constitution:

"Sec. 26. In times of war or other national emergency, the Congress may by law authorize the President, for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy." (Art VI, sec. 26, 1935 Constitution.)

This provision is copied verbatim in the 1973 Charter except for the reference to the Prime Minister instead of to the President and the addition of the following sentence indicating more emphatically the temporary nature of the delegation:

"Unless sooner withdrawn by resolution of the National Assembly, such powers shall cease upon its next adjournment." (Section 15, Article VIII, 1973 Constitution of the Philippines.)

The point that immediately surges to the mind upon a reading of this provision is that in times of war or other national emergency it is definitely to the Executive that the people thru the fundamental law entrust the running of the government, either by delegation of the legislative power to him thru an express enactment of the Legislature to that effect or by direct authorization from the Constitution itself to utilize all the powers of government should he find it necessary to place the country or any part thereof under martial law. Additional evidence of such clear intent is the fact that in the course of the deliberations in the Constitutional Convention of 1934 of the proposal to incorporate the above provision in the charter, Delegate Wenceslao Vinzons of Camarines Norte moved to delete the same for fear that the concentration of powers in one man may facilitate the emergence of a dictatorship. He said in part:

"The power to promulgate rules and regulations in times of emergency or war is not recognized in any constitution except, perhaps, the Constitution of Denmark, which provides that in case of special urgency the King may, when the Reichstag is not in session, issue laws of temporary application. Such laws, however, shall not be contrary to the Constitution, and they shall be submitted to the Reichstag in its next session. So, even in a kingdom like Denmark, the powers of the King are limited in times of emergency.

"Under the Constitution we are drafting now, there is absolutely no limit except when the National Assembly specifies at the inception of the grant of power.

"I want to warn, Mr. President, of a future condition in our Republic when we shall no longer be under the tutelage of any foreign power, when we shall have to work for our own destiny. I want to say that I am not very positive in stating here that we shall have a dictatorship because the structure of the government that we are creating permits its establishment, but the power to promulgate rules and regulations will give rise to a strong man who may, in a desire to gratify his personal ambitions, seize the reins of government." (Page 391, Volume Five, The Philippine Constitution, Its Origins, Making, Meaning, and Application, a publication of the Philippine Lawyers Association, 1972.)

Despite such eloquent warning, the assembly voted down his motion.

It is now contended that instead of declaring martial law, President Marcos should have sought from Congress the approval of an emergency powers act similar to Commonwealth Acts 600 and 671 passed respectively on August 19, 1940, long before the Japanese invasion, and December 16, 1941, when the Nippon Army was already on its way to Manila from Lingayen and other landing points in the North.

To start with, Congress was not unaware of the worsening conditions of peace and order and of, at least, evident insurgency, what with the numerous easily verifiable reports of open rebellious activities in different parts of the country and the series of rallies and demonstrations, often bloody, in Manila itself and other centers of population, including those that reached not only the portals but even the session hall of the legislature, but the legislators seemed not to be sufficiently alarmed or they either were indifferent or did not know what to do under the circumstances. Instead of taking immediate measures to alleviate the conditions denounced and decried by the rebels and the activists, they debated and argued long on palliatives without coming out with anything substantial, much less satisfactory in the eyes of those who were seditiously shouting for reforms. In any event, in the face of the inability of Congress to meet the situation, and prompted by his appraisal of a critical situation that urgently called for immediate action, the only alternative open to the President was to resort to the other constitutional source of extraordinary powers, the Constitution itself.

It is significant to note that Commonwealth Act 671 granted the President practically all the powers of government. It provided as follows:

"Sec. 1. The existence of war between the United States and other countries of Europe and Asia, which involves the Philippines, makes it necessary to invest the President with extraordinary powers in order to meet the resulting emergency.

"Sec. 2. Pursuant to the provisions of Article VI, section 16, of the Constitution, the President is hereby authorized, during the existence of the emergency, to promulgate such rules and regulations as he may deem necessary to carry out the national policy declared in section 1 hereof. Accordingly, he is, among other things, empowered (a) to transfer the seat of the Government or any of its subdivisions, branches, departments, offices, agencies or instrumentalities; (b) to reorganize the Government of the Commonwealth including the determination of the order of precedence of the heads of the Executive Departments; (c) to create new subdivisions, branches, departments, offices, agencies or instrumentalities of government and to abolish any of those already existing; (d) to continue in force laws and appropriations which would lapse or otherwise become inoperative, and to modify or suspend the operation or application of those of an administrative character; (e) to impose new taxes or to increase, reduce, suspend, or abolish those in existence; (f) to raise funds through the issuance of bonds or otherwise, and authorize the expenditure of the proceeds thereof; (g) to authorize the National, provincial, city or municipal governments to incur in overdrafts for purposes that he may approve; (h) to declare the suspension of the collection of credits or the payment of debts; and (i) to exercise such other powers as he may deem necessary to enable the Government to fulfill its responsibilities and to maintain and enforce its authority.

"Sec. 3. The President of the Philippines shall as soon as practicable upon the convening of the Congress of the Philippines report thereto all the rules and regulations promulgated by him under the powers herein granted.

"Sec. 4. This act shall take effect upon its approval, and the rules and regulations promulgated hereunder shall be in force and effect until the Congress of the Philippines shall otherwise provide."

From this extensive grant of immense powers, it may be deduced that the difference between martial law and the delegation of legislative power could be just a matter of procedure in that the investment of authority in the former is by the Constitution while in the latter it is by the Legislature. The resulting constitutional situation is the

same in both — government by the Executive. It can be said that even the primacy of military assistance in the discharge of government responsibilities would be covered by the exercise of the delegated authority from Congress.

What is most important, however, is that the Constitution does not prohibit the declaration of martial law just because of the authority given to the Legislative to invest the Executive with extraordinary powers. It is not to be supposed that in the face of the inability or refusal of the Legislature to act, the people should be left helpless and without a government to cope with the emergency of an internal or external aggression. Much less is it logical to maintain that it is the Supreme Court that is called upon to decide what measures should be taken in the premises. Indeed, the fundamental law looks to the Executive to make the choice of the means not only to repel the aggression but, as a necessary consequence, to undertake such curative measures and reforms as are immediately available and feasible to prevent the recurrence of the causes of the emergency.

Petitioners are capitalizing on the pronouncements of this Court in *Lansang*. We feel, however, that such excessive reliance is not altogether well placed.

The exact import of the *Lansang* doctrine is that it is within the constitutional prerogative of the Supreme Court to inquire into the veracity of the factual bases recited by the Executive in a proclamation ordering the suspension of the privilege of the writ of habeas corpus, for the purpose of determining whether or not the Executive acted arbitrarily in concluding from the evidence before him that there was indeed a rebellion and that public necessity, as contemplated in the Constitution, required such suspension. In other words, We held therein that the issue of legality or illegality of a proclamation suspending the Privilege is a justiciable one, in regard to which the Court could make independent findings based on the evidence on which the President himself acted. Actually, however, no real hearing was held for the purpose in that case. What might perhaps be considered as such a hearing was what took place on October 28 and 29, 1971, when, because of the willingness expressed by the respondents therein to impart to the Court classified information relevant to the cases, subject to appropriate security measures, the Court met behind closed doors, and in the presence of three attorneys representing the petitioners therein and the Solicitor General, it was briefed by the Chief of Staff of the Armed Forces and other ranking military officials on said classified information, after which the parties were granted time to file their respective memoranda of observations on the matters revealed in the briefing, which they did. (See 42 SCRA, at pp. 466-467). In the present cases there has been no such hearing, not even a briefing wherein petitioners were represented. And it is gravely doubtful whether any move in that direction would prosper, considering there are not enough members of the Court, who believe in the juridical relevance thereof, to constitute the required majority for a binding action to order such a hearing or even just a similar briefing as before.

Be that as it may, the important point is that *Lansang* case referred to the extent of the powers of the Court in regard to a proclamation suspending the Privilege whereas what is before Us now is a proclamation imposing martial law. We hold that the powers of the Executive involved in the two proclamations are not of the same constitutional level and the prerogatives of the Court relative to habeas corpus are distinct from those in the perspective of martial law.

To start with, it is too evident to admit of dispute that the aforequoted constitutional provision touching on the three powers of the Executive, the calling of the armed forces, the suspension of the privilege and the imposition of martial law contemplates varying and ascending degrees of lawlessness and public disorder. While it is true that textually any of the three courses of action mentioned may be taken by the Executive on the occasion of an invasion, insurrection or rebellion, the degree of resulting repression of individual rights under each of them varies so substantially that it cannot be doubted that the constitution contemplates that the determination as to which of them should be taken should depend on the degree of gravity of the prevailing situation. In other words,

it is the actual magnitude of the rebellion to be suppressed and the degree and extent of danger to public safety resulting therefrom that determines whether it should be the first, the second or the third that should be taken, in order that there may be a direct proportion between the degree of gravity of the crisis and the restraint of individual rights and liberties. When the situation is not very serious but is nevertheless beyond the control of the regular peace authorities of the place affected, then the armed forces can be called. Should the conditions deteriorate in such a way as to involve a considerable segment of the population, thereby making it difficult to maintain order and to differentiate the loyal from the disloyal among the people, without detaining some of them, either preventively or for their delivery to the proper authorities after the emergency or as soon as it eases, then the privilege of the writ of habeas corpus may also be suspended. But the moment the situation assumes very serious proportions, to the extent that there is a breakdown of the regular government machinery either because the officials cannot physically function or their functioning would endanger public safety, martial law may be imposed. There is thus a marked gradation of the circumstances constituting rebellion and danger to public safety in the provision, and it is to be supposed that the measure to be adopted by the Executive should be that which the situation demands.

The calling of the armed forces is done by the Executive in his capacity as Commander-in-Chief. The power thus exercised is purely executive and does not cause any disturbance in the constitutional order in the government. In the case of suspension of the Privilege, individual rights guaranteed by the Bill of Rights are restrained, but otherwise the regular constitutional machinery and the powers and functions of the different officials of the government, including the courts, remain unaffected. Moreover, the suspension of the Privilege, although premised on the demand of public safety, need not be necessarily predicated on the requirements of national security as should be the case with martial law. Again, the power exercised in suspension is executive power and nothing more. But when martial law is proclaimed, there is, as already observed earlier, a surrogation of the regular government machinery by the constitutionally designated administrator with the aid of the military. What is exercised in this instance is not executive power alone but state power which involves the totality of government authority, but without an actual military takeover, if only because the civilian President remains at the head.

In this connection, it is very important to note that whereas the Bill of Rights explicitly prohibits the suspension of the Privilege of the writ of habeas corpus except under the detailed circumstances prescribed therein, including the limitations as to the time and place when and where it may stay suspended, there is no similar injunction in regard to the imposition of martial law. In other words, the grant of the power to declare martial law in the Executive portion of the Constitution is not countered, unlike in the case of habeas corpus, by a prohibition in the Bill of Rights, the sanctuary of individual liberties.

Invoking *Lansang*, petitioners argue that if an order of suspension of the Privilege which involves less repression of constitutional processes than martial law is reviewable by the courts, with more reason should the imposition of martial law, whose effect upon the constitutional rights and processes is more pervasive, be subject to a judicial test of constitutionality. Viewing it from the angle of individual rights, the argument sounds plausible, but when it is considered that the framers of the Bill of Rights never bothered to put the same or any similar brakes to the imposition of martial law as that which they placed in regard to suspension, it can be readily seen that because of the gravity of the crisis predating the extreme remedy of martial law, the constitution itself makes the invocation of individual rights subordinate to the national interest involved in the defense of the state against the internal aggression that confronts it. From this consideration, it follows that whatever standard of constitutionality was established by the Court in *Lansang* relative to Suspension is not necessarily the measure of the powers the Court can exercise over the Executive's proclamation of martial law. What the Constitution purposely and with good reason differentiates, the Court may not equate.

At any rate, We do not believe this is the proper occasion for the Court to alter or modify what We said in *Lansang*. All that We say here is that *Lansang* does not reach the martial law powers of the Executive, if only because that case involved exclusively the question of legality of the detention, during the Suspension, of some individuals, the petitioners therein, whereas here We are dealing with the deprivation of liberty of petitioners as a direct consequence of martial law, and in effect the real question before Us now is the legality of the martial law regime itself, which, as already demonstrated, occupies a different, level in the constitutional order of Executive power, specially when considered from the point of view of the Bill of Rights.

But even if We must refer to the considerations of the Court in formulating *Lansang*, We cannot disregard the impact of contemporary constitutional developments related thereto. The Constitutional Convention of 1971 had barely started its relevant deliberations when *Lansang* was decided. It is to be assumed that the delegates were well informed about its import. Indeed, they must have focused their attention thereto when martial law was proclaimed in September of 1972, if only because some of the delegates were apprehended and detained and had forthwith filed the petitions now pending before Us. The delegates knew or ought to have known that under the existing Constitution, the Bill of Rights made no mention of the possible imposition of martial law in the section prohibiting the suspension of the privilege of the writ of habeas corpus. Instead of seeing to it that in the charter they were drafting the prohibition as to habeas corpus should be extended to the declaration of martial law, in order to make the contingency thereof as difficult as in the case of the former, they evidently found more reason to concur in the construction pursued by President Marcos of the prerogatives which the Constitution empowers him to utilize during a rebellion or invasion. Accordingly, to erase further doubts on the matter, the Convention enacted the transitory provision earlier referred to making the Proclamation, among others, part of the law of the land, which provision, We deem, at this point, not as a fiat placing the Proclamation definitely beyond the pale of unconstitutionality, but as a contemporary authoritative construction of the current charter by the body precisely called to examine it carefully and determine its defects that should be corrected, to the end that the rights of the people may be best safeguarded. Verily, such construction is entitled to due respect from Us, particularly because it has been in effect, if not directly, approved by the people, not only in the referendum of January 10-15, 1973 assailed by petitioners but in the other one held by secret ballot on July 27-28, 1973 under the supervision of the Commission on Elections. And in the light of such construction, Our considered view is that *Lansang* is not controlling on the issues regarding martial law involved in these cases.

Perhaps, it may not be amiss to add here that although the records of the Constitutional Convention of 1934 do not reveal the actual reasons for the rejection of the amendment proposed by Delegate Vicente J. Francisco to include in the Bill of Rights provision regarding habeas corpus the reference made to imminent danger of invasion, insurrection or rebellion in the enumeration of the powers of the Executive relative to the same subject, it is quite possible that in the mind of the convention it was not absolutely necessary to suspend the Privilege when the danger is only imminent unless the element of public safety involved already requires the imposition of martial law. Relatedly, Delegate Araneta who as earlier mentioned, proposed to subject the suspension of the Privilege to legislative or judicial concurrence or review, and who appeared to be the most bothered, among the delegates, about the exertion of executive power during the emergencies contemplated, never said a word against the manner in which the Executive was being granted the authority to impose martial law, much less proposed any restriction upon it the way he did with the suspension of the Privilege. This goes to show that the feeling in the assembly was to regard martial law differently from the suspension and to recognize that its imposition should not be trammelled nor shackled by any provision of the Bill of Rights.

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There are insurmountable pragmatic obstacles to the theory of justiciability sustained by petitioners.

The most important of this is that there is no known or recognized procedure which can be adopted in the proposed inquiry into the factual bases of the Executive's proclamation to insure that the degree of judicious and fair hearing and determination of facts might be approximated. Admittedly, the ordinary rules of pleading, practice and evidence are out of the question. The relevant elemental facts are scattered throughout the length and breadth of the country, and there is no conceivable judicial camera that can catch the whole picture with adequate fidelity to the truth. Perhaps judicial notice can help, but the elements of public safety are not properly susceptible of judicial notice when it comes to covert subversive activities. The problems of demonstration are manifold, and when it is borne in mind that, in the very nature of things and under universally accepted norms of state protection, there is a wall, impenetrable even to the judiciary, behind which the state rightfully keeps away from other Departments matters affecting national security, one will realize the futility of believing that the Court can, assuming it were, by some curious way of reasoning, legally required to do so, properly perform its judicial attributes when it comes to determining in the face of an apparently nationwide rebellion, whether or not martial law should be proclaimed by the Executive, instead of resorting to the lesser remedies of calling the armed forces or suspending the Privilege. Besides, for the Court to be able to decide whether or not the action of the Executive is arbitrary, it must, in justice to both parties, and to him in particular, act in the light of the same evidence from which he drew his conclusion. How can such evidence be all gathered and presented to the Court?

Some members of the Court are of the firm conviction that it is Our constitutional duty to indulge in the suggested inquiry, so We can be assured in Our own conscience, and for the protection of the people, whether or not President Marcos has acted arbitrarily. But prescinding from the difficulties of demonstration just discussed, from what evidence is the Court going to draw its own conclusions in the cases at bar, when We have not even been told what evidence the President had before him, except those that may be inferred from the whereases of the Proclamation which are disputed by petitioners? On the other hand, how can We have all the evidence before Us, when in the very nature thereof We cannot have access to them, since they must be kept under the forbidding covers of national security regulations? Even the standing ordinary rules of evidence provide in this respect thus:

"SEC. 21. Privileged communication. —

xx xx xx xx xx xx

(e) A public officer cannot be examined during his term of office or afterwards, as to communications made to him in official confidence, when the court finds that the public interest would suffer by the disclosure." (Rule 130, Revised Rules of Court of the Philippines).

The inevitable conclusion is that the Constitution must have intended that the decision of the Executive should be his alone.

If We should hold that the matter before Us is justiciable, the practical result would be that even if the Court should now decide in the style of *Lansang* that the President did not act arbitrarily in issuing the Proclamation, We would have to be ready to entertain future petitions, one after the other, filed by whosoever may be minded to allege, for his own purpose, that conditions have so improved as to warrant the lifting of martial law. Accordingly, every now and then the Court would have to hear the parties and evaluate their respective evidence. The Government would have to appear and prove all over again the justifications for its action. The consequence would be that instead of devoting his time to the defense of the nation, the President would be preparing himself for the court battle. It is ridiculous to think that the members of the Constitutional Convention had conceived placing such difficulties in the way of the Executive which make of his function of defending the state a continuous running battle in two separate fronts, one with the enemy and another with the courts. It is suggested that the Court can summarily dismiss any such future petitions in cavalier fashion by simply holding on to the finding We would make in these cases. But new allegations and arguments are bound to be made, and it is

definitely improper for Us to just summarily uphold the Executive everytime a case comes up.

What is more absurd is that the Supreme Court is not the only court in which a petition to lift may be filed. Imagine if petitions were filed in two or three Courts of First Instance, what would happen? In this connection, We are in no position to enjoin the lower courts to entertain such petitions because they may refer to the proposed lifting of martial law only in the respective provinces where the courts are, and We cannot hold, precisely because of Our own characterization of the nature of the issue as justiciable, or more simply, that the Proclamation is subject to the review of factual bases by the court, that any of said courts is without jurisdiction to entertain the petition. Stated otherwise, every court would then be open to pass on the reasonability or arbitrariness of the President's refusal or failure to lift martial law. We do not mean to insinuate that the lower court judges may not be prepared for the purpose, but the spectacle alone of several of such petitions pending in various courts, without visualizing anymore the potentiality of one judge or another upholding the proponent, is something that will not only foreseeably complicate our international relations but will also detract from our image as a people trained in the field of government. All of these considerations suggest again that it is best that the Judiciary abstain from assuming a role not clearly indicated in the Constitution to pertain to it.

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THE SUPREME COURT ABSTAINS FROM REVIEWING PROCLAMATION 1081, BECAUSE, IN THE LIGHT OF THE CONSIDERATIONS HEREIN DISCUSSED, IT IS CONVINCED THAT THE CONSTITUTION CONTEMPLATES THAT THE DECLARATION OF MARTIAL LAW SHOULD BE THE RESPONSIBILITY SOLELY OF THE EXECUTIVE, BUT SHOULD ANY OCCASION OF OPEN DEFIANCE AND MANIFEST DISREGARD OF THE PERTINENT CONSTITUTIONAL PROVISION ARISE, THE COURT IS NOT POWERLESS TO "SUPPORT AND DEFEND" THE CONSTITUTION.

The greatest fear entertained by those who would sustain the Court's authority to review the action of the President is that there might be occasions when an Executive drunk with power might without rhyme or reason impose martial law upon the helpless people, using the very Constitution itself as his weapon of oppression to establish here a real dictatorship or totalitarian government. The view is that it is only the Supreme Court that can prevent such a dismal eventuality by holding that it has the final authority and inescapable duty to define the constitutional boundaries of the powers of the Executive and to determine in every case properly brought before it whether or not any such power has been abused beyond the limits set down by the fundamental law, and that unless We hold here that the Court can determine the constitutional sufficiency of Proclamation 1081 in fact and in law, the Filipino people would have no protection against such an abusive Executive.

We here declare emphatically that such apprehension is definitely unfounded. Precisely, in this decision, We are holding that the Court has the jurisdiction, the power and the authority to pass on any challenge to an Executive's declaration of martial law alleged in a proper case affecting private or individual rights to be unwarranted by the Constitution. In these cases, however, we do not see any need for the interposition of our authority. Instead what appears clear to Us, in the light of the considerations We have discussed above, and so We hold, is that the Solicitor General is eminently correct in contending that in the circumstantial and constitutional milieu of the impugned Proclamation, We should abstain from conducting the suggested inquiry to determine their constitutional sufficiency.

In the way We see the martial law provision of the Constitution, only two hypotheses can be considered relative to the Constitutional problem before Us. Either the Executive acts in conformity with the provision or he does not. In other words, either he imposes martial law because there is actually a rebellion endangering the public safety or he does it for his own personal desire to grab power, notwithstanding the absence of the factual grounds required

by the fundamental law. In the latter case, the Court would have the constitutional power and duty to declare the proclamation issued null and void. But to do this it does not have to conduct a judicial inquiry by the reception of evidence. It should be guided solely by facts that are of judicial notice. Thus, if the predicative recitals of the proclamation are confirmed by facts of general public knowledge, obviously any further inquiry would be superfluous. On the other hand, in the contrary hypothesis, that is, it is publicly and generally known that there is no rebellion of the nature and extent contemplated in the Constitution, no amount of evidence offered by the Executive can judicially create such a rebellion. Indeed, as observed elsewhere in this opinion, a rebellion that does not come to the judicial notice of the Court cannot warrant the imposition of martial law, particularly in reference to one imposed over the whole country. But once it is known to the Court by judicial notice that there is a rebellion, it would constitute an undue interference with the constitutional duties and prerogatives of the Executive for the Court to indulge in an inquiry as to the constitutional sufficiency of his decision. Whether or not public safety requires the drastic action of imposing martial law already involves the exercise of judgment, which as far as We can see is committed to the responsibility of the Executive as the protector and defender of the nation. Our considered view is that in such circumstances, the Constitution rather expects the Court to defer to his decision. Under this concept of the powers of the Court relative to the exercise by the Executive of his martial law prerogatives, the Court does not relinquish its authority as guardian of the Constitution and the Executive, guided solely by his own sense of responsibility under his solemn oath "to defend and preserve" the Constitution, can proceed with his task of saving the integrity of the government and the nation, without any fear that the Court would reverse his judgment.

To be sure, it could have sufficed for Us to point out, in answer to the contention about possible abuse, that it is axiomatic in constitutional law that the possibility that an official might abuse the powers conferred upon him by law or by the Charter does not mean that the power does not exist or should not be granted. This Court affirmed this principle not only in *Barcelon vs. Baker*, quoted *supra*, which was the precursor perhaps of the extreme of judicial self-restraint or abstention in this jurisdiction but even in *Angara vs. Electoral Commission*, 63 Phil. 139, reputedly the vanguard of judicial activism in the Philippines. Justice Laurel postulated reassuringly on this point in *Angara* thus: "The possibility of abuse is not an argument against the concession of power as there is no power that is not susceptible of abuse" (at p. 177). And We could have complemented this ratiocination with the observation that it is most unlikely that the Filipino people would be penalized by Divine Providence with the imposition upon them of an Executive with the frightening characteristics ominously portrayed by those who advocate that the Court, assuming its own immunity from being abusive, arbitrary or improvident, should not recognize any constitutionally envisioned deference to the other Departments of the Government, particularly the Executive.

We can feel, however, that the people need further reassurance. On this score, it is opportune to recall that in *Avelino vs. Cuenco*, 83 Phil. 68, in spite of the fact that in the Resolution of March 4, 1949, this Court refused to intervene in the controversy between the parties as to whether or not there was a valid election of a new President of the Senate, upon the ground that the issue involved was purely political, in the subsequent Resolution of March 14, 1949, upon realizing that a critical situation, detrimental to the national interest, subsisted as a consequence of its abstention, the Court reversed itself and assumed the power to state categorically the correct solution to the conflict based on its interpretation of the pertinent provisions of the Constitution.

Again, in January, 1962, in the space of several hours, 350 appointments to different positions in the government, including Justices of the Supreme Court and of the Court of Appeals and judges of the lower courts, fiscals, officers of the Army, directors of bureaus, Governor of the Central Bank, and others were sent by the President then to the Commission on Appointments on December 29, 1961, the day preceding his last half-day in office, December 30, 1961. Upon the said appointments being impugned in the Supreme Court, the Court, aghast by the

number of and the speed in the making of said appointments, the fact that they were made under circumstances that betrayed not only lack of proper and deliberate consideration of the qualifications of the appointees but also an evident intent to deprive the succeeding President from filling the vacancies that had been left vacant even after the results showing the defeat of the incumbent President had already been publicly known and conceded, the departure from long established practices in their preparation as well as the other undesirable circumstances that surrounded the same, promptly struck them down as the product of an improvident exercise of power, obnoxious to the precepts underlying the principled government conceived in the Constitution.¹⁵ The violation of the spirit and intent of the Constitution appeared manifest to the Court on the basis of facts which were mainly if not all of judicial notice and, therefore, needed no further demonstration in an inquiry or investigation by the Court. Under more or less a similar setting of circumstances, which occurred in the latter part of the term of the President whose tenure expired on December 30, 1965, the Supreme Court reiterated the above ruling in *Guevara vs. Inocentes*, ¹⁶ SCRA 379.

Thus everyone can see that when situations arise which on their faces and without the need of inquiry or investigation reveal an unquestionable and palpable transgression of the Constitution, the Supreme Court has never been without means to uphold the Constitution, the policy of judicial self-restraint implicit therein notwithstanding. The precedents just related relate to peaceful controversies, and, of course, the alleged violation of the Constitution by the Executive in the exercise of a power granted to him to meet the exigencies of rebellion and the dangers to public safety it entails has to be considered from a different perspective. Even then, the Supreme Court would not be powerless to act. Until all of its members are incarcerated or killed and there are not enough of them to constitute a quorum, the Court would always be there ready to strike down a proclamation of martial law as unconstitutional, whenever from the facts manifest and generally known to the people and to it, and without its having conducted any inquiry by the reception of evidence, it should appear that the declaration is made without any rational basis whatsoever and is predicated only on the distorted motives of the Executive. For as long, however, as the recitals or grounds given in a proclamation accord substantially with facts of judicial notice, either because they are of public knowledge or are by their nature capable of unquestionable demonstration, We have no reason to interfere with the discharge by the Executive of a responsibility imposed upon him by the Constitution and in which there is no indication therein that the Court should share. But when, as just stated, it is generally known or it is of public knowledge that there is no rebellion or, there being one, that it poses no conceivable danger to the public safety, and, God forbid, martial law is proclaimed, the Court, even without the need of any kind of judicial inquiry into the facts alleged in the proclamation, will certainly act and declare the pretentious Executive a constitutional outlaw, with the result that the regular government established by the Constitution may continue in the hands of those who are constitutionally called upon to succeed him, unless he overcomes the legitimate government by force. In truth, such is the only way the Supreme Court should act in discharging its duty to uphold the Constitution by the use of the judicial power, if it is to give to the Executive or the Legislature, as the case may be, the due regard that the Constitution contemplates should be accorded to them in consideration of their own functions and responsibilities implicit in the principle of separation of powers embodied therein.

II

THE CONSTITUTION IS MERELY IN A STATE OF ANAESTHESIA, SINCE A MAJOR SURGERY IS NEEDED TO SAVE THE NATION'S LIFE.

The foregoing discussion covers, as must have been noted, the resolution not only of the issue of jurisdiction raised by the respondents but also of the corollary question of the application of the *Lansang* doctrine. Not only that, from what has been said, it is obvious that since it is to the President that the Constitution has committed the

discretion to impose martial law, it follows that he alone should have the discretion and the prerogative to declare when it should cease or be lifted. Exactly the same considerations compelling the conclusion that the Court may not review the constitutional sufficiency of his proclamation of martial law make it ineludible to conclude that the people have also left it to the Executive to decide when conditions would permit the full restoration of the regular constitutional processes. With characteristic perceptive insight, in his thesis to be cited *infra*, Justice Guillermo S. Santos of the Court of Appeals, discourses on this point as follows:

"44. When Martial Rule is Terminated -

In both England and the United States martial rule terminates ipso facto upon the cessation of the public emergency that called it forth. To this proposition there has been no dissent. Martial rule must cease when the public safety no longer require its further exercise.

"45. Who Terminates Martial Rule -

Since the declaration of martial rule has been committed to the judgment of the President, it follows that its termination is to be fixed by the same authority. (*Barcelon vs. Baker*, 1905, 5 Phil. 87.) Again, to this view there cannot be any valid objection. It would seem only natural that since the President has been expressly authorized to declare martial rule no other authority should be permitted to terminate it." (*Martial Law, Nature, Principles and Administration* by Guillermo S. Santos, p. 75.)

Needless to say, it is our Constitution that controls in the cases at bar, not the American theory. In fact, when President Laurel proclaimed martial law during the Second World War, he expressly provided, to avoid any doubt about the matter, thus:

"8. The proclamation of martial law being an emergency measure demanded by imperative necessity, it shall continue as long as the need for it exists and shall terminate upon proclamation of the President of the Republic of the Philippines."

In the interest of truth and to set Our perspective aright, it may not be said that under Proclamation 1081 and the manner in which it has implemented, there has been a total suspension, much less an abrogation of the Constitution. Even textually, the ensuing orders issued by the President have left virtually unaltered the established constitutional order in all levels of government and society except those that have to be adjusted and subjected to potential changes demanded by the necessities of the situation and the attainment of the objectives of the declaration. Repeatedly and emphatically, the President has solemnly reassured the people that there is no military takeover and that the declared principle in the Constitution that "Civilian authority is at all times supreme over the military" (Section 8, Article II, 1973 Charter) shall be rigorously observed. And earlier in this opinion, We have already discussed how he restored the security of tenure of the members of the Court and how the judicial power has been retained by the courts, except in those cases involving matters affecting national security and public order and safety which the situation demands should be dealt with by the executive arms of the government.

When President Lincoln proclaimed martial law in Kentucky in 1864, he did not completely overhaul the existing machinery, he let it continue insofar as it did not obstruct the military operations and related activities. He ordered thus:

"Whereas many citizens of the State of Kentucky have joined the forces of the insurgents, and such insurgents have, on several occasions, entered the said State of Kentucky in large force, and, not without aid and comfort furnished by disaffected and disloyal citizens of the United States residing therein, have not only disturbed the public peace, but have overborne the civil authorities and made flagrant civil war, destroying property and life in various parts of the State: And whereas it has been made known to the President of the United States by the

officers commanding the national armies, that combinations have been formed in the said State of Kentucky with a purpose of inciting rebel forces to renew the said operations of civil war within the said State, and thereby to embarrass the United States armies now operating in the said States of Virginia and Georgia, and even to endanger their safety: x x "The martial law herein proclaimed, and the things in that respect herein ordered, will not be deemed or taken to interfere with the holding of lawful elections, or with the proceedings of the constitutional legislature of Kentucky, or with the administration of justice in the courts of law existing therein between citizens of the United States in suits or proceedings which do not affect the military operations or the constituted authorities of the government of the United States." (Martial Law, Nature, Principles and Administration by Guillermo S. Santos, pp. 97-98.)

Incidentally, there is here a clear repudiation of the open court theory, and what is more, even the holding of regular elections and legislative sessions were not suppressed.¹⁶ Accordingly, the undeniable fact that the Philippine Congress was in session, albeit about to adjourn, when martial law was declared on September 21, 1972 is not necessarily an argument against the exercise by the President of the power to make such a declaration.

President Laurel's own declaration of martial law during the Japanese occupation did not involve a total blackout of constitutional government. It reads in its pertinent portions thus:

"x x x

"4. All existing laws shall continue in force and effect until amended or repealed by the President, and all the existing civil agencies of an executive character shall continue exercising their powers and performing their functions and duties, unless they are inconsistent with the terms of this Proclamation or incompatible with the expeditious and effective enforcement of martial law herein declared.

"5. It shall be the duty of the Military Governors to suppress treason, sedition, disorder and violence; and to cause to be punished all disturbances of public peace and all offenders against the criminal laws; and also to protect persons in their legitimate rights. To this end and until otherwise decreed, the existing courts of justice shall assume jurisdiction and try offenders without unnecessary delay and in a summary manner, in accordance with such procedural rules as may be prescribed by the Minister of Justice. The decisions of courts of justice of the different categories in criminal cases within their original jurisdiction shall be final and unappealable: Provided, however, That no sentence of death shall be carried into effect without the approval of the President.

"6. The existing courts of justice shall continue to be invested with, and shall exercise, the same jurisdiction in civil actions and special proceedings as are now provided in existing laws, unless otherwise directed by the President of the Republic of the Philippines."

Proclamation 1081 is in no sense any more constitutionally offensive. In fact, in ordering detention of persons, the Proclamation pointedly limits arrests and detention only to those "presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the laws of nations, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction."

Indeed, even in the affected areas, the Constitution has not been really suspended much less discarded. As contemplated in the fundamental law itself, it is merely in a state of anaesthesia, to the end that the much needed major surgery to save the nation's life may be successfully undertaken.

III

THE IMPOSITION OF MARTIAL LAW AUTOMATICALLY CARRIES WITH IT THE SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS. IN ANY EVENT, THE PRESIDENTIAL ORDER OF ARREST AND DETENTION CANNOT BE ASSAILED AS DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS.

The next issue to consider is that which refers to the arrest and continued detention and other restraints of the liberties of petitioners, and their main contention in this respect is that the proclamation of martial law does not carry with it the suspension of the privilege of the writ of habeas corpus, hence petitioners are entitled to immediate release from their constraints.

We do not believe such contention needs extended exposition or elaboration in order to be overruled. The primary and fundamental purpose of martial law is to maintain order and to insure the success of the battle against the enemy by the most expeditious and efficient means without loss of time and with the minimum of effort. This is self-evident. The arrest and detention of those contributing to the disorder and especially of those helping or otherwise giving aid and comfort to the enemy are indispensable, if martial law is to mean anything at all. This is but logical. To fight the enemy, to maintain order amidst riotous chaos and military operations, and to see to it that the ordinary constitutional processes for the prosecution of law-breakers are three functions that cannot humanly be undertaken at the same time by the same authorities with any fair hope of success in any of them. To quote from Malcolm and Laurel, "Martial law and the privilege of that writ (of habeas corpus) are wholly incompatible with each other." (Malcolm and Laurel, Philippine Constitutional Law, p. 210). It simply is not too much for the state to expect the people to tolerate or suffer inconveniences and deprivations in the national interest, principally the security and integrity of the country.

Mere suspension of the Privilege may be ordered, as discussed earlier, when the situation has not reached very critical proportions imperilling the very existence of the nation, as long as public safety demands it. It is, therefore, absurd to contend, that when martial law, which is precisely the ultimate remedy against the gravest emergencies of internal or external aggression, is proclaimed, there is no suspension of the Privilege unless this is separately and distinctly ordered. Considering that both powers spring from the same basic causes, it stands to reason that the graver sanction includes the lesser. It is claimed that President Laurel treated the two matters separately in his aforequoted proclamation. We do not believe that the precedent cited controls. It only proves that to avoid any doubt, what President Laurel did may be adopted. There can be no denying the point that without suspension of the Privilege, martial law would certainly be ineffective. Since martial law involves the totality of government authority, it may be assumed that by ordering the arrest and detention of petitioners and the other persons mentioned in the Proclamation, until ordered released by him, the President has by the tenor of such order virtually suspended the Privilege. Relatedly, as pointed out by the Solicitor General, no less than petitioner Diokno himself postulated in a lecture at the U.P. Law Center that:

"There are only, as far as I know, two instances where persons may be detained without warrant but with due process. The first is in cases of martial law or when the writ of habeas corpus is suspended. In those cases, it is not that their detention is legal, it is that we cannot inquire into the legality of their detention. Because martial law means actually the suspension of law and the substitution of the will of our Congress. The second instance is that which is provided for in Rule 113, section 6 of the Rules of Court and Section 37 of the Revised Charter of the City of Manila. Essentially it consists of cases where the crime is committed right in the presence of the person who is making the arrest or detention." (Trial Problems in City & Municipal Courts, 1970 p. 267, U.P. Law Center Judicial Conference Series.)

In his well documented and very carefully prepared and comprehensive thesis on Martial Law, Nature, Principles

and Administration, Published by Central Lawbook Publishing Co. Inc. in 1972, Justice Guillermo S. Santos of the Court of Appeals and formerly of the Judge Advocate General's Service, Armed Forces of the Philippines, makes these pointed observations:

"Whether the existence of martial law and the suspension of the privilege of the writ of habeas corpus 'are one and the same thing', or 'the former includes the latter and much more,' had been the subject of 'an angry war of pamphlets between Professors Parsons and Parker of the Harvard Law School at the outbreak of the Civil War.' (Fairman, p. 43; Wiener, p. 9.) It has also been a difficult question to decide in some jurisdictions whether the suspension of the privilege of the writ amounted to a declaration of martial law. (Winthrop, pp. 820 & 828, citing *Ex parte Field*, 9 Am. L.R. 507; *Bouvier's Law Dictionary*, 3rd Francis Rawls Ed., 1914, p. 2105, citing 1 Halleck, Int. Law 549.)

"In the face of the constitutional provisions (Art. III, Sec. 1, Clause [14] and fn 9, supra.) in our jurisdiction, there seems to be no room for doubt that the two are different. While the grounds for the suspension of the privilege of the writ and the proclamation of martial law are the same, there can be no question that suspension of the writ means what it says, that during the suspension of the privilege, the writ, if issued, will be to no avail; but martial law has more than just this effect. The only question which apparently remains to be determined herein, is, whether the declaration of martial law ipso facto carries with it the suspension of the privilege of the writ, or whether a declaration of martial law must necessarily include a declaration suspending the privilege of the writ in order to consider the same inoperative. But it appears that the former is the better view, (Malcolm and Laurel, *Philippine Constitutional Law*, p. 310) although in United States it has been held that qualified martial rule may exist where the writ has, in legal contemplation, not been suspended, (Fairman, p. 44) and that the status of martial law does not of itself suspend the writ. (Military Law (Domestic Disturbances), Basic Field Manual, War Department, [US] fn. 19 & 15, p. 17 [1945].)" (See pp. 41-42.)

Of course, We are not bound by the rule in other jurisdictions.

Former Dean Vicente G. Sinco of the College of Law of the University of the Philippines, of which he became later on President, a noted authority on constitutional law from whom many of us have learned the subject, likewise sustains the view that the proclamation of martial law automatically suspends the privilege of the writ of habeas corpus. (V. Sinco, *Phil. Political Law*, p. 259, 11th Ed., 1962)

Now, as to the constitutional propriety of detaining persons on suspicion of conspiracy with the enemy without the need of the regular judicial process, We have also the authoritative support of no less than what a distinguished member of this Court, considered as one of the best informed in American constitutional law, Mr. Justice Enrique Fernando, and the principal counsel of petitioners, former Senator Tañada, himself an authority, on the subject, had to say on the point in their joint authorship, used as textbook in many law schools, entitled *Constitution of the Philippines*, to wit:

"Once martial law has been declared, arrest may be necessary not so much for punishment but by way of precaution to stop disorder. As long as such arrests are made in good faith and in the honest belief they are needed to maintain order, the President as Commander-in-Chief, cannot thereafter, when he is out of office, be subjected to an action on the ground that he had no reasonable ground for his belief. When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." (Emphasis supplied. (*Constitution of the Philippines* by Tañada & Fernando, Vol. 2. pp. 523-525.)

The authority cited by Justice Fernando and Senator Tañada says:

"The plaintiff's position, stated in a few words, is that the action of the governor, sanctioned to the extent that it was by the decision of the Supreme Court, was the action of the state and therefore within the 14th

Amendment; but that, if that action was unconstitutional, the governor got no protection from personal liability for his unconstitutional interference with the plaintiffs rights. It is admitted, as it must be, that the governor's declaration that a state of insurrection existed is conclusive of that fact. It seems to be admitted also that the arrest alone would not necessarily have given a right to bring this suit. *Luther vs. Borden*, 7 How. 1, 45, 46, 12 L. ed. 581, 600, 601. But it is said that a detention for so many days, alleged to be without probable cause, at a time when the courts were open, without an attempt to bring the plaintiff before them, makes a case on which he has a right to have a jury pass.

"We shall not consider all of the questions that the facts suggest, but shall confine ourselves to stating what we regard as a sufficient answer to the complaint, without implying that there are not others equally good. Of course, the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus, summary proceedings suffice for taxes, and executive decisions for exclusion from the country. *Den ex dem. Murray vs. Hoboken Land & Improve. Co.* 18 How. 272, 15 L. ed. 372; *United States vs. Ju Toy*, 198 U.S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644. What, then, are the circumstances of this case? By agreement the record of the proceedings upon habeas corpus was made part of the complaint, but that did not make the averments of the petition for the writ averments of the complaint. The facts that we are to assume are that a state of insurrection existed and that the governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought that he safely could release him.

"It would seem to be admitted by the plaintiff that he was president of the Western Federation of Miners, and that, whoever was to blame, trouble was apprehended with the members of that organization. We mention these facts not as material, but simply to put in more definite form the nature of the occasion on which the governor felt called upon to act. In such a situation we must assume that he had a right, under the state Constitution and laws, to call out troops, as was held by the supreme court of the state. The Constitution is supplemented by an act providing that 'when an invasion of or insurrection in the state is made or threatened, the governor shall order the national guard to repel or suppress the same. *Laws of 1897, chap. 83, art. 7, & 2, p. 204.* That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the 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 not reasonable ground for his belief. If we suppose a governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end.

No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But, even in that case, great weight is given to his determination, and the matter is to be judged on the facts as they appeared then, and not merely in the light of the event. *Lawrence vs. Minturn*, 17 How. 100, 110, 15 L. ed. 58, 62; *The Star of Hope*, 9 Wall, 203, 19 L. ed. 638; *The Germanic (Oceanic Steam Nay. Co. vs. Aitken)* 196 U.S. 589, 594, 595, 49 L. Ed. 610, 613, 25 Sup. Ct. Rep. 317.) When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See *Keely vs. Sanders*, 99 U.S. 441, 446, 25 L. ed. 327, 328." (*Moyer vs. Peabody*, 212 U.S. 416, 417).

Relatedly, in the decision of the Supreme Court of Colorado dealing with the same detention of Charles II Moyer by order of the state governor, it was held:

"By the reply it is alleged that, notwithstanding the proclamation and determination of the Governor that a state of insurrection existed in the country of San Miguel, that as a matter of fact these conditions did not exist at the time of such proclamation or the arrest of the petitioner, or at any other time. By S 5, art. 4, of our Constitution, the governor is the commander in chief of the military forces of the state, except when they are called into actual service of the United States; and he is thereby empowered to call out the militia to suppress insurrection. It must therefore become his duty to determine as a fact when conditions exist in a given locality which demand that, in the discharge of his duties as chief executive of the state, he shall employ the militia to suppress. This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment, but the judgment of another coordinate branch of the state government . . .

". . . If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished. The power and authority of the militia in such circumstances are not unlike that of the police of a city, or the sheriff of a county, aided by his deputies or posse comitatus in suppressing a riot. Certainly such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them there until the riot was suppressed. Hallett, J., in *Re Application of Sherman Parker* (no opinion for publication). If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail, and left free to again join the rioters or engage in aiding and abetting their action, and, if again arrested, the same process would have to be repeated, and thus the action of the military would be rendered a nullity. Again, if it be conceded that, on the arrest of a rioter by the military, he must at once be turned over to the custody of the civil officers of the county, then the military, in seizing armed insurrectionists and depriving them of their arms, would be required to forthwith return them to the hands of those who were employing them in acts of violence; or be subject to an action of replevin for their recovery, whereby immediate possession of such arms would be obtained by the rioters, who would thus again be equipped to continue their lawless conduct. To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of the law, nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of authority conferred by law, is endeavoring to suppress. When this end is reached, he could no longer be restrained of his liberty by the military, but must be, just as respondents have indicated in their return to the writ, turned over to the usual civil authorities of the county, to be dealt with in the ordinary course of justice, and tried for such offenses against the law as he may have committed. It is true that petitioner is not held by virtue of any warrant, but if his arrest and detention are authorized by law, he cannot complain because those steps have not been taken which are ordinarily required before a citizen can be arrested and detained.

"...The same power which determines the existence of an insurrection must also decide when the insurrection has been suppressed." (Emphasis added.) (*Re Moyer*, 35 Colo. 159, 85 Pac. 190 [1904].)

It is evident, therefore, that regardless of whether or not the privilege of the writ of habeas corpus is expressly suspended during martial law, arrest, detention and other restraints of liberty of individuals may not be assailed as violative of the due process clause. The Presidential orders to such effect constitute substantive and procedural

due process at the same time and may therefore be invoked as valid defenses against any remedy or prayer for release. Given the validity of the declaration of martial law, the sole tests of legality of constraints otherwise frowned upon in normal times by the fundamental law are substantial relevance and reasonableness. In the very nature of things, and absent any obvious showing of palpable bad faith, the Executive should enjoy respectful deference in the determination of his grounds. As a rule, the Courts are not supposed to make any inquiry into the matter.

We accordingly hold that, as well demonstrated by the Solicitor General, a proclamation of martial law automatically results in the suspension of the privilege of the writ of habeas corpus and, therefore, the arrest, detention and restraints upon petitioners are authorized by the Constitution. In any event, the Presidential order of arrest and detention constitute due process and is, therefore, a valid defense to any allegation of illegality of the constraints upon petitioners. We further hold that the duration of such constraints may be co-extensive with martial law unless otherwise ordered by the Executive.

IV

THE EFFECT OF THE APPROVAL AND RATIFICATION OF THE NEW CONSTITUTION ON THE INSTANT PETITIONS

All that remains now for resolution is the question of what effect did the approval and ratification of the New Constitution have upon the instant petitions?

When petitioners came to this Court in September and October 1972 to impugn the legality of their arrest and detention by virtue of Proclamation 1081 and General Order No. 2, their common fundamental theory was that said proclamation and order were violative of the Constitution of the Philippines of 1935, not only because, according to them, there was no justification for its placing the country under martial law but also because, even assuming its propriety, there was allegedly no legal basis for the apprehension and detention of petitioners without any warrant of arrest and without even any charges being filed against them. Thus, in his return of the writ of habeas corpus issued by the Court, as well as in his oral argument at the hearings, the Solicitor General limited himself to barely invoking the provision of the said Constitution empowering the President to proclaim martial law, even as he denied the allegation that there was no factual basis therefor, and simply contended that the arrest and detention of petitioners were made pursuant to orders validly issued under the powers of the President flowing from the proclamation.

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As already noted, however, even before these cases could be submitted for decision, on November 30, 1972, the Constitutional Convention of 1971 approved a draft constitution designed to supersede the Constitution of 1935 and on January 17, 1973, thru Proclamation 1102, the President declared that draft constitution to have been ratified by the people in the referendum of January 10-15, 1973, and, as also stated earlier, said proclamation became the subject of two series of cases in this Court which ultimately ended with the decision of March 31, 1973 adjudging that "there is no further judicial obstacle to the New Constitution being considered in force and effect." And among the salient and pertinent provisions of the New Constitution or the Constitution of 1973 as the new charter may distinctively be referred to, is that of Section 3 (2) of Article XVII textually reproduced earlier above.

In view of the comprehensive or all-inclusive tenor of the constitutional injunction contained in said provision, referring as it does to "all proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President", there can be no doubt that Proclamation 1081 and General Order No. 2, herein assailed

by petitioners, are among those enjoined to be "part of the law of the land." The question that arises then is, did their having been made part of the law of the land by no less than an express mandate of the fundamental law preclude further controversy as to their validity and efficacy?

In pondering over this question, it is important to bear in mind the circumstances that attended the framing and final approval of the draft constitution by the Convention. As already noted, two actuations of the President of indubitable transcendental import overtook the deliberation of the constituent assembly, namely, the issuance by him of Proclamation 1081 placing the Philippines under martial law and his exercise, under said proclamation, of non-executive powers, inclusive of general legislative authority. As to be expected in a country, like the Philippines, long accustomed to strict constitutionalism and the superiority of civilian authority over the military, soon enough, these two actuations spawned constitutional controversies of serious dimensions, so much so that several cases involving them, including the instant ones, are now pending in the Supreme Court. Surely, the members of the Convention were well aware of these developments. In other words, the delegates in convention assembled were living witnesses of the manner in which, for the first time in our constitutional history, the martial law clause of the charter was being actually implemented and they knew the grave constitutional issues such implementation had provoked.

Indeed, no constituent assembly could have been better circumstanced to formulate the fundamental law of the land. The Convention had a full and first-hand view of the controversial operation of the most important part of the charter it was called to improve upon — its martial law clause. Verily, no other aspect of the constitution could have commanded more the most serious attention of the delegates. They knew or ought to have known that the placing of the country or any part thereof under martial law could possibly affect the continued operation therein of the constitution or at least, the enforceability of particular provisions thereof. Therefore, if the Convention felt that what was being done by the President as witnessed by them was not within the contemplation of the existing fundamental law or that it was inconsistent with the underlying principles of democracy and constitutionalism to which the nation has been irrevocably committed since its birth and which were to remain as the foundations of the new charter, the delegates would have considered it to be their bounden duty to our people and to the future generations of Filipinos, to manifest their conviction by providing appropriate safeguards against any repetition thereof in the constitution they were drafting. And so, when it is considered that as finally approved, the New Constitution reproduces in exactly the same terms or verbatim the martial law clause of the 1935 charter, the ineludible conclusion is that our new constitutional fathers did not see anything repugnant to the concept of the old constitution in what the President has done or was doing. As We see it, this attitude of the Convention constitutes an authoritative contemporary construction of the provision in controversy, and considering that the President's manner of implementing martial law has been sanctioned by the people not only in the referendum of January 10-15, 1973 but also in that of July 27-28, 1973, reliance on such attitude in determining the meaning and intent of said provision cannot be out of place.

In the light of these considerations, We do not see in the transitory provision under discussion any idea of ratification or validation of something void or unauthorized. Rather, what We perceive in it are revelations of what lay in the core of the martial law clause of the 1935 Constitution as it was conceived and formulated by its wise and farsighted framers. It would be unreasonable, illogical and unworthy of the 1971 delegates to impute to them an intent to merely ratify, confirm or validate the President's acts, on the assumption that they were originally unauthorized by the charter, for that would imply that they were concerned only about straightening out the present situation, when it is just as important to insure that future acts of the President are not tainted with illegality. We cannot entertain any thought that the delegates were not sufficiently apprised on the implications of their acts. Indeed, the New Constitution has not imparted *ex proprio vigore* any element of validity to the acts in question, it has only expressed in black and white what the Old Constitution did not deem necessary to lay down

with precision in respect to them. Viewed this way, what the transitory provision under discussion means is that both the acts of the President before as well as those after ratification of the New Constitution are valid ? not validated — and, as just stated, what reinforces this construction and places the said acts beyond possible attacks for unconstitutionality are the results of the two referendums of January and July, 1973.

Withal, having absolute faith in the high sense of duty and the patriotic courage of the members of the Convention, We also reject the suggestion that they were in any way impeded, under the circumstances then obtaining, from freely expressing themselves. We cannot for a moment entertain the thought that any other Filipino can ever have less courage and love of country and concern for the future of our people than the members of this Court who are presently called upon to make momentous decisions affecting no less than the legality and legitimacy of the very Government admittedly in effective control of the whole territory of the nation, regardless of possible personal consequences to themselves.

The fact of the matter is that Proclamation 1081 did not make mention of the Convention at all. On the contrary, judicial notice may be taken of the increased funds appropriated by the President so as to enable it to proceed with its deliberations, unbothered by any apprehension regarding the inadequacy of the funds which the Congress had appropriated for it, and which were then fast dwindling, without any certainty of further congressional appropriations. Indeed, when Delegate Kalaw of the First District of Rizal proposed in a formal resolution that the sessions be suspended until after the lifting of martial law, the assembly voted overwhelmingly to turn down the proposal. There is no evidence at all that any form of undue pressure was brought to bear upon the delegates in any respect related to their constituent functions. It has not been shown that the arrest and detention of a number of delegates, some of whom are petitioners herein, was in any way connected with or caused by their actuations related to their constituent functions. What General Order No. 2 asserts is that the President ordered the "Secretary of National Defense to forthwith arrest or cause the arrest and take into custody the individuals named in the attached list (among them, the said delegates) and to hold them until otherwise so ordered by me or my duly designated representative" for their "being active participants or for having given aid and comfort in the conspiracy to seize political and state power in the country and to take over the Government by force, the extent of which has now assumed the proportion of an actual war against our people and our legitimate Government and in order to prevent them from further committing acts that are inimical or injurious to our people, the Government and our national interest, and to hold said individuals until otherwise so ordered by me or by my duly designated representative." Even then, said delegates were allowed to cast their votes in the assembly when the final draft was submitted for approval of the members of the Convention. Thus, it can be safely asserted that the freedom of the Convention to act and to perform whatever was incumbent upon it as a constituent body suffered no substantial diminution or constraint on account of the proclamation of martial law.

To reiterate then, Section 3 (2), Article XVII of the New Constitution enjoins that "all proclamations, orders, decrees, instructions and acts promulgated, issued or done by the incumbent President shall be part of the law of the land and shall remain valid, legal, binding and effective even after the lifting of martial law or the ratification of this Constitution, unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly." Notably, the provision does not only make all such proclamations, orders, decrees, etc. "part of the law of the land", in which case, it would have been perhaps possible to argue, that they had just been accorded the status of legislative enactments, ordinarily subject to possible attack on constitutional grounds. The provision actually goes further. It expressly ordains that the proclamations, orders, etc. referred to should "remain valid, legal, binding, and effective" . . . until revoked, modified, repealed or superseded in the manners therein stipulated. What is more, the provision refers to and contemplates not only proclamations, orders, decrees, instructions and acts of executive character, but even those essentially legislative, as may be gathered

from the nature of the proclamations, decrees, orders, etc. already existing at the time of the approval of the draft constitution and of the acceptance thereof by the people. Accordingly, and because there is no doubt that Proclamation 1081 and General Order No. 2, herein challenged, are among the proclamations and orders contemplated in said provision, the Court has no alternative but to hold, as it hereby holds, in consonance with the authoritative construction by the Constitutional Convention of the fundamental law of the land, that Proclamation 1081 of President Marcos placing the Philippines under martial law as well as General Order No. 2, pursuant to which petitioners are either in custody or restrained of their freedoms "until otherwise so ordered by (the President) or (his) duly designated representative" are valid, legal, binding and effective, and consequently, the continued detention of petitioner Aquino as well as the constraints on the freedoms of the other petitioners resulting from the conditions under which they were released from custody are legal and constitutional. We feel We are confirmed in this conclusion by the results of the referendum of July 27-28, 1973 in which 18,052,016 voters gave their affirmative approval to the following question:

"Under the constitution the President, if he so desires, can continue in office beyond 1973.

Do you want President Marcos to continue beyond 1973 and finish the reforms he has initiated under Martial Law?"

We hasten to add, to avoid misunderstanding or confusion of concepts, that it is not because of the fiat or force of the New Constitution itself that the transitory provision is being relied upon for the purposes of the instant petitions. At this point, and without prejudice to looking into the matter insofar as other issues and other cases affecting martial law and the order issued under it are concerned, all that We say is that the said provision constitutes an authoritative contemporary construction of the martial law clause of the Constitution giving light regarding the emergency powers that the Executive may exercise after its proclamation.

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But petitioner Diokno¹⁷ would dilute the force of this conclusion by trying to find fault with the dispositive portion of the decision of this Court in the Ratification Cases. He contends that actually, six justices rendered opinions expressly holding that the New Constitution has not been validly ratified in accordance with Article XV of the 1935 Constitution and that the said dispositive, portion "is not consistent with their findings, which were also the findings of the majority of the Court." Otherwise stated, the position of petitioner Diokno is that the decision in the Ratification Cases has no binding legal force as regards the question of whether or not the New Constitution is indeed in force and effect. This is practically an attempt to make the Court resolve the same points which counsels for the petitioners in the Ratification Cases submitted to the Court on the last day for the finality of the decision therein, but without asking for either the reconsideration or modification thereof, because they merely wanted to record for posterity their own construction of the judgment of the Court.¹⁸

Without in any way attempting to reopen the issues already resolved by the Court in that decision, but for the sake of erasing any doubt as to the true import of Our judgment therein, and in order that those who would peruse the same may not be led astray by counsel's misconstruction thereof, the writer feels it is here opportune to say a few words relative to petitioner's observations, considering specially that Our discussion above is predicated on the premise that the New Constitution is in full force and effect.

To start with, it is evident that the phrase in question saying that "there is no further judicial obstacle to the New Constitution being considered in force and effect" was in actual fact approved specifically by the members of the Court as the juridical result of their variant separate opinions. In fact, even those who dissented, except Justice Zaldivar, accepted by their silence the accuracy of said conclusion.¹⁹ Had any of the other justices, particularly, Chief Justice Makalintal and Justice Castro felt that their joint opinion did not justify such a judgment they would

have certainly objected to its tenor, as Justice Zaldivar did. (See footnote 11). Surely, it is not for anyone to say now that the Court misstated its judgment.

In the particular case of Counsels Tañada and Arroyo, while it is true that on the last day for the finality of that decision, they filed a "Constancia", separately from the Manifestation to the same effect of the other counsel, discussing extensively the alleged inconsistency between the collective result of the opinions of the majority of the Court and the dispositive portion of the judgment, like the other counsel, however, they did not make any prayer for relief, stating that their only purpose is "to save our people from being misled and confused, in order to place things in their proper perspective, and in order to keep faith with the 1935 Constitution . . . so that when history passes judgment upon the real worth and meaning of the historic Resolution of this Honorable Court promulgated on March 31, 1973, it may have all the facts before it," for which reason, the majority of the Court, over the dissent of Justices Zaldivar, Antonio, Esguerra and the writer, did not consider it necessary to act, believing it was not exactly the occasion to disabuse the minds of counsels about the judicial integrity of the Court's actuation embodied in the resolution. In a sense, therefore, said counsels should be deemed to be in estoppel to raise the same points now as arguments for any affirmative relief, something which they did not ask for when it was more appropriate to do so.

In the second place, laying aside the division of views among the members of the Court on the question of whether or not there has been compliance with the provisions of Article XV of the 1935 Constitution, the vital and decisive fact is that the majority of the Court held that the question of whether or not the New Constitution is already in force and effect is a political question and the Court must perforce defer to the judgment of the political departments of the government or of the people in that respect. It is true some of the Justices could not find sufficient basis for determining whether or not the people have accepted the New Constitution, but, on that point, four Justices, Justices Makasiar, Antonio, Esguerra and the writer, did vote categorically in the affirmative, while two Justices, then Chief Justice Concepcion and Justice Zaldivar, voted in the negative. And in the joint opinion of now Chief Justice Makalintal and Justice Castro, it is crystal clear that the reference therein to their inability to accurately appraise the people's verdict was merely casual, the thrust of their position being that what is decisive is the President's own attitude regarding the situation, that is, whether he would take the report of the Katipunan ng mga Barangay to the effect that the people have approved and ratified the New Constitution as definitive and final or he would prefer to submit the new charter to the same kind of election which used to be held for the ratification of constitutional amendments, his decision either way not being subject to judicial inquiry. Stated differently, our distinguished colleagues were of the view that whether or not the New Constitution may be held to have been duly ratified pursuant to Article XV of the 1935 Constitution and even their own negative conclusion in such respect, have no bearing on the issue of the enforceability of the New Constitution on the basis of its having been accepted by the people, and that although they were not possessed of sufficient knowledge to determine this particular fact, the President's own finding thereon is conclusive upon the Court, since, according to them, such a decision is political and outside the pale of judicial review. To quote their own words:

"However, a finding that the ratification of the draft Constitution by the Citizens Assemblies, as certified by the President in Proclamation No. 1102, was not in accordance with the constitutional and statutory procedure laid down for the purpose does not quite resolve the questions raised in these cases. Such a finding, in our opinion, is not a matter which is essentially justiciable, that is, within the power of this Court to inquire into. It imports nothing more than a simple reading and application of the pertinent provisions of the 1935 Constitution, of the Election Code and of other related laws and official acts. No question of wisdom or of policy is involved. But from this finding it does not necessarily follow that this Court may justifiably declare that the Constitution has not become effective, and for that reason give due course to these petitions or grant the writs herein prayed for. The effectivity of the Constitution in the final analysis, is the basic and ultimate question posed by these cases, to resolve which considerations other than judicial, and therefore beyond the

competence of this Court, are relevant and unavoidable.

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

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"But then the President, pursuant to such recommendation, did proclaim that the Constitution had been ratified and had come into effect. The more relevant consideration, therefore, as far as we can see, should be as to what the President had in mind in convening the Citizens Assemblies, submitting the Constitution to them and proclaiming that the favorable expression of their view was an act of ratification. In this respect subjective factors, which defy judicial analysis and adjudication, are necessarily involved.

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

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

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

nation's Charter.

"In the deliberation of this Court one of the issues formulated for resolution is whether or not the new Constitution, since its submission to the Citizens Assemblies, has found acceptance among the people, such issue being related to the political question theory propounded by the respondents. We have not tarried on the point at all since we find no reliable basis on which to form a judgment. Under a regime of martial law, with the free expression of opinions through the usual media vehicles restricted, we have no means of knowing, to the point of judicial certainty, whether the people have accepted the Constitution. In any event, we do not find the issue decisive insofar as our vote in these cases is concerned. To interpret the Constitution — that is judicial. That the Constitution should be deemed in effect because of popular acquiescence -- that is political, and therefore beyond the domain of judicial review." (*Javellana vs. The Executive Secretary* — 50 SCRA 161-162; 164; 166-167; 170-171)20

It only remains for the writer to reiterate here a few considerations already touched in the separate opinions in the Ratification Cases which in his considered view may well be taken into account by those who would read again the judgment of the Court therein.

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Having come to the conclusion that the question of whether or not the New Constitution is legally in force and effect is political and outside the domain of judicial review, it was not strange that the Court should simply rule that there should be no further judicial obstacle to the enforcement of the charter, should that be, as it appeared to be, the intent of those actually in authority in the government. It is implicit in the political-question doctrine that the Court's opinion as to the correctness of the legal postures involved is of no moment, for the simple reason that the remedy against any error therein lies either with the sovereign people at the polls or with the political department concerned in the discharge of its own responsibility under the fundamental law of the land, and not with the Court. Even if it were otherwise desirable, if only for the benefit of those interested in the settlement of the specific legal problem posed, any categorical ruling thereon would transcend the bounds of judicial propriety. For the Court to hold it is without power to decide and in the same breath to actually decide is an intolerable incongruity, hence any pronouncement or holding made under the circumstances could have no more force than an obiter dictum, no matter how rich in erudition and precedential support. Consequently, to say that the New Constitution may be considered by those in authority to be in force and effect because such is the mandate expressed by the people in the form announced by the President is but a proper manner of expressing the Court's abstention from wresting the power to decide from those in whom such prerogative is constitutionally lodged. This is neither to dodge a constitutional duty nor to refrain from getting involved in a controversy of transcendental implications — it is plain adherence to a principle considered paramount in republican democracies wherein the political-question doctrine is deeply imbedded as an inextricable part of the rule of law. It is an unpardonable misconception of the doctrine for anyone to believe that for the Supreme Court to bow to the perceptible or audible voice of the sovereign people in appropriate instances is in any sense a departure from or a disregard of law as applied to political situations, for the very rule that enjoins judicial interference in political questions is no less a legal principle than any other that can be conceived. Indeed, just as, in law, judicial decisions rendered within the ambit of the courts' authority deserve the respect of the people, by the same token, the people's verdict on what inherently is theirs to decide must be accorded due deference by the judiciary. Otherwise, judges would be more powerful than the people by whom they have been given no more prerogative than to act solely within the boundaries of the judicial sphere. Withal, a court may err in finding that a given situation calls for its abstention, in the same way it may commit mistakes of judgment about any other matter it decides, still its decision, conceding its honesty, cannot be faulted as an assault on the rule of law. Thus, in a broad sense, it may be said that it is a necessary corollary of the truth that the administration of justice in courts

presided by human beings cannot be perfect that even the honest mistake of a judge is a law.

The writer further submits that, as pointed out in his separate opinion in the Ratification Cases, those who vehemently insist that the referendum of January 10-15, 1973 was not the kind of election contemplated in Article XV of the 1935 Constitution seem to overlook that the said provision refers only to the mode of ratifying amendments thereto and makes no mention at all of how a new constitution designed to supersede it is to be submitted for approval by the people. Indeed, the writer would readily agree, as was already made clear in the aforementioned opinion, that if what were submitted to the people in the January, 1973 referendum had been merely an amendment or a bundle of amendments to the 1935 Constitution, the results thereof could not constitute a valid ratification thereof. But since it was a whole integral charter that the Citizens' Assemblies had before them in that referendum, it is evident that the ratification clause invoked cannot be controlling.

That a new constitution is not contemplated is indicated in the text of the provision itself. It says: "Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast" How can it be ever conceived that the 1973 Constitution which is an entire charter in itself, differing substantially in its entirety and radically in most of its provisions, from the 1935 Constitution be part of the latter? In other words, the mode of ratification prescribed in Article XV is only for amendments that can be made part of the whole constitution, obviously not to an entire charter precisely purported to supersede it.

And it is but logical that a constitution cannot and should not attempt to bind future generations as to how they would do away with it in favor of one suitable to their more recent needs and aspirations. It is true that in *Tolentino vs. Comelec*, 41 SCRA 702, this Court, thru the writer, held that:

"In our discussion of the issue of jurisdiction, We have already made it clear that the Convention came into being by a call of a joint session of Congress pursuant to Section 1 of Article XV of the Constitution, already quoted earlier in this opinion. We reiterate also that as to matters not related to its internal operation and the performance of its assigned mission to propose amendments to the Constitution, the Convention and its officers and members are all subject to all the provisions of the existing Constitution. Now, We hold that even as to its latter task of proposing amendments to the Constitution, it is subject to the provisions of Section 1 of Article XV. This must be so, because it is plain to Us that the framers of the Constitution took care that the process of amending the same should not be undertaken with the same ease and facility in changing an ordinary legislation. Constitution making is the most valued power, second to none, of the people in a constitutional democracy such as the one our founding fathers have chosen for this nation, and which we of the succeeding generations generally cherish. And because the Constitution affects the lives, fortunes, future and every other conceivable aspect of the lives of all the people within the country and those subject to its sovereignty, every degree of care is taken in preparing and drafting it. A constitution worthy of the people for which it is intended must not be prepared in haste without adequate deliberation and study. It is obvious that correspondingly, any amendment of the Constitution itself, must perforce be conceived and prepared with as much care and deliberation. From the very nature of things, the drafters of an original constitution, as already observed earlier, operate without any limitations, restraints or inhibitions save those that they may impose upon themselves. This is not necessarily true of subsequent conventions called to amend the original constitution. Generally, the framers of the latter see to it that their handiwork is not lightly treated and as easily mutilated or changed, not only for reasons purely personal but more importantly, because written constitutions are supposed to be designed so as to last for some time, if not for ages, or for, at least, so long as they can be adopted to the needs and exigencies of the people, hence, they must be insulated against precipitate and hasty actions motivated by more or less passing political moods or fancies. Thus, as a rule, the original constitutions carry with them limitations and conditions, more or less stringent, made so by the people themselves, in regard to the process of their amendment. And when such limitations or conditions are so incorporated in the original constitution, it does not lie in the delegates of any subsequent convention to claim that they may ignore and disregard such conditions because they are as powerful and omnipotent as their original counterparts." (At

Page 724-726)

But this passage should not be understood, as it was not meant to be understood, to refer to the people's inalienable right to cast aside the whole constitution itself when they find it to be in their best interests to do so. It was so indicated already in the resolution denying the motion for reconsideration:

"This is not to say that the people may not, in the exercise of their inherent revolutionary powers, amend the Constitution or promulgate an entirely new one otherwise, but as long as any amendment is formulated and submitted under the aegis of the present Charter, any proposal for such amendment which is not in conformity with the letter, spirit and intent of the provision of the Charter for effecting amendments cannot receive the sanction of this Court." (Resolution of Motion for Reconsideration, Tolentino vs. Comelec, G.R. No. L-34150, February 4, 1971).

For it is rather absurd to think that in approving a new fundamental law with which they would replace the existing one, they have to adhere to the mandates of the latter, under pain of getting stuck with it, should they fail. One can easily visualize how the evil forces which dominated the electoral process during the old society would have gone into play in order to stifle the urge for change, had the mode of ratification in the manner of past plebiscites been the one observed in the submission of the New Constitution. To reiterate what the writer said in the Ratification Cases:

"Consider that in the present case what is involved is not just an amendment of a particular provision of an existing Constitution; here, it is, as I have discussed earlier above, an entirely new Constitution that is being proposed. This important circumstance makes a great deal of difference.

No less than counsel Tolentino for herein respondents Puyat and Roy, who was himself the petitioner in the case I have just referred to, is now inviting Our attention to the exact language of Article XV and suggesting that the said Article may be strictly applied to proposed amendments but may hardly govern the ratification of a new Constitution. It is particularly stressed that the Article specifically refers to nothing else but "amendments to this Constitution" which if ratified "shall be valid as part of this Constitution." Indeed, how can a whole new constitution be by any manner of reasoning an amendment to any other constitution and how can it, if ratified, form part of such other constitution? x x x

"It is not strange at all to think that the amending clause of a constitution should be confined in its application only to proposed changes in any part of the same constitution itself, for the very fact that a new constitution is being adopted implies a general intent to put aside the whole of the old one, and what would be really incongruous is the idea that in such an eventuality, the new Constitution would subject its going into effect to any provision of the constitution it is to supersede, to use the language precisely of Section 6, Article XVII, the effectivity clause, of the New Constitution. My understanding is that generally, constitutions are selfborn, they very rarely, if at all, come into being, by virtue of any provision of another constitution. This must be the reason why every constitution has its own effectivity clause, so that if, the Constitutional Convention had only anticipated the idea of the referendum and provided for such a method to be used in the ratification of the New Constitution, I would have had serious doubts as to whether Article XV could have had priority of application." (Javellana vs. The Executive Secretary — 50 SCRA 197-198).

Since in the withdrawal motion of petitioner Diokno, the whole thrust of this posture relative to the alleged non-enforceability of the Constitution of 1973 revolves around supposed non-compliance in its ratification, with Article XV of the 1935 Charter, and inasmuch as it is evident that the letter and intent of that invoked provision do not warrant, as has just been explained, the application thereof to the New Constitution, for the simple reason that the same is not in fact and in law as well as in form and in intent a mere amendment to the Old Constitution, but an integrally new charter which cannot conceivably be made just a part thereof, one cannot but view said motion to withdraw as having been designed for no other purpose than to serve as a vehicle for the ventilation of

petitioner's political rather than legal outlook which deserves scant consideration in the determination of the merits of the case at bar.

In any event, that a constitution need not be ratified in the manner prescribed by its predecessor and that the possible invalidity or the mode of its ratification does not affect its enforceability, as long as the fact of its approval by the people or their acquiescence thereto is reasonably shown, is amply demonstrated in the scholarly dissertation made by our learned colleague, Mr. Justice Felix V. Makasiar, in his separate opinion in the Ratification Cases, which carried the concurrence of Justices Antonio, Esguerra and the writer. And that what took place in the Philippines in January, 1973 is not an unprecedented practice peculiar to our country, is likewise plainly shown therein, since it appears that no less than the Constitution of the United States of America, the nation whose close adherence to constitutionalism petitioners would want the Filipinos to emulate, was also ratified in a way not in conformity with the Articles of Confederation and Perpetual Union, the Constitution which it replaced, and the reason for it was only because those in authority felt that it was impossible to secure ratification, if the amendment clause of the Articles were to be observed, and so they resorted to extra-constitutional means to accomplish their purpose of having a new constitution. Following is the pertinent portion of Mr. Justice Makasiar's illuminating disquisition based on actual historical facts rather than on theoretical and philosophical hypotheses on which petitioners would seem to rely:

"The classic example of an illegal submission that did not impair the validity of the ratification or adoption of a new Constitution is the case of the Federal Constitution of the United States. It should be recalled that the thirteen (13) original states of the American Union — which succeeded in liberating themselves from England after the revolution which began on April 19, 1775 with the skirmish at Lexington, Massachusetts and ended with the surrender of General Cornwallis at Yorktown, Virginia, on October 19, 1781 (Encyclopedia Brit., Vol. 1, 1933 Ed., p. 776) — adopted their Articles of Confederation and Perpetual Union, that was written from 1776 to 1777 and ratified on March 1, 1781 (Encyclopedia Brit., Vol. II, 1966 Ed., p. 525). About six years thereafter, the Congress of the Confederation passed a resolution on February 21, 1787 calling for a Federal Constitutional Convention "for the sole and express purpose of revising the articles of confederation . . ." (Appendix I, The Federalist, Modern Library ed., p. 577, italics supplied).

"The Convention convened at Philadelphia on May 14, 1787. Article XIII of the Articles of Confederation and Perpetual Union stated specifically:

'The articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.' (See the Federalist, Appendix II, Modern Library Ed., 1937, p. 584; italics supplied).

But the foregoing requirements prescribed by the Articles of Confederation and Perpetual Union for the alteration and for the ratification of the Federal Constitution as drafted by the Philadelphia Convention were not followed. Fearful that the said Federal Constitution would not be ratified by the state legislatures as prescribed, the Philadelphia Convention adopted a resolution requesting the Congress of the Confederation to pass a resolution providing that the Federal Constitution should be submitted to elected state conventions and if ratified by the conventions in nine (9) states, not necessarily in all thirteen (13) states, the said Constitution shall take effect.

Thus, history Professor Edward Earle Mead of Princeton University recorded that:

'It would have been a counsel of perfection to consign the new Constitution to the tender mercies of the legislatures of each and all of the 13 states. Experience clearly indicated that ratification would have had the same chance as the scriptural camel passing thru the eye of a needle. It was therefore determined to recommend to

Congress that the new Constitution be submitted to conventions in the several states specially elected to pass it and when it should be ratified by nine of the thirteen states . . .' (The Federalist, Modern Library Ed., 1937, Introduction by Edward Earle Mead, pp. viii-ix, italics supplied).

Historian Samuel Eliot Morison similarly recounted:

"The Convention, anticipating that the influence of many state politicians would be Antifederalist, provided for ratification of the Constitution by popularly elected conventions in each state. Suspecting that Rhode Island, at least, would prove recalcitrant, it declared that the Constitution would go into effect as soon as nine states ratified. The convention method had the further advantage that judges, ministers, and others ineligible to state legislatures, could be elected to a convention. The nine-state provision was, of course, mildly revolutionary. But the Congress of the Confederation, still sitting in New York to carry on federal government until relieved, formally submitted the new constitution to the states and politely faded out before the first presidential inauguration." (The Oxford History of the Am. People by Samuel Eliot Morison, 1965 ed., p. 312).

And so the American Constitution was ratified by nine (9) states on June 21, 1788 and by the last four states on May 29, 1790 (12 C.J. p. 679 footnote, 16 C.J.S. 27 — by the state conventions and not by all thirteen (13 state legislatures as required by Article XIII of the Articles of Confederation and Perpetual Union aforequoted — and in spite of the fact that the Federal Constitution as originally adopted suffers from two basic infirmities, namely, the absence of a bill of rights and of a provision affirming the power of judicial review.

The liberties of the American people were guaranteed by the subsequent amendments to the Federal Constitution. The doctrine of judicial review has become part of American constitutional law only by virtue of a judicial pronouncement by Chief Justice Marshall in the case of *Marbury vs. Madison* (1803, 1 Cranch 137).

Until this date, no challenge has been launched against the validity of the ratification of the American Constitution, nor against the legitimacy of the government organized and functioning thereunder.

In the 1946 case of *Wheeler vs. Board of Trustees* (37 SE 2nd 322, 326-330), which enunciated the principle that the validity of a new or revised Constitution does not depend on the method of its submission or ratification by the people, but on the fact of fiat or approval or adoption or acquiescence by the people, which fact of ratification or adoption or acquiescence is all that is essential, the Court cited precisely the case of the irregular revision and ratification by state conventions of the Federal Constitution, thus:

'No case identical in its facts with the case now under consideration has been called to our attention, and we have found none. We think that the principle which we apply in the instant case was very clearly applied in the creation of the constitution of the United States. The convention created by a resolution of Congress had authority to do one thing, and one only, to wit, amend the articles of confederation. This they did not do, but submitted to the sovereign power, the people, a new constitution. In this manner was the constitution of the United States submitted to the people and it became operative as the organic law of this nation when it had been properly adopted by the people.'

'Pomeroy's Constitutional Law, p. 55, discussing the convention that formulated the constitution of the United States, has this to say: "The convention proceeded to do, and did accomplish, what they were not authorized to do by a resolution of Congress that called them together. That resolution plainly contemplated amendments to the articles of confederation, to be submitted to and passed by the Congress, and afterwards ratified by all the state legislatures, in the manner pointed out by the existing organic law. But the convention soon became convinced that any amendments were powerless to effect a cure; that the disease was too deeply seated to be reached by such tentative means. They saw that the system they were called to improve must be totally abandoned, and that the national idea must be re-established at the center of their political society. It was objected by some members, that they had no power, no authority, to construct a new government. They had no authority, if their decisions were to

be final; and no authority whatever, under the articles of confederation, to adopt the course they did. But they knew that their labors were only to be suggestions: and that they as well as any private individuals, and any private individuals as well as they, had a right to propose a plan of government to the people for their adoption. They were, in fact, a mere assemblage of private citizens, and their work had no more binding sanction, than a constitution drafted by Mr. Hamilton in his office would have had. The people, by their expressed will, transformed this suggestion, this proposal, into an organic law, and the people might have done the same with a constitution submitted to them by a single citizen.'

x x x x x x x x

'x x x When the people adopt a completely revised or new Constitution, the framing or submission of the instrument is not what gives it binding force and effect. The fiat of the people, and only the fiat of the people, can breathe life into a constitution.

'x x x We do not hesitate to say that a court is never justified in placing by implication a limitation upon the sovereign. This would be an unauthorized exercise of sovereign power by the court. (In *State vs. Swift*, 69 Ind. 505, 519, the Indiana Supreme Court said: 'The people of a State may form an original constitution, or abrogate an old one and form a new one, at any time, without any political restriction except the constitution of the United States; . . .' (37 SE 327-328, 329, italics supplied.)

In the 1903 case of *Weston vs. Ryan*, the Court held:

'It remains to be said that if we felt at liberty to pass upon this question, and were compelled to hold that the act of February 23, 1887, is unconstitutional and void, it would not, in our opinion, by any means follow that the amendment is not a part of our state Constitution. In the recent case of *Taylor vs. Commonwealth* (Va.) 44 S.E. 754, the Supreme Court of Virginia held that their state Constitution of 1902, having been acknowledged and accepted by the officers administering the state government, and by the people, and being in force without opposition, must be regarded as an existing Constitution, irrespective of the question as to whether or not the convention which promulgated it had authority so to do without submitting it to a vote of the people. In *Brittle vs. People*, 2 Neb. 198, is a similar holding as to certain provisions of the Nebraska Constitution of 1886, which were added by the Legislature at the requirement of Congress, though never submitted to the people for their approval.' (97 NW 349-350; italics supplied).

Against the decision in the *Wheeler* case, *supra*, confirming the validity of the ratification and adoption of the American Constitution, in spite of the fact that such ratification was a clear violation of the prescription on alteration and ratification of the Articles of Confederation and Perpetual Union, petitioners in G.R. No. L-36165 dismissed this most significant historical fact by calling the Federal Constitution of the United States as a revolutionary one, invoking the opinion expressed in Vol. 16, *Corpus Juris Secundum*, p. 27, that it was a revolutionary constitution because it did not obey the requirement that the Articles of Confederation and Perpetual Union can be amended only with the consent of all thirteen (13) state legislatures. This opinion does not cite any decided case, but merely refers of the footnotes on the brief historical account of the United States Constitution on p. 679 of Vol. 12, *CJS*. Petitioners, on p. 18 of their main Notes, refer US to pp. 270-316 of the *Oxford History of the American People*, 1965 Ed. by Samuel Eliot Morison, who discusses the Articles of Confederation and Perpetual Union in Chapter XVIII captioned 'Revolutionary Constitution Making, 1775-1781' (pp. 270-281). In Chapter XX on 'The Creative Period in Politics, 1785-1788,' Professor Morison delineates the genesis of the Federal Constitution, but does not refer to it even implicitly as a revolutionary constitution (pp. 297-316). However, the Federal Constitution may be considered revolutionary from the view point of McIver if the term revolution is understood in 'its WIDER sense to embrace decisive changes in the character of government, even though they do not involve the violent overthrow of an established order, xx.' (R.M. MacIver, *The Web of Government*, 1965 ed., p. 203).

It is rather ridiculous to refer to the American Constitution as a revolutionary constitution. The Articles of Confederation and Perpetual Union that was in force from July 12, 1776 to 1788, forged as it was during the war of independence was a revolutionary constitution of the thirteen (13) states. In the existing Federal Constitution of the United States which was adopted seven (7) or nine (9) years after the thirteen (13) states won their independence and long after popular support for the government of the Confederation had stabilized was not a product of a revolution. The Federal Constitution was a 'creation of the brain and purpose of man' in an era of peace. It can only be considered revolutionary in the sense that it is a radical departure from its predecessor, the Articles of Confederation and Perpetual Union.

It is equally absurd to affirm that the present Federal Constitution of the United States is not the successor to the Articles of Confederation and Perpetual Union. The fallacy of the statement is so obvious that no further refutation is needed." (50 SCRA 209-215).

Moreover, whether a proposal submitted to the people is just an amendment to an existing constitution within the contemplation of its amendment clause or is a new charter not comprehended by its language may not be determined solely by the simple processes of analysis of and comparison between the contents of one and the other. Very much depends on what the constituent assembly, reflecting its understanding of the desire of the people it represents, actually intends its handiwork to be, as such intent may be deduced from the face of the document itself. For the truth is that whatever changes in form and in substance a constitution may undergo, as long as the same political, social and economic ideologies as before continue to be the motivation behind such changes, the result can never be, in a strict sense, a new constitution at all. Indeed, in such circumstance, any alteration or modification of any provision of a constitution, no matter how extensive, can always be traced as founded on its own bedrock, thereby proving identity. It is therefore the expressed desire of the makers of the charter that is decisive. And that is why the New Constitution has its own effectivity clause which makes no reference howsoever to Article XV of the past charter.²¹

Now, how the founding fathers of America must have regarded the difference between a constitutional amendment, on the one hand, and a new Constitution, on the other, when they found the Articles of Confederation and Perpetual Union no longer adequate for the full development of their nation, as can be deduced from the historical account above, is at least one case in point — they exercised their right to ratify their new fundamental law in the most feasible manner, without regard to any constitutional constraints. And yet, it is the constitution that is reputed to have stood all tests and was, in fact, the model of many national constitutions, including our own of 1935, if it cannot be accurately regarded also as the model of the present one.

With the foregoing considerations in mind, it can be readily seen how pointless it is to contend, as petitioner Diokno does in his motion to withdraw, that what he deems as the failure of the January, 1973 referendum to conform with the requirements of Article XV of the 1935 Constitution detracts from the enforceability of the New Constitution, in the light of the President's assertion contained in Proclamation 1102 that it has been approved and ratified by the people, coupled with his evident firm and irreversible resolution to consider it to have been, indeed, duly ratified, and in the face of the indisputable fact that the whole government effectively in control of the entire Philippine territory has been operating under it without any visible resistance on the part any significant sector of the populace. To allude to the filing of the petitions in the Plebiscite and the Ratification Cases and the occasional appearances in some public places of some underground propaganda which, anyway, has not cut any perceptible impression anywhere, as indicative or evidence of opposition by the people to the New Constitution would be, to use a commonplace but apt expression, to mistake the trees for the forest.

It is thus abundantly clear that the passionate and tenacious ratiocination in petitioner Diokno's withdrawal motion tending to assail the cogency of our opinions and their consistency with the judgment in the Ratification Cases, to the extent of using terms that could signify doubt in the good faith and intellectual integrity of some members of

the Court and of trying to embarrass the Court itself before the bar of history, does not in fact have any plausible basis whatsoever.

CONCLUSION

The instant cases are unique. To Our knowledge never before has any national tribunal of the highest authority been called upon to pass on the validity of a martial law order of the Executive issued in the face of actual or imminent danger of a rebellion — threatening the very existence of the nation. The petitions herein treat of no more than the deprivation of liberty of the petitioners, but in reality what is involved here is the legitimacy of the government itself. No Supreme Court of any other country in the world, We reiterate, has even been confronted with such a transcendental issue.

This is, therefore, a decision that affects not the petitioners alone, but the whole country and all our people. For this reason, We have endeavored to the best of our ability to look at all the issues from every conceivable point of view. We have gone over all the jurisprudence cited by the parties, the writings of learned and knowledgeable authorities they have quoted and whatever We could avail of by Ourselves. We trust We have not misunderstood any of the contentions of the parties and their able and learned counsels and that We have not overlooked any authority relevant to them. And We must say We perceive no cause to downgrade their love of and loyalty to our common motherland even if differences there are between our convictions as to how to earlier attain the national destiny. Indeed, We have not considered as really persuasive any insinuations of motivations born of political partisanship and personal ambitions.

We do not mean to belittle or depreciate foreign jurisprudence, but We have deliberately refrained from relying on alien opinions, judicial or otherwise, in order to stress that the Filipinos can solve their own problems with their own resources intellectual or otherwise. Anyway, We doubt if there is enough relevant parallelism between occurrences in other countries passed upon by the courts with what is happening here today.

Principally, by this decision, We hold that the power to proclaim martial law is lodged by the Constitution exclusively in the Executive, but the grant of judicial power to the Supreme Court also by the Constitution is plenary and total and, therefore, when it is a matter of judicial notice, because it is commonly known by the general public or is capable of unquestionable demonstration, that any particular declaration of martial law is devoid of any of the constitutionally required bases, the Court has the full authority and it would not hesitate to strike down any such improvident proclamation and to adjudge that the legitimate government continue without the offending Executive, who shall be replaced in accordance with the rules of succession provided in the existing Constitution and laws. In the cases at bar, however, the Court, with the abstention of only one member who has preferred not to emit any opinion on the issue at this time, holds that the President had good and sufficient grounds in issuing Proclamation 1081, whether the same is examined in the light of its own recitals, as some Justices advocate, or of facts of judicial notice together with those undisputed in the record, in the manner the rest of Us have actually tested it. We further hold that in restraining the liberties of petitioners, the President has not overstepped the boundaries fixed by the Constitution.

For doctrinal purposes, it is best to add to all the foregoing that a judicial challenge against the imposition of martial law by the Executive in the midst of the actualities of a real assault against the territorial integrity and life of the nation, inevitably calls for the reconciliation, which We feel We have been able to effectuate here, of two extremes in the allocation of powers under the Constitution — the resort by the Executive to the ultimate weapon with which the fundamental law allows him to defend the state against factual invasion or rebellion threatening the public safety, on the one hand, and the assertion by the Supreme Court of the irreducible plenitude of its judicial authority, on the other. No other conflict of prerogatives of such total dimensions can conceivably arise

from the operation of any other two parts of the charter. This decision then could well be sui generis, hence, whatever has been said here would not necessarily govern questions related to adverse claims of authority related to the lower levels of the hierarchy of powers in the Constitution.

We humbly submit this decision to the judgment of all our people, to history and to the generations of Filipinos still unborn, confident that it carries all that We know and all that We are. As We do this, We are fully aware that in this critical stage of our life as a nation, our overriding need is unity. It is Our fervent hope that by this decision, We have duly performed Our constitutionally assigned part in the great effort to reduce if not to eliminate the remaining fundamental causes of internecine strife.

May Divine Providence continue to always keep the Philippines in the right paths of democracy, freedom and justice for all!

J U D G M E N T

WHEREFORE, the petitions in all the above-entitled cases are dismissed. No costs.

A D D E N D U M

The following are my reasons for voting in favor of granting the motion to withdraw:

It is elementary that the remedy of habeas corpus exists only against involuntary confinement. The moment, therefore, that after initially questioning the legality of his detention, the petitioner seeks withdrawal of his petition at any stage of the case before judgment, his detention becomes in law automatically, by his own act, voluntary or with his express consent, hence, the reason for further inquiry into the circumstances thereof ceases completely, and the court's duty to proceed further and render judgment comes to an end. By allowing the withdrawal, no interest of justice would be prejudiced, no juridical harm needing redress could be caused to anyone. Accordingly, the petitioner's motive for his withdrawal, whether expressed or unarticulated, are absolutely immaterial, albeit, in the case at bar, petitioner himself suggests that, while acceding to his request, the members of the Court may express their views thereon. (Sur-Rejoinder dated May 21, 1974, p. 3).

In the mind of the writer, the grounds alleged by petitioner Diokno and his counsel have an apparent tendency to offend the dignity of the Court and to undermine the respect and faith of the people in its capacity to administer justice. What is worse, they may be false and baseless, as they are emotional and personal. Unless properly explained, they give the impression that movant is impeaching the integrity and good faith of some members of the Court. In the premises, said petitioner and counsel could be required to show cause why they should not be held in contempt of the Court, but there being no formal charge to such effect in the instant proceedings, and in order not to confuse the discussion and resolution of the transcendental issues herein, it is preferable, and the Court has opted, to take up the matter of the possible responsibility for contempt separately, either *motu proprio* or upon the initiative of whoever may allege to be aggrieved thereby. For the present, it has to be stated, however, that under no circumstances may any party or counsel vent his personal feelings and emotions in any pleading or paper filed with the Court, particularly while his case is pending therein. Personalities that are directed towards the occupants of the judicial office naturally mar the legal issues before them, correspondingly making more difficult their proper and impartial resolution. Even if the judges concerned are actually, as they are supposed to be, unmoved by them, still there can be no assurance that the litigants and the public in general will be convinced of their absolute impartiality in their subsequent actuations, and to that extent, the interests of justice are bound to suffer. It is but in keeping with the highest traditions of the judiciary that such improprieties are not allowed to pass unnoticed and are dealt with by the court either *motu proprio* or upon corresponding complaint, whether in and independent proceeding or as an incident within the pending case. No court worthy of its position should

tolerate them.

But assaults upon the dignity and integrity of the court, are one thing, and the issues of the case at hand are another. Regardless of what the judge thinks is the belief of those concerned about the motivations of the court's subsequent resolution of the issues, unless he inhibits himself from further acting in the case, circumstances permitting, it is his inescapable duty to render judgment, taking care, of course, that he remains, in fact, objective and impartial. It is, therefore, of no moment, for the purposes of disposing of petitioner Diokno's motion to withdraw, whether or not the charges leveled by him and his counsel against the Court or any of its members are founded or unfounded and whether or not the same constitute actionable misconduct on their part, as participants in the case before Us and/or as members of the Bar and officers of the Court. Any possible action for such probable misconduct has no bearing on the question of whether or not, observing the usual rules and practices, the Court should dismiss his main petition, the alleged illegality of his detention having been duly cured by his voluntary submission thereto.

All these is not to say that I have not given thought to the imperative necessity of resolving the issues of public interest raised in petitioner Diokno's petition. I can also see that it is important to the Government that he does not escape the legal effect of the decision in these cases. But if these are the main reasons for denying his motion to withdraw, I believe that the Government's apprehensions are rather unfounded. While I would not say that by his withdrawal, petitioner impliedly admits the correctness of the stand of the Government, what with the avalanche of protests against alleged injustice and supposed legal errors running through his pleadings, I am of the considered view that in law, he cannot correctly pretend that the rulings of the Court in the other cases herein in respect to the issues therein that are common with those of his petition are not binding on him at least by precedential force. And inasmuch as in the cases not withdrawn, all the issues of public interest raised in his case will have to be resolved, I do not see any purpose in insisting that he should remain a petitioner when he refuses, as a matter of conscience, to await the unfavorable verdict he foresees in his own case, which he himself anticipates will not set him free anyway. Of course, he protests that nothing he can say can convince the Court, and, on the other hand, perhaps, the most technically accurate and palpably just decision the court may fashion will not convince him, but it has to be a strange court that will yield to a litigant's point of view just because he sincerely feels he is right, whereas it is not unusual for a litigant to pretend not to see the correctness and justice of the court's judgment unfavorable to his interests.

(a) 50 SCRA 30.

[1] The Court took no action on the prohibition aspect of G.R. No. L-35540 and later of G.R. No. L-35573. Anyway, with the outcome of the habeas corpus petitions and in the light of the grounds of this decision, it would be academic to prosecute the same further.

[2] Petitioner died at ABM Sison Hospital on March 2, 1973 of causes unrelated to his detention.

[3] Actually there are only 28 petitioners, as 4 of them appear to have filed double petitions.

[4] Excluding Enrique Voltaire Garcia II who, as mentioned earlier, had died.

[5] The writer's reasons in favor of granting the motion to withdraw are discussed in the addendum to this decision. Since the Court as a body has denied said motion, petitioner Diokno's case has to be resolved on its merits. Accordingly, a discussion of some of the grounds alleged in the said motion which may have a bearing in one way or another with the fundamental issues herein involved is in order. In view, however, of the release of Senator Diokno on September 11 1974, the Court has decided to dismiss his petition for being moot and

academic. But this development does not necessarily render the discussion of his contentions irrelevant because they can also support the cases of the other petitioner, hence it seems better to retain said discussion in this opinion.

[6] At best, such a pose could be true only as regards his arrest and detention up to January 17, 1973, but not with respect to his continued detention after the New Constitution became effective.

6a Villavicencio vs. Lukban, 39 Phil. 778, at p. 790.

7 It is a matter of contemporary history that in a unanimous decision promulgated on January 8, 1973, in the case of Sergio Osmena, Jr. vs. Ferdinand E. Marcos, the Presidential Electoral Tribunal upheld the election of President Marcos in November, 1969 and dismissed the protest of Osmena, ruling as follows:

“In the light of the foregoing, We are of the opinion and so hold that the result of the revision and appreciation of the ballots in the pilot provinces, congressional districts and cities designated by the Protestant as best exemplifying the rampant terrorism and massive vote-buying, as well as the fraud and other irregularities allegedly committed by the Protestee, has shown, beyond doubt, that the latter had obtained a very substantial plurality and/or majority of votes over the former, regardless of whether We consider that the Protest is limited to the elections in the provinces, congressional districts and cities specified in paragraph VIII of the Protest, or includes, also, the result of the elections in the provinces and municipalities mentioned in paragraph VII of the Protest, or even if the average reductions suffered by both parties in said pilot provinces, congressional districts and cities were applied to the entire Philippines; that it is unnecessary, therefore, to continue the present proceedings and revise the ballots cast in the provinces and cities specified in paragraph VIII of the Protest — much less those named in paragraph VII thereof — other than the pilot provinces and congressional districts designated by the Protestant, as above-stated; that neither would it serve any useful purpose to revise the ballots cast in the provinces and cities counter-protested by the Protestee herein; that, in filing his certificate of candidacy - for Mayor of Cebu City, in the general elections held in 1971, and particularly, in assuming said office on January 1, 1972, (as attested to by his oath of office, copy of which is appended to this decision as Annex H) after his proclamation as the candidate elected to said office, the Protestant had abandoned his Protest herein: that the Protestant has failed to make out his case; that the Protestee has obtained the plurality and majority of the votes cast for the office of the President of the Philippines, in the general elections held in 1969; and that, accordingly, he was duly elected to said office in the aforementioned elections and properly proclaimed as such.”

8 Excluding week-end suspension of sessions..

* See footnote on page 143.

9 Unless expressly stated otherwise, all references to the Constitution in this discussion are to both the 1935 and 1973 charters, since, after all the pertinent provisions are practically identical in both.

10 See provisions of both the Old and the New Constitution *infra*, quoted on page 103.

The term Executive is used to have a common reference to the President under the Old Constitution and to the Prime Minister under the new one.

11 Art. III, sec. 1, Old (1935) Constitution Art. IV, sec. 1, New (1973) Constitution.

12 Art. II, sec. 14. In the New Constitution, the corresponding provision reads as follows:

"The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, rebellion, or imminent danger thereof, when the public safety requires it." (Art. IV, sec. 15.)

13 *Barcelon vs. Baker*, 5 Phil. 87; *Severino vs. Governor-General*, 16 Phil. 366; *Abueva vs. Wood*, 45 Phil. 612; *Alejandrino vs. Quezon*, 46 Phil. 85; *Vera vs. Avelino*, 77 Phil. 192; *Mabanag vs. Lopez Vito*, 78 Phil. 1; *Cabili vs. Francisco*, 88 Phil. 654; *Montenegro vs. Castaneda*, 91 Phil. 882; *Santos vs. Yatco*, 55 O.G. 8641 (Minute Resolution of Nov. 6, 1959); *Osmeña vs. Pendatun*, Oct. 28, 1960.

14 *Duncan vs. Kahanamoku* and *White vs. Steer*, 327 U.S. 304-358.

15 *Aytona vs. Castillo*, 4 SCRA 1.

16 In the referendum of January 10-15, 1973, the people expressed themselves against the holding of elections and the immediate convening of the legislature. This was virtually reaffirmed in the referendum of July 27-28, 1973.

17 It is interesting to note that the other petitioners have not discussed this issue and do not seemingly join him in his pose.

18 Which may not be surprising, considering that Counsel Tañada of petitioner Diokno who signed the motion to withdraw was one of the leading counsels of the petitioners in the Ratification Cases.

19 In G.R. No. L-36142, *Javellana vs. Executive Secretary* and the other Ratification Cases, the writer, joined by Justices Antonio and Esguerra, was of the view that before allowing the entry of final judgment and despite the absence of any prayer for relief in the *Constancia* and *Manifestation* mentioned above, it was best for the Court to correct the representation of counsel regarding the true juridical import of the decision, but the majority were of the opinion that misconstructions by the interested parties of the judgment of the Court cannot alter the effect thereof intended by the Court and evident in its dispositive portion. The writer was afraid that future occasions might arise, as it has happened now, when Our silence may be taken advantage of, even for the sake of propaganda alone. On the other hand, Justice Zaldivar stated that "I find merit in the '*Constancia*' and *manifestation* of counsel for the petitioners where they assert that the sentence. 'This being the vote of the majority, there is no further judicial obstacle to the New Constitution being considered in force and effect in the dispositive portion of the resolution is not warranted . . .'" and that "This last sentence of the dispositive portion of the resolution should have been deleted."

20 The above exposition of the joint opinion is made in order to explain why the rest of the members of the Court (except Justice Zaldivar) evidently felt that the view thus expressed by Chief Justice Makalintal and Justice Castro justified not only the judgment of dismissal but also the statement that "there is no more judicial obstacle to the New Constitution being considered in force and effect."

21 Section 16 of Article XVII of the 1973 Constitution provides: "This Constitution shall take effect immediately upon its ratification by a majority of the votes cast in a plebiscite called for the purpose and, except as herein provided, shall supersede the Constitution of nineteen hundred and thirty-five and all amendments thereto." Even this expressed desire of the Convention was disregarded by the people, and it is difficult to see what valid principle there is that can curtail them from exercising their ultimate sovereign authority in the manner they deem best under the circumstances.

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SEPARATE OPINION

CASTRO, J.:

I

These nine cases are applications for writs of habeas corpus. The petitions aver in substance that on September 21, 1972 the President of the Philippines placed the country under martial law (Proclamation 1081); that on various dates from September 22 to September 30, 1972, the petitioners or the persons in whose behalf the applications were made were arrested by the military authorities and detained, some at Fort Bonifacio in Makati, Rizal, others at Camp Aguinaldo and still others at Camp Crame, both in Quezon City; and that the arrest and detention of the petitioners were illegal, having been effected without a valid order of a competent court of justice.

Writs of habeas corpus were issued by the Court directing the respondents Secretary of National Defense, Chief of Staff of the Armed Forces of the Philippines, and Chief of the Philippine Constabulary, to produce the bodies of the petitioners in Court on designated dates and to make returns to the writs. In due time the respondents, through the Solicitor General, filed their returns to the writs and answers to the petitions. Admitting that the petitioners had been arrested and detained, the respondents nevertheless justified such arrest and detention as having been legally ordered by the President of the Philippines pursuant to his proclamation of martial law, the petitioners being regarded as participants or as having given aid and comfort "in the conspiracy to seize political and state power and to take over the government by force." The respondents traversed the petitioners' contention that their arrest and detention were unconstitutional.

Hearings were held on September 26 and 29 and October 6, 1972, at which the petitioners were produced in Court. Thereafter the parties filed memoranda.

Meanwhile, some of the petitioners, with leave of Court, withdrew their petitions;^[1] others, without doing so, were subsequently released from custody under certain restrictive conditions.^[2] Enrique Voltaire Garcia II, the sole petitioner in L-35547 and one of those released, having died shortly after his release, the action was deemed abated as to him.

As of this date only Jose W. Diokno, in whose behalf the petition in L-35539 was filed, and Benigno S. Aquino, Jr. in L-35546, are still in military custody.

On August 23, 1973 the petitioner Aquino filed an action for certiorari and prohibition with this Court, alleging that on August 11, 1973 charges of murder, subversion and illegal possession of firearms were filed against him with a military commission; that his trial by the military court which was to be held on August 27, 29 and 31, 1973 was illegal because the proclamation of martial law was unconstitutional; and that he could not expect a fair trial because the President of the Philippines, having prejudged his case, could reverse any judgment of acquittal by the military court and sentence him to death. That action, docketed as L-37364 and entitled "Benigno S. Aquino, Jr. vs. Military Commission No. 2," is still pending consideration and decision.

On the other hand, Jose W. Diokno, on December 28, 1973, filed a motion to withdraw the petition filed in his behalf, imputing delay in the disposition of his case, and asseverating that because of the decision of the Court in the Ratification Cases^[3] and the action of the members of the Court^[4] in taking an oath to support the new Constitution, he cannot "reasonably expect to get justice in this case." The respondents oppose the motion on the grounds that there is a public interest in the decision of these cases and that the reasons given for the motion to withdraw are untrue, unfair and contemptuous.

II

The threshold question is whether to allow the withdrawal of the petition in L-35539 filed in behalf of Diokno. In his letter to his counsel, which is the basis of the motion to withdraw, Diokno states the following considerations: first, the delay in the disposition of his case; second, the dismissal of the petitions in the Ratification Cases, contrary to the Court's ruling that the 1973 Constitution was not validly ratified; and third, the action of the members of the Court in taking an oath of allegiance to the new Constitution. Diokno asserts that "a conscience that allows a man to rot behind bars for more than one year and three months without trial — of course, without any charges at all — is a conscience that has become stunted, if not stultified," and that "in swearing to support the new 'Constitution,' the five members of the Court who had held that it had not been validly ratified, have not fulfilled our expectations." He goes on to say: "I do not blame them. I do not know what I would have done in their place. But, at the same time, I can not continue to entrust my case to them; and I have become thoroughly convinced that our quest for justice in my case is futile."

As already noted, the Solicitor General, in behalf of the respondents, opposes the withdrawal of the petition on the ground of public interest, adding that the motion to withdraw cannot be granted by the Court without in effect admitting the "unfair, untrue and contemptuous" statements contained therein.

Without passing on the liability of any party in this case for contemptuous statements made, the Court (by a vote of 5 to 7) denied the motion.

I voted for the denial of the motion to withdraw for inescapable reasons that I now proceed to expound.

The general rule is that in the absence of a statute expressly or impliedly prohibiting the withdrawal of an action, the party bringing such action may dismiss it even without the consent of the defendant or respondent where the latter will not be prejudiced, although it may be necessary to obtain leave of court. But there are recognized exceptions: when the public interest or questions of public importance are involved.^[5] For example, the fact that a final determination of a question involved in an action is needed or will be useful as a guide for the conduct of public officers or tribunals is a sufficient reason for retaining an action which would or should otherwise be dismissed. Likewise, appeals may be retained if the questions involved are likely to arise frequently in the future unless they are settled by a court of last resort.

Thus, in *Gonzales vs. Commission on Elections*,^[6] an action for declaratory judgment impugning the validity of Republic Act No. 4880 which prohibits the early nomination of candidates for elective offices and early election campaigns or partisan political activities became moot by reason of the holding of the 1967 elections before decision could be rendered. Nonetheless the Court treated the petition as one for prohibition and rendered judgment in view of "the paramount public interest and the undeniable necessity for a ruling, the national elections [of 1969] being barely six months away."

In *Krivenko vs. Register of Deeds*,^[7] the Court denied the petition to withdraw an appeal in view of the public importance of the questions involved, and lest "the constitutional mandate [proscribing the sale of lands to aliens] . . . be ignored or misconceived, with all the harmful consequences . . . upon the national economy."

The petitioner Diokno has made allegations to the effect that the President has "arrogated" unto himself the powers of government by "usurping" the powers of Congress and "ousting" the courts of their jurisdiction, thus establishing in this country a "virtual dictatorship." Diokno and his counsel have in fact stressed that the present trend of events in this country since the proclamation of martial law bears a resemblance to the trend of events that led to the establishment of a dictatorship in Germany under Hitler. There is thus a profound public interest in the resolution of the questions raised in the cases at bar, questions that, in the phrase of Chief Justice Marshall in

Marbury vs. Madison,[8] are "deeply interesting to the nation." I apprehend that in view of the import of the allegations made by Diokno and his counsel, incalculable harm or, in the very least, great disservice may be caused to the national interest if these cases are not decided on the merits. As the Solicitor General has observed, "petitioner's [Diokno's] arrest and detention have been so exploited in the hate campaign that the only way to protect the integrity of the government is to insist on a decision of this case in the forum in which the petitioner had chosen to bring them. Otherwise, like festering sores, the issues stirred up by this litigation will continue to agitate the nation."

Prescinding from the policy considerations just discussed, I am gladdened that the Court has not shunted aside what I regard as the inescapable moral constraints in the petitioner Diokno's motion to withdraw his petition for habeas corpus.[9] The Court repudiated the facile recourse of avoiding resolution of the issues on the pretext that Diokno insists on withdrawing his petition. It is thus not a mere happenstance that, notwithstanding that seven members of the Court are of the view that Diokno has an absolute right to withdraw his petition, the Court has confronted the issues posed by him, and now resolves them squarely, definitively and courageously. No respectable legal historian or responsible chronicler of the nation's destiny will therefore have any reason to level the indictment that once upon a grave national crisis the Court abdicated its constitutional prerogative of adjudication and forswore the sacred trust reposed in it as the nation's ultimate arbiter on transcendental, far-reaching justiciable questions.

With respect to the reasons given for the motion to withdraw, the Court is mindful that it has taken some time to resolve these cases. In explanation let it be said that the issues presented for resolution in these cases are of the utmost gravity and delicateness. No question of the awesome magnitude of those here presented has ever confronted the Court in all its history. I am not aware that any other court, except possibly the Circuit Court in *Ex parte Merryman*, [10] has decided like questions during the period of the emergency that called for the proclamation of martial law.

But then in *Merryman* the Court there held that under the U.S. Federal Constitution the President did not have power to suspend the privilege of the writ of habeas corpus. Otherwise, where the question involved not power but rather the exercise of power, courts have declined to rule against the duly constituted authorities while the emergency lasted. As Glendon Schubert noted, the U.S. Supreme Court "was unwilling to [do so] until the war was over and Lincoln was dead."

Thus, in *Ex parte Milligan*, [11] the decision voiding the petitioner's trial by a military court was not announced until December 14, 1866, after the Civil War was over. The Civil War began on May 3, 1861 with the capture of Fort Sumter by Confederate forces. Lambdin Milligan was charged before a military commission with aiding rebels, inciting insurrection, disloyal practices and violation of the laws of war. His trial ran from September to December 1862; he was convicted on October 21, 1864 and ordered executed on May 19, 1865. On May 10, 1865 he applied for a writ of habeas corpus from the Circuit Court of Indianapolis. On May 11, Justice Davis and Judge McDonald certified that they differed in opinion and, therefore, pursuant to the statute of 1802, elevated their questions to the Supreme Court. On June 3, 1865 the death sentence was commuted to life imprisonment by President Johnson who had succeeded to the Presidency after the assassination of Lincoln. The Supreme Court heard the parties' arguments for eight days, on March 5, 6, 7, 8, 9, 12 and 13, and April 3, 1866. On December 14, 1866 the decision of the Supreme Court voiding Milligan's trial was announced.

In *In Re Moyer*, [12] martial rule was proclaimed in Colorado on March 23, 1904. Application for a writ of habeas corpus was filed with the State Supreme Court on April 14, 1904, seeking the release of Moyer who had been detained under the Colorado governor's proclamation. On June 6, 1904 the complaint was dismissed and the petitioner was remanded to the custody of the military authorities. The Court held that as an incident to the

proclamation of martial law, the petitioner's arrest and detention were lawful. Moyer subsequently brought an action for damages for his imprisonment from March 30 to June 15, 1904. The complaint was dismissed by the Circuit Court. On writ of error, the U.S. Supreme Court affirmed, holding that "So long as such arrests are made in good faith and in the 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 no reasonable ground for his belief." [13]

Finally, in *Duncan vs. Kahanamoku*, [14] Hawaii was placed under martial rule on December 7, 1941, after the Japanese sneak attack on Pearl Harbor. The petitioner Duncan was tried by a provost court on March 2, 1944 and found guilty on April 13 of assault on two marine sentries. The other petitioner, White, was charged on August 25, 1942, also before a provost court, with embezzling stocks belonging to another civilian. White and Duncan questioned the power of the military tribunals in petitions for habeas corpus filed with the District Court of Hawaii on March 14 and April 14, 1944, respectively. Writs were granted on May 2, 1944, and after trial the District Court held the military trials void and ordered the release of Duncan and White. On October 24, 1944 the privilege of the writ of habeas corpus was restored and martial law was terminated in Hawaii. On appeal, the decision of the District Court was reversed. [15] Certiorari was granted by the U.S. Supreme Court on February 12, 1945. [16] On February 25, 1946 the Court held that the trials of White and Duncan by the military tribunals were void.

In truth, as the Court in *Milligan* recognized, its decision could not have been made while the Civil War lasted. Justice Davis wrote:

"During the Wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approached the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation." [17]

No doubt there is a point, although controversial, in the observation that in the instances just examined a successful challenge was possible only retroactively, after the cessation of the hostilities which would under any circumstances have justified the judgment of the military. [18]

Nor did it offend against principle or ethics for the members of this Court to take an oath to support the 1973 Constitution. After this Court declared that, with the dismissal of the petitions questioning the validity of the ratification of the new Constitution, there was "no longer any judicial obstacle to the new Constitution being considered in force and effect," [19] it became the duty of the members of the Court, let alone all other government functionaries, to take an oath to support the new Constitution. While it is true that a majority of six justices declared that the 1973 Constitution was not validly ratified, it is equally true that a majority of six justices held that the issue of its effectivity was a political question, which the Court was not equipped to determine, depending as it did on factors for which the judicial process was not fit to resolve. Resolution of this question was dispositive of all the issues presented in the Ratification Cases. It thus became untenable for the members of the Court who held contrary opinions to press their opposition beyond the decision of those cases. Fundamental respect for the rule of law dictated that the members of the Court take an oath to uphold the new Constitution. There is nothing in that solemn oath that debases their individual personal integrity or renders them unworthy or incapable of doing justice in these cases. Nor did the environmental milieu of their adjuration in any manner demean their high offices or detract from the legitimacy of the Court as the highest judicial collegium of the land.

III

From its Anglo-Saxon origin and throughout its slow evolution, the concept, scope and boundaries, application, limitations and other facets of martial law have been the subject of misunderstanding, controversy and debate.[20] To the legal scholar interested in set legal principles and precise distinctions, martial law could be a frustrating subject. On the matter of its definition alone, it is known to have as many definitions as there are numerous authors and court decisions (not to discount the dissenting opinions) on the subject. The doctrinal development of martial law has relied mainly on case-law,[21] and there have been relatively few truly distinctive types of occasions where martial law, being the extraordinary remedy that it is, has been resorted to.

In the Philippines, the only other notable instance when martial law was declared was on September 22, 1944, per Proclamation No. 29 promulgated by President Jose P. Laurel. But this was pursuant to the constitution of the short-lived Japanese Occupation Republic, and the event has not been known to be productive of any jurisprudential pronouncements emanating from the high court of the land.

Notwithstanding the confused state of jurisprudence on the subject of martial law in England and in the United States, and, consequently, in the Philippines, a useful knowledge of the law on the subject can fairly be had from a study of its historical background and its rationale, its doctrinal development, applicable constitutional and statutory provisions, and authoritative court decisions and commentaries.

Legal scholars trace the genesis of martial law to England starting from the age of the Tudors and the Stuarts in the 14th century when it was first utilized for the suppression of rebellions and disorders. It later came to be employed in the British colonies and dominions where its frequent exercise against British subjects gave rise to the criticism that it was being exploited as a weapon to enhance British imperialism.[22]

In the United States, martial law was declared on numerous occasions from the revolutionary period to the Civil War, and after the turn of the century. One of the earliest instances in American history was the declaration of martial law by Gen. Andrew Jackson before the Battle of New Orleans in 1814. Fearing that the New Orleans legislature might capitulate to the British, he placed the State under "strict martial law" and forbade the State legislature to convene. Martial law was lifted after the American victory over British arms. The Civil War period saw the declaration of martial law on many occasions by both the Confederate and the Union authorities. It has also been resorted to in cases of insurrection and rebellion, as exemplified by the Whiskey rebellion (1794 in Pennsylvania and Virginia) and the Dorr's rebellion (1842 in Rhode Island). Martial law has also been utilized during periods of disaster, such as the San Francisco earthquake and fire of 1906, and in industrial disputes involving violence and disorder. It has likewise been variously instituted to police elections, to take charge of ticket sales at a football game, to prevent the foreclosure of mortgages, to close a race track. In an extreme case, the governor of Georgia proclaimed martial law around a government building to exclude from its premises a public official whom he was enjoined from removing.[23]

At the close of the World War I, the term "martial law" was erroneously employed to refer to the law administered in enemy territory occupied by the allied forces pending the armistice.[24] William Winthrop states that the earlier confusion regarding the concept of martial law, resulting partly from the wrong definition of the term by the Duke of Wellington who had said that "it is nothing more nor less than the will of the general," had misled even the Supreme Court of the United States.[25] In the leading case of *Ex Parte Milligan*,[26] however, Chief Justice Chase, in his dissenting opinion, clarified and laid down the classic distinctions between the types of military jurisdiction in relation to the terms "martial law," "military law" and "military government," which to a great extent cleared the confusion in the application of these terms.

These distinctions were later incorporated in the Manual for Courts-Martial of the United States Army,[27] after

which the Manual for Courts-Martial of the Armed Forces of the Philippines, promulgated on December 17, 1938 pursuant to Executive Order No. 178, was patterned. In essence, these distinctions are as follows:

a. Military jurisdiction in relation to the term military law is that exercised by a government "in the execution of that branch of its municipal law which regulates its military establishment." (In the U.S. and the Philippines, this refers principally to the statutes which embody the rules of conduct and discipline of members of their respective armed forces. In the Philippines we have for this purpose Commonwealth Act No. 408, as amended, otherwise known as "The Articles of War").

b. Military jurisdiction in relation to the term martial law is that "exercised in time of rebellion and civil war by a government temporarily governing the civil population of a locality through its military forces, without the authority of written law, as necessity may require." [28]

c. Military jurisdiction in relation to the term military government is that "exercised by a belligerent occupying an enemy's territory;" [29] (A familiar example of a military government was, of course, that established and administered by the Japanese armed forces in the Philippines from 1942 to 1945).

What is the universally accepted fundamental justification of martial law? Wiener, in *A Practical Manual of Martial Law*, [30] ventures this justification: "Martial Law is the public law of necessity. Necessity calls it forth, necessity justifies its existence, and necessity measures the extent and degree to which it may be employed."

Martial law is founded, upon the principle that the state has a right to protect itself against those who would destroy it, and has therefore been likened to the right of the individual to self-defense. [31] It is invoked as an extreme measure, and rests upon the basic principle that every state has the power of self-preservation, a power inherent in all states, because neither the state nor society would exist without it. [32]

IV

I now proceed to discuss the issues posed in these cases.

In Proclamation 1081, dated September 21, 1972, the President of the Philippines declared that lawless elements, supported by a foreign power, were in "armed insurrection and rebellion against the Government of the Philippines in order to forcibly seize political and state power, overthrow the duly constituted government and supplant our existing political, social, economic and legal order with an entirely new one . . . based on the Marxist-Leninist-Maoist teachings and beliefs." He enumerated many and varied acts of violence committed in pursuance of the insurrection and rebellion. He therefore placed the Philippines under martial law, commanded the armed forces to suppress the insurrection and rebellion, enforce obedience to his decrees, orders and regulations, and arrest and detain those engaged in the insurrection and rebellion or in other crimes "in furtherance or on the occasion thereof, or incident thereto or in connection therewith." The President invoked his powers under article VII section 10(2) of the 1935 Constitution "to save the Republic and reform our society." [33]

By General Order No. 2 the President directed the Secretary of National Defense to "forthwith arrest or cause the arrest . . . the individuals named in the attached lists for being participants or for having given aid and comfort in the conspiracy to seize political and state power in the country and to take over the government by force . . . in order to prevent them from further committing acts that are inimical or injurious . . ." The Secretary was directed to hold in custody the individuals so arrested "until otherwise so ordered by me or by my duly designated representative." The arrest and detention of the petitioners in these cases appear to have been made pursuant to this order.

I cannot blink away the stark fact of a continuing Communist rebellion in the Philippines. The Court has repeatedly taken cognizance of this fact in several cases decided by it. In 1971, in *Lansang vs. Garcia*, [34] the

Court, after reviewing the history of the Communist movement in the country since the 1930s, concluded: "We entertain, therefore, no doubts about the existence of a sizeable group of men who have publicly risen in arms to overthrow the government and have thus been and still are engaged in rebellion against the Government of the Philippines." It affirmed this finding in 1972^[35] in sustaining the validity of the Anti-Subversion Act (Republic Act 1700). The Act is itself a congressional recognition and acute awareness of the continuing threat of Communist subversion to democratic institutions in this country. Enacted in 1957, it has remained in the statute books despite periodic agitation in many quarters for its total excision.

At times the rebellion required no more than ordinary police action, coupled with criminal prosecutions. Thus the 1932 Communist trials resulted in the conviction of the well-known Communists of the day: Crisanto Evangelista, Jacinto G. Manahan, Dominador J. Ambrosio, Guillermo Capadocia, Ignacio Nabong and Juan Feleo, among others, for crimes ranging from illegal association to rebellion and sedition.^[36]

The end of World War II saw the resurgence of the Communist rebellion. Now with an army forged out of the former Hukbalahaps (the armed resistance against the Japanese) and renamed Hukbong Mapagpalaya ng Bayan or HMB, the threat to the security of the state became so malevolent that on October 22, 1950, President Elpidio Quirino was impelled to suspend the privilege of the writ of habeas corpus. This enabled the Government to effect the apprehension of top Communist Party leaders Guillermo Capadocia, Flavio Nava, Amado V. Hernandez, Jesus Lava, Jose Lava, Angel Baking and Simeon Rodriguez, among others.^[37] When challenged by one of those detained under the Presidential proclamation, the suspension of the privilege of the writ of habeas corpus was sustained by the Court.^[38]

The beginning of the 1970s was marked by the rise of student activism. This phenomenon swept around the globe, and did not spare our own colleges and universities. Soon the campuses became staging grounds for student demonstrations that generally ended in bloody and not infrequently lethal street riots.

In *Navarro vs. Villegas*,^[39] in upholding the power of the Mayor of Manila to determine the place and time for the holding of public assemblies, this Court noted —

"That experiences in connection with present assemblies and demonstrations do not warrant the Court's disbelieving respondent Mayor's appraisal that a public rally at Plaza Miranda, as compared to one at the Sunken Gardens as he suggested, poses a clearer and more imminent danger of public disorders, breaches of the peace, criminal acts, and even bloodshed as an aftermath of such assemblies, and petitioner has manifested that it has no means of preventing such disorders;

"That, consequently, every time that such assemblies are announced, the community is placed in such a state of fear and tension that offices are closed early and employees dismissed, storefronts boarded up, classes suspended, and transportation disrupted, to the general detriment of the public."

Riding on the crest of student unrest, the Communist rebellion gained momentum. As the Court noted in *Lansang vs. Garcia*,^[40]

"[T]he reorganized Communist Party of the Philippines has, moreover, adopted Mao's concept of protracted people's war, aimed at the paralyzation of the will to resist of the government, of the political, economic and intellectual leadership, and of the people themselves; that conformably to such concept the Party has placed special emphasis upon a most extensive and intensive program of subversion by the establishment of front organizations in urban centers, the organization of armed city partisans and the infiltration in student groups, labor unions, and farmer and professional groups; that the CPP has managed to infiltrate or establish and control nine (9) major labor organizations; that it has exploited the youth movement and succeeded in making Communist fronts of eleven (11) major student or youth organizations; that there are, accordingly, about thirty (30) mass organizations actively advancing the CPP interests, among which are the Malayang Samahan ng

Magsasaka (MASAKA), the Kabataang Makabayan (KM), the Movement for the Advancement of Nationalism (MAN), the Samahang Demokratiko ng Kabataan (SDK), the Samahang Molave (SM), and the Malayang Pagkakaisa ng Kabataang Pilipino (MPKP); that, as of August, 1971, the KM had two hundred forty-five (245) operational chapters throughout the Philippines, of which seventy-three (73) were in the Greater Manila Area, sixty (60) in Northern Luzon, forty-nine (49) in Central Luzon, forty-two (42) in the Visayas and twenty-one (21) in Mindanao and Sulu; that in 1970, the Party had recorded two hundred fifty-eight (258) major demonstrations, of which about thirty-three (33) ended in violence, resulting in fifteen (15) killed and over five hundred (500) injured; that most of these actions were organized, coordinated or led by the aforementioned front organizations; that the violent demonstrations were generally instigated by a small, but well-trained group of armed agitators; that the number of demonstrations heretofore staged in 1971 has already exceeded those in 1970; and that twenty-four (24) of these demonstrations were violent, and resulted in the death of fifteen (15) persons and the injury of many more."

The mounting level of violence necessitated the suspension, for the second time, of the privilege of the writ of habeas corpus on August 21, 1971. The Government's action was questioned in *Lansang vs. Garcia*. This Court found that the intensification and spread of Communist insurgency imperiled the state. The events after the suspension of the privilege of the writ confirmed the alarming extent of the danger to public safety:

"Subsequent events — as reported — have also proven that petitioners' counsel have underestimated the threat to public safety posed by the New People's Army. Indeed, it appears that, since August 21, 1971, it had in Northern Luzon six (6) encounters and staged one (1) raid, in consequence of which seven (7) soldiers lost their lives and two (2) others were wounded, whereas the insurgents suffered five (5) casualties; that on August 26, 1971, a well-armed group of NPA, trained by defector Lt. Victor Corpus, attacked the very command post of TF LAWIN in Isabela, destroying two (2) helicopters and one (1) plane, and wounding one (1) soldier; that the NPA had in Central Luzon a total of four (4) encounters, with two (2) killed and three (3) wounded on the side of the Government, one (1) BSDU killed and three (3) NPA casualties; that in an encounter at Botolan, Zambales, one (1) KM-SDK leader, an unidentified dissident, and Commander Panchito, leader of the dissident group, were killed; that on August 26, 1971, there was an encounter in the Barrio of San Pedro, Iriga City, Camarines Sur, between the PC and the NPA, in which a PC and two (2) KM members were killed; that the current disturbances in Cotabato and the Lanao provinces have been rendered more complex by the involvement of the CPP/NPA for, in mid-1971, a KM group, headed by Jovencio Esparagoza, contacted the Higa-onan tribes, in their settlement in Magsaysay, Misamis Oriental, and offered them books, pamphlets and brochures of Mao Tse Tung, as well as conducted teach-ins in the reservation; that Esparagoza was reportedly killed on September 22, 1971, in an operation of the PC in said reservation; and that there are now two (2) NPA cadres in Mindanao.

"It should, also, be noted that adherents of the CPP and its front organizations are, according to intelligence findings, definitely capable of preparing powerful explosives out of locally available materials; that the bomb used in the Constitutional Convention Hall was a 'clay-more' mine, a powerful explosive device used by the U.S. Army, believed to have been one of many pilfered from the Subic Naval Base a few days before; that the President had received intelligence information to the effect that there was a July-August Plan involving a wave of assassinations, kidnappings, terrorism and mass destruction of property and that an extraordinary occurrence would signal the beginning of said event; that the rather serious condition of peace and order in Mindanao, particularly in Cotabato and Lanao, demanded the presence therein of forces sufficient to cope with the situation; that a sizeable part of our armed forces discharges other functions; and that the expansion of the CPP activities from Central Luzon to other parts of the country, particularly Manila and its suburbs, the Cagayan Valley, Ifugao, Zambales, Laguna, Quezon and Bicol Region, required that the rest of our armed forces be spread thin over a wide area." [41]

By virtue of these findings, the Court, led by Chief Justice Roberto Concepcion, unanimously upheld the suspension of the privilege of the writ of habeas corpus. The Court said:

"Considering that the President was in possession of the above data — except those related to events that happened after August 21, 1971 — when the Plaza Miranda bombing took place, the Court is not prepared to hold that the Executive had acted arbitrarily or gravely abused his discretion when he then concluded that public safety and national security required the suspension of the privilege of the writ, particularly if the NPA were to strike simultaneously with violent demonstrations staged by the two hundred forty-five (245) KM chapters, all over the Philippines, with the assistance and cooperation of the dozens of CPP front organizations, and the bombing of water mains and conduits, as well as electric power plants and installations — a possibility which, no matter how remote, he was bound to forestall, and a danger he was under obligation to anticipate and arrest.

"He had consulted his advisers and sought their views. He had reason to feel that the situation was critical — as, indeed, it was — and demanded immediate action. This he took believing in good faith that public safety required it. And, in the light of the circumstances adverted to above, he had substantial grounds to entertain such belief." [42]

The suspension of the privilege of the writ was lifted on January 7, 1972, but soon thereafter chaos engulfed the nation again. A large area of the country was in open rebellion. The authority of the Government was frontally challenged by a coalition of forces. It was against this backdrop of violence and anarchy that martial law was proclaimed on September 21, 1972.

Personally, I take notice of this condition, in addition to what the Court has found in cases that have come to it for decision, and there is no cogent reason for me to say as a matter of law that the President exceeded his powers in declaring martial law. Nor do I believe that the Solicitor General's manifestation of May 13, 1974 to the effect that while on the whole the military challenge to the Republic has been overcome there are still large areas of conflict which warrant the continued imposition of martial law, can be satisfactorily controverted by the petitioners or by any perceptive observer of the national scene.

As I will point out in this opinion, the fact that courts are open cannot be accepted as proof that the rebellion and insurrection, which compellingly called for the declaration of martial law, no longer imperil the public safety. Nor are the many surface indicia adverted to by the petitioners (the increase in the number of tourists, the choice of Manila as the site of international conferences and of an international beauty contest) to be regarded as evidence that the threat to public safety has abated. There is actual armed combat, attended by the somber panoply of war, raging in Sulu and Cotabato, not to mention the Bicol region and Cagayan valley. [43] I am hard put to say, therefore, that the Government's claim is baseless.

I am not insensitive to the plea made here in the name of individual liberty. But to paraphrase *Ex parte Moyer*, [44] if it were the liberty alone of the petitioner Diokno that is in issue we would probably resolve the doubt in his favor and grant his application. But the Solicitor General, who must be deemed to represent the President and the Executive Department in these cases, [45] has manifested that in the President's judgment peace and tranquility cannot be speedily restored in the country unless the petitioners and others like them meantime remain in military custody. For, indeed, the central matter involved is not merely the liberty of isolated individuals, but the collective peace, tranquility and security of the entire nation.

V

The 1935 Constitution committed to the President the determination of the public exigency or exigencies requiring the proclamation of martial law. It provided in article VII, section 10(2) that-

"The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, [46] invasion,

insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law."[47]

In the 1934 Constitutional Convention it was proposed to vest the power to suspend the privilege of the writ of habeas corpus in the National Assembly. The proposal, sponsored by Delegate Araneta, would give this power to the President only in cases where the Assembly was not in session and then only with the consent of the Supreme Court. But the majority of the delegates entertained the fear that the Government would be powerless in the face of danger.[48] They rejected the Araneta proposal and adopted instead the provisions of the Jones Law of 1916. The framers of the Constitution realized the need for a strong Executive, and therefore chose to retain the provisions of the former organic acts,[49] which, adapted to the exigencies of colonial administration, naturally made the Governor General a strong Executive.

Construing a similar provision of the Philippine Bill of 1902 which authorized the Governor General, with the approval of the Philippine Commission, to suspend the privilege of the writ of habeas corpus "when in cases of rebellion, insurrection, or invasion the public safety may require it," this Court held that the Governor General's finding as to the necessity for such action was "conclusive and final" on the judicial department.[50] This ruling was affirmed in 1952 in *Montenegro vs. Castañeda*,[51] this Court stating that -

"the authority to decide whether the exigency has arisen requiring the suspension belongs to the President and 'his decision is final and conclusive' upon the courts and upon all other persons."

It is true that in *Lansang vs. Garcia*[52] there is language that appears to detract from the uniform course of judicial construction of the Commander-in-Chief Clause. But a close reading of the opinion in that case shows that in the main there was adherence to precedents. To be sure, the Court there asserted the power to inquire into the "existence of the factual bases [for the suspension of the privilege of the writ of habeas corpus] in order to determine the sufficiency thereof." But this broad assertion of power is qualified by the Court's unambiguous statement that "the function of the Court is merely to check — not to supplant — the Executive, or to ascertain merely whether he has gone beyond the constitutional limits of his jurisdiction, not to exercise the power vested in him or to determine the wisdom of his act." For this reason this Court announced that the test was not whether the President acted correctly but whether he acted arbitrarily. In fact this Court read *Barcelon* and *Montenegro* as authorizing judicial inquiry into "whether or not there really was a rebellion, as stated in the proclamation therein contested."

Of course the judicial department can determine the existence of the conditions for the exercise of the President's powers and is not bound by the recitals of his proclamation. But whether in the circumstances obtaining public safety requires the suspension of the privilege of the writ of habeas corpus or the proclamation of martial law is initially for the President to decide. Considerations of commitment of the power to the executive branch of the Government and the lack of accepted standards for dealing with incommensurable factors, suggest the wisdom of considering the President's finding as to necessity persuasive upon the courts. This conclusion results from the nature of the power vested in the President and from the evident object contemplated. For that power is intended to enable the Government to cope with sudden emergencies and meet great occasions of state under circumstances that may be crucial to the life of the nation.[53]

The fact that courts are open and in the unobstructed discharge of their functions is pointed to as proof of the absence of any justification for martial law. The ruling in *Milligan*[54] and *Duncan*[55] is invoked. In both cases the U.S. Supreme Court reversed convictions by military commissions. In *Milligan* the Court stated that "martial law cannot arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration." In *Duncan* a similar expression was made: "The

phrase 'martial law' . . . while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."

But Milligan and Duncan were decided on the basis of a widely disparate constitutional provision. What is more, to the extent that they may be regarded as embodying what the petitioners call an "open court" theory, they are of doubtful applicability in the context of present-day subversion.

Unlike the detailed provision of our Constitution, the U.S. Federal Constitution does not explicitly authorize the U.S. President to proclaim martial law. It simply states in its article II, section 2 that "the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ." On the other hand, our Constitution authorizes the proclamation of martial law in cases not only of actual invasion, insurrection or rebellion but also of "imminent danger" thereof.

It is true that in Duncan the U.S. Supreme Court dealt with a U.S. statute that in terms was similar to the Philippine Constitution. Section 67 of the Hawaiian Organic Act provided that "[the Territorial Governor] may, in case of invasion, or imminent danger thereof, when public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof under martial law until communication can be had with the President [of the United States] and his decision thereon made known." In fact the Hawaiian Organic Act, that of Puerto Rico, and the Jones Law of 1916, from which latter law, as I have earlier noted, the Commander-in-Chief Clause of our Constitution was adopted, were part of the legislation of the U.S. Congress during the colonial period. But again, unlike the Jones Law, the Hawaiian Organic Act also provided in its section 5 that the U.S. Federal Constitution "shall have the same force and effect in the Territory [of Hawaii] as elsewhere in the United States." For this reason it was held in Duncan that "imminent danger" of invasion or rebellion was not a ground for authorizing the trial of civilians by a military tribunal. Had Duncan been decided solely on the basis of section 67 of the Hawaiian Organic Act and had the petitioners in that case been tried for offenses connected with the prosecution of the war,[56] the prison sentences imposed by the military tribunals would in all probability have been upheld. As a matter of fact those who argued in Duncan that the power of the Hawaiian governor to proclaim martial law comprehended not only actual rebellion or invasion but also "imminent danger thereof" were faced with the problem of reconciling the two parts of the Hawaiian Organic Act. They contended that "if any part of section 67 would otherwise be unconstitutional section 5 must be construed as extending the [U.S.] Constitution to Hawaii subject to the qualifications or limitations contained in section 67." [57]

Forsooth, if the power to proclaim martial law is at all recognized in American federal constitutional law, it is only by implication from the necessity of self-preservation and then subject to the narrowest possible construction.

Nor is there any State Constitution in the United States, as the appended list indicates (see Appendix), which in scope and explicitness can compare with the Commander-in-Chief. Clause of our Constitution. The Alaska Constitution, for example, authorizes the governor to proclaim martial law when the public safety requires it in case of rebellion or actual or imminent invasion. But even then it also provides that martial law shall not last longer than twenty days unless approved by a majority of the legislature in joint session. On the other hand, the present Constitution of Hawaii does not grant to the State governor the power to suspend the writ of habeas corpus or to proclaim martial law as did its Organic Act before its admission as a State to the American Union.

An uncritical reading of Milligan and Duncan is likely to overlook these crucial differences in textual concepts between the Philippine Constitution, on the one hand, and the Federal and State Constitutions of the United States,

on the other. In our case then the inclusion of the "imminent danger" phrase as a ground for the suspension of the privilege of the writ of habeas corpus and for the proclamation of martial law was a matter of deliberate choice and renders the language of Milligan ("martial law cannot arise from a threatened invasion") inapposite and therefore inapplicable.

The Philippine Bill of 1902 provided in its section 2, paragraph 7 —

"that the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor General with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist."

The Jones Law of 1916 substantially reenacted this provision. Thus section 3, paragraph 7 thereof provided:

"That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President or by the Governor General, wherever during such period the necessity for such suspension shall exist."

In addition, the Jones Law provided in its section 21 that —

". . . [The Governor General] may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privileges of the writ of habeas corpus, or place the Islands, or any part thereof, under martial law: Provided, That whenever the Governor General shall exercise this authority, he shall at once notify the President of the United States thereof, together with the attending facts and circumstances, and the President shall have power to modify or vacate the action of the Governor General."

Note that with respect to the suspension of the privilege of the writ of habeas corpus, section 21 mentions, as ground therefor, "imminent danger" of invasion or rebellion. When the Constitution was drafted in 1934, its framers, as I have already noted, decided to adopt these provisions of the Jones Law. What was section 3, paragraph 7, in the Jones Law became section 1[14] of article III (Bill of Rights) of the Constitution; and what was section 21 became article VII, section 10(2) (Commander-in-Chief Clause). Thus, the Bill of Rights provision reads:

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

On the other hand, the Commander-in-Chief Clause states:

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

The attention of the 1934 Convention was drawn to the apparent inconsistency between the Bill of Rights provision and the Commander-in-Chief Clause. Some delegates tried to harmonize the two provisions by inserting the phrase "imminent danger thereof" in the Bill of Rights provision, but on reconsideration the Convention deleted the phrase from the draft of the Bill of Rights provision, at the same time retaining it in the Commander-in-Chief Clause.

When this apparent inconsistency was raised in a suit[58] questioning the validity of President Quirino's

suspension of the privilege of the writ of habeas corpus, this Court sustained the President's power to suspend the privilege of the writ even on the ground of imminent danger of invasion, insurrection or rebellion. It held that as the Commander-in-Chief Clause was last in the order of time and local position it should be deemed controlling. This rationalization has evoked the criticism that the Constitution was approved as a whole and not in parts, but in result the decision in that case is certainly consistent with the conception of a strong Executive to which the 1934 Constitutional Convention was committed.

The 1973 Constitution likewise authorizes the suspension of the privilege of the writ of habeas corpus on the ground of imminent danger of invasion, insurrection or rebellion.

The so-called "open court" theory does not apply to the Philippine situation because our 1935 and 1973 Constitutions expressly authorize the declaration of martial law even where the danger to public safety arises merely from the imminence of invasion, insurrection, or rebellion. Moreover, the theory is too simplistic for our day, what with the universally recognized insidious nature of Communist subversion and its covert operations.

Indeed the theory has been dismissed as unrealistic by perceptive students of Presidential powers.

Charles Fairman says:

"These measures are unprecedented but so is the danger that called them into being. Of course we are not without law, even in time of crisis. Yet the cases to which one is cited in the digests disclose such confusion of doctrine as to perplex a lawyer who suddenly tries to find his bearings. Hasty recollection of *Ex parte Milligan* recalls the dictum that 'Martial rule cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.' Not even the aerial attack upon Pearl Harbor closed the courts or of its own force deposed the civil administration; yet it would be the common understanding of men that those agencies which are charged with the national defense surely must have authority to take on the spot some measures which in normal times would be *ultra vires*. And whilst college sophomores are taught that the *Milligan* case stands as a constitutional landmark, the hard fact is that of late governors have frequently declared 'martial law' and 'war' and have been judicially sustained in their measures. Undoubtedly, many of these cases involving the suspension of strikers went much too far. But just as certainly — so it will be argued here — the doctrine of the majority in *Ex parte Milligan* does not go far enough to meet the conditions of modern war." [59]

Clinton Rossiter writes:

"It is simply not true that 'martial law cannot arise from a threatened invasion,' or that 'martial rule can never exist where the courts are open.' These statements do not present an accurate definition of the allowable limits of the martial powers of the President and Congress in the face of alien threats of internal disorder. Nor was Davis' dictum on the specific power of Congress in this matter any more accurate. And, however eloquent and quotable his words on the untouchability of the Constitution in time of actual crisis, they do not now, and did not then, express the realities of American constitutional law." [60]

William Winthrop makes these thoughtful observations:

"It has been declared by the Supreme Court in *Ex parte Milligan* that 'martial law' is 'confined to the locality of actual war,' and also that it 'can never exist when the courts are open and in the proper and unobstructed exercise of their jurisdiction.' But this ruling was made by a bare majority — five — of the court, at a time of great political excitement, and the opinion of the four other members, as delivered by the Chief Justice, was to the effect that martial law is not necessarily limited to time of war, but may be exercised at other periods of 'public danger,' and that the fact that the civil courts are open is not controlling against such exercise, since they 'might be open and undisturbed in the execution of their functions and yet wholly incompetent to avert threatened danger or to punish with adequate promptitude and certainty the guilty.' It is the opinion of the

author that the view of the minority of the court is the sounder and more reasonable one, and that the dictum of the majority was influenced by a confusing of martial law proper with that military government which exists only at a time and on the theatre of war, and which was clearly distinguished from martial law by the Chief Justice in the dissenting opinion — the first complete judicial definition of the subject." [61] (emphasis supplied)

In *Queen vs. Bekker* (on the occasion of the Boer War) Justice Maasdorp categorically affirmed that "the existence of civil courts is no proof that martial law has become unnecessary." [62]

VI

Given then the validity of the proclamation of martial law, the arrest and detention of those reasonably believed to be engaged in the disorder or in fomenting it is well nigh beyond questioning. Negate the power to make such arrest and detention, and martial law would be "mere parade, and rather encourage attack than repel it." [63] Thus, in *Moyer vs. Peabody*, [64] the Court sustained the authority of a State governor to hold temporarily in custody one whom he believed to be engaged in fomenting trouble, and denied recovery against the governor for the imprisonment. It was said that, as the governor "may kill persons who resist," he "may use the milder measure of seizing the bodies of those whom he considers in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the 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 no reasonable ground for his belief."

It is true that in *Sterling vs. Constantin* [65] the same Court set aside the action of a State governor taken under martial law. But the decision in that case rested on the ground that the action set aside had no direct relation to the quelling of the uprising. There the governor of Texas issued a proclamation stating that certain counties were in a state of insurrection and declaring martial law in that territory. The proclamation recited that there was an organized group of oil and gas producers in insurrection against conservation laws of the State and that this condition had wrought such a state of public feeling that if the State government could not protect the public's interest they would take the law into their own hands. The proclamation further recited that it was necessary that the Railroad Commission be given time to make orders regarding oil production. When the Commission issued an order limiting oil production, the complainants brought suit in the District Court which issued restraining orders, whereupon Governor Sterling ordered General Wolters of the Texas National Guards to enforce a limit on oil production. It was this order of the State governor that the District Court enjoined. On appeal the U.S. Supreme Court affirmed. After assuming that the governor had the power to declare martial law, the Court held that the order restricting oil production was not justified by the exigencies of the situation.

" . . . Fundamentally, the question here is not the power of the Governor to proclaim that a state of insurrection, or tumult, or riot, or breach of the peace exists, and that it is necessary to call military force to the aid of the civil power. Nor does the question relate to the quelling of disturbance and the overcoming of unlawful resistance to civil authority. The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil. Instead of affording them protection in the exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible."

On the other hand, what is involved here is the validity of the detention order under which the petitioners were ordered arrested. Such order is, as I have already stated, a valid incident of martial law. With respect to such question Constantin held that "measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace."

In the cases at bar, the respondents have justified the arrest and detention of the petitioners on the ground of reasonable belief in their complicity in the rebellion and insurrection. Except Diokno and Aquino, all the petitioners have been released from custody, although subject to defined restrictions regarding personal movement and expression of views. As the danger to public safety has not abated, I cannot say that the continued detention of Diokno and Aquino and the restrictions on the personal freedoms of the other petitioners are arbitrary, just as I am not prepared to say that the continued imposition of martial rule is unjustified.

As the Colorado Supreme Court stated in denying the writ of habeas corpus in Moyer.[66]

"His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress."

VII

While courts may inquire into or take judicial notice of the existence of conditions claimed to justify the exercise of the power to declare martial law,[67] the determination of the necessity for the exercise of such power is within the periphery of the constitutional domain of the President; and as long as the measures he takes are reasonably related to the occasion involved, interference by the courts is officious.

I am confirmed in this construction of Presidential powers by the consensus of the 1971 Constitutional Convention to strengthen the concept of a strong Executive and by the confirmation of the validity of acts taken or done after the proclamation of martial law in this country. The 1973 Constitution expressly authorizes the suspension of the privilege of the writ of habeas corpus as well as the imposition of martial law not only on the occasion of actual invasion, insurrection or rebellion, but also where the danger thereof is imminent.[68] Acrimonious discussion on this matter has thus become pointless and should therefore cease.

The new Constitution as well provides that —

"All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after lifting of martial law or the ratification of this Constitution, unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly."[69]

The effectivity of the new Constitution is now beyond all manner of debate in view of the Court's decision in the Ratification Cases[70] as well as the demonstrated acquiescence therein by the Filipino people in the historic July 1973 national referendum.

VIII

It is thus evident that suspension of the privilege of the writ of habeas corpus is unavoidably subsumed in a declaration of martial law, since one basic objective of martial rule is to neutralize effectively — by arrest and continued detention (and possibly trial at the proper and opportune time) — those who are reasonably believed to be in complicity or are *particeps criminis* in the insurrection or rebellion. That this is so and should be so is ineluctable; to deny this postulate is to negate the very fundament of martial law: the preservation of society and the survival of the state. To recognize the imperativeness and reality of martial law and at the same time dissipate its efficacy by withdrawing from its ambit the suspension of the privilege of the writ of habeas corpus, is a proposition I regard as fatuous and therefore repudiate.

"Invasion and insurrection, both of them conditions of violence, are the factual pre--requisites of martial law . .

. The rights of person and property present no obstruction to the authorities acting under such a regime, if the acts which encroach upon them are necessary to the preservation or restoration of public order and safety. Princeps et res publica ex justa causa possunt rem meam auferre. All the procedures which are recognized adjuncts of executive crisis government . . . are open to the persons who bear official authority under martial law. The government may wield arbitrary powers of police to allay disorder, arrest and detain without trial all citizens taking part in this disorder and even punish them (in other words, suspend the [privilege of the] writ of habeas corpus), institute searches and seizures without warrant, forbid public assemblies, set curfew hours, suppress all freedom of expression, institute courts-martial for the summary trial of crimes perpetrated in the course of this regime and calculated to defeat its purposes. . ."[71] (emphasis supplied)

"The point here is whether martial law is simply a shorthand expression denoting the suspension of the writ, or whether martial law involves not only the suspension of the writ but much more besides. . . . The latter view is probably sounder because martial law, certainly in the present state of its development, is not at all dependent on a suspension of the writ of habeas corpus. . . . Where there has been violence or disorder in fact, continued detention of offenders by the military is so far proper as to result in a denial by the courts of writs releasing those detained. . . ."[72]

IX

Although the respondents, in their returns to the writs and in their answers to the several petitions, have insisted on a disclaimer of the jurisdiction of this Court, on the basis of General Orders Nos. 3 and 3-A,[73] their subsequent manifestations urging decision of these cases amount to an abandonment of this defense. In point of fact President Marcos has written, in unmistakable phrase, that "Our martial law is unique in that it is based on the supremacy of the civilian authority over the military and on complete submission to the decision of the Supreme Court. . . . For who is the dictator who would submit himself to a higher body like the Supreme Court on the question of the constitutionality or validity of his actions?"[74] Construing this avowal of the President and the repeated urgings of the respondents in the light of the abovequoted provision of the 1973 Constitution (Art. XVII, sec. 3(2)), it is my submission that General Orders Nos. 3 and 3-A must be deemed revoked in so far as they tended to oust the judiciary of jurisdiction over cases involving the constitutionality of proclamations, decrees, orders or acts issued or done by the President.

X

In sum and substance, I firmly adhere to these views: (1) that the proclamation of martial law in September 1972 by the President was well within the aegis of the 1935 Constitution; (2) that because the Communist rebellion had not abated and instead the evil ferment of subversion had proliferated throughout the archipelago and in many places had exploded into the roar of armed and searing conflict with all the sophisticated panoply of war, the imposition of martial law was an "imperative of national survival;" (3) that the arrest and detention of persons who were "participants or gave aid and comfort in the conspiracy to seize political and state power and to take over the government by force," were not unconstitutional nor arbitrary; (4) that subsumed in the declaration of martial law is the suspension of the privilege of the writ of habeas corpus; (5) that the fact that the regular courts of justice are open cannot be accepted as proof that the rebellion and insurrection, which compellingly called for the declaration of martial law, no longer imperil the public safety; (6) that actual armed combat has been and still is raging in Cotabato, Lanao, Sulu and Zamboanga, not to mention the Bicol Region and Cagayan Valley, and nationwide Communist subversion continues unabated; (7) that the host of doubts that had plagued this Court with respect to the validity of the ratification and consequent effectivity of the 1973 Constitution has been completely dispelled by every rational evaluation of the national referendum of July 1973, at which the people conclusively, albeit quietly, demonstrated nationwide acquiescence in the new Constitution; and (8) that the issue of the validity

and constitutionality of the arrest and detention of all the petitioners and of the restrictions imposed upon those who were subsequently freed, is now foreclosed by the transitory provision of the 1973 Constitution (Art. XVII, Sec. 3(2)) which efficaciously validates all acts made, done or taken by the President, or by others upon his instructions, under the regime of martial law, prior to the ratification of the said Constitution.

XI

It is not a mere surreal suspicion on the part of the petitioner Diokno that the incumbent members of this highest Tribunal of the land have removed themselves from a level of conscience to pass judgment upon his petition for habeas corpus or afford him relief from his predicament. He has actually articulated it as a formal indictment. I venture to say that his obsessional preoccupation on the ability of this Court to reach a fair judgment in relation to him has been, in no small measure, engendered by his melancholy and bitter and even perhaps traumatic detention. And even as he makes this serious indictment, he at the same time would withdraw his petition for habeas corpus — hoping thereby to achieve martyrdom, albeit dubious and amorphous. As a commentary on this indictment, I here declare that for my part — and I am persuaded that all the other members of this Court are situated similarly — I avow fealty to the full intendment and meaning of the oath I have taken as a judicial magistrate. Utilizing the modest endowments that God has granted me, I have endeavored in the past eighteen years of my judicial career — and in the future will always endeavor — to discharge faithfully the responsibilities appurtenant to my high office, never fearing, wavering or hesitating to reach judgments that accord with my conscience.

ACCORDINGLY, I vote to dismiss all the petitions.

[1] The following individuals, on their own motions, were allowed to withdraw their petitions: Veronica L. Yuyitung (Supreme Court Res. Oct. 6, 1972) and Tan Chin Hian (Res. Oct. 11, 1972) in L-35556; Amando Doronila, Hernando J. Abaya, Ernesto Granada, Luis D. Beltran, Bren Guiao, Ruben Cusipag and Willie Baun (Res. Oct. 3, 1972; Res. Oct. 11, 1972) in L-35567; Teresita M. Guiao in behalf of Bren Guiao (who was also a petitioner in L-35567) (Res. Oct. 9, 1972) in L-35571.

[2] The following individuals have since been released from custody: Joaquin P. Roces, Teodoro M. Locsin, Sr., Rolando Fadul, Rosalind Galang, Go Eng Guan, Renato Constantino and Luis R. Mauricio, all of whom were petitioners in L-35538; Maximo V. Soliven, Napoleon G. Rama and Jose Mari Velez in L-35540; Ramon Mitra, Jr., Francisco Rodrigo and Napoleon Rama in L-35546; Enrique Voltaire Garcia II (deceased) in L-35547; Tan Chin Hian and Veronica Yuyitung in L-35556; Amando Doronila, Juan L. Mercado, Hernando J. Abaya, Ernesto Granada, Luis D. Beltran, Ruben Cusipag, Roberto Ordoñez, Manuel Almario and Willie Baun in L-35567; Ernesto Rondon in L-35573; and Bren Z. Guiao in L-35571.

[3] *Javellana vs. Executive Secretary*, L-36142, March 31, 1973, 50 SCRA 30.

[4] Chief Justice Makalintal and Associate Justices Zaldivar, Castro, Fernando, Teehankee, Barredo, Makasiar, Antonio and Esguerra.

[5] See *Anno.*, Public Interest as Ground for Refusal to Dismiss on Appeal where Question has Become Moot or Dismissal is Sought by One or Both Parties, 132 A.L.R. 1185 to 1200; *Willis vs. Buchman*, 132 A.L.R. 1179; *State ex rel. Traub vs. Brown* (1938), 197 A 478; *Melson vs. Shetterley* (1933), 95 Ind. App. 538, 183 NE 802.

[6] L-27833, April 18, 1969, 27 SCRA 835.

[7] 79 Phil. 461 (1947).

[8] 1 Cranch 137, 2 L. ed. 60 (1803).

[9] Personally, I view this motion as a heretofore unheard-of curiosity. I cannot comprehend Diokno's real motivation, since granting his motion could conceivably result in his indefinite detention.

[10] 17 Fed. Cas. 144, Case No. 9487 (C.C.D. Md. 1861).

[11] 4 Wall. 2, 18 L. ed. 281 (1866).

[12] 35 Colo. 159, 85 Pac. 190 (1904).

[13] Moyer vs. Peabody, 212 U.S. 78, 53 L. ed. 410 (1909).

[14] 327 U.S. 304, 90 L. ed. 688 (1946).

[15] 146 F. 2d 578 (C.C.A. 9th, 1944).

[16] 324 U.S. 833, 89 L. ed. 1398 (1945).

[17] Supra, note 11.

[18] Schubert, The Presidency in the Courts, n. 54. p. 185 (1957).

[19] Supra, note 3.

[20] See 14 Encyclopaedia Britannica, pp. 984-985 (1945).

[21] England has an unwritten constitution, there is not even a bare mention of martial law in the Federal and in most of the State constitutions of the United States (see Appendix to this separate opinion), and there is a paucity or complete absence of statutes or codes governing it in the various common-law jurisdictions where it has been instituted.

[22] Fairman, The Law of Martial Rule (2nd ed., 1943), pp. 2, 52 and 145.

[23] Fairman. Id., pp. 94, 103, 108-109; Walker, Military Law (1954 ed.), p. 475.

[24] Fvaental, Military Occupation and the Rule of Law (1944 ed.), pp. 9, 24, 27, 31, 42-44.

[25] Winthrop, Military Law & Precedents (2nd ed., 1920), p. 799.

[26] 4 Wallace 2, 18 L. ed. 281 (1866).

[27] Winthrop, id., p. 817.

[28] Commonwealth Act No. 408 recognizes the eventuality of the declaration of martial law in its Articles of War 2, 37, 82 and 83. The AFP Manual for Courts-Martial defines martial law as "the exercise of military jurisdiction by a government temporarily governing the civil population of a locality through its military forces, without authority of written law, as necessity may require." Martial law, as thus exercisable, is in many respects comparable to the state of siege of the continental nations of Europe.

[29] See Manual for Courts-Martial (AFP), p. 1. Willoughby observes that "Where martial law is invoked in the face of invasion; it is war pure and simple, and it is in this sense that Field defines martial law as 'simply military authority, exercised in accordance with the laws and usages of war,' and that the U.S. Supreme Court defines it as 'the law of necessity in the actual presence of war' . . . Upon the actual scene of war, martial law becomes indistinguishable from military government." (Willoughby, The Constitutional Law of the United States, 2nd ed., 1939, Vol. 3, pp.1595--1597).

[30] See 45 Mich. Law Review 87.

[31] Winthrop, id., p. 820.

[32] Luther vs. Borden, 7 How. 1, 12 L. ed. 581, 600 (1849).

[33] President Marcos writes: "The compelling necessity [of the imposition of martial law in the Philippines] arises out of the seven grave threats to the existence of the Republic: the communist rebellion, the rightist conspiracy, the Muslim secessionist movement, the rampant corruption on all levels of society, the criminal and criminal-political syndicates — including the private armies — deteriorating economy and the increasing social injustice." (Ferdinand E. Marcos, Notes on the New Society of the Philippines, 98 (1973).

[34] L-33964, Dec. 11, 1971, 42 SCRA 448.

[35] People vs. Ferrer, L-32613-14, Dec. 27, 1972, 48 SCRA 382, 405: "In the Philippines the character of the Communist Party has been the object of continuing scrutiny by this Court. In 1932 we found the Communist Party of the Philippines to be an illegal association. In 1969 we again found that the objective of the Party was the 'overthrow of the Philippine Government by armed struggle and to establish in the Philippines a communist form of government similar to that of Soviet Russia and Red China.' More recently, in Lansang vs. Garcia, we noted the growth of the Communist Party of the Philippines and the organization of Communist fronts among youth organizations such as the Kabataang Makabayan (KM) and the emergence of the New People's Army. After meticulously reviewing the evidence, we said: 'We entertain, therefore, no doubts about the existence of a sizeable group of men who have publicly risen in arms to overthrow the government and have thus been and still are engaged in rebellion against the Government of the Philippines.'"

[36] People vs. Evangelista, 57 Phil. 375 (1932) (illegal association); People vs. Evangelista, 57 Phil. 354 (1932) (rebellion and sedition); People vs. Capadocia, 57 Phil. 364 (1932) (rebellion and sedition); People vs. Evangelista, 57 Phil. 372 (1932) (rebellion and sedition); People vs. Feleo, 57 Phil. 451 (1932) (inciting to sedition); People vs. Nabong, 57 Phil. 455 (1932) (inciting to sedition).

[37] People vs. Lava, L-4974, May 16, 1969, 28 SCRA 72 (rebellion); People vs. Hernandez, L-6025, May 30, 1964, 11 SCRA 223 (rebellion); Lava vs. Gonzales, L-23048, July 31, 1964, 11 SCRA 650 (rebellion); People vs. Capadocia, L-4907, June 29, 1963, 8 SCRA 301 (rebellion).

[38] Montenegro vs. Castañeda, 91 Phil. 882 (1952).

[39] L-31687, Feb. 26, 1970, 31 SCRA 730 (with Castro and Fernando, JJ. dissenting).

[40] Supra, note 34.

[41] Id. at 485-486.

[42] Id. at 486-487.

[43] The Times Journal, Bulletin Today and Daily Express, on Wednesday, August 28, 1974, carried news of a nationwide arms-smuggling network being operated by the Communist Party of the Philippines in collaboration with a foreign-based source. The Department of National Defense reported that several arms-smuggling vessels had been seized, that the network had acquired several trucking services for its illegal purposes, and that about P2 million had so far been expended for this operation by a foreign source. The Department stressed that "the clandestine network is still operating with strong indications that several arms landings have already been made." The Department also revealed that the military has "launched necessary countermeasures in order to dismantle in due time this extensive anti-government operation." The Department finally confirmed the arrest of 38

subversives, including the following 13 persons who occupy important positions in the hierarchy of the Communist movement in the Philippines: Manuel Chiongson, Fidel V. Agcaoili, Danilo Vizmanos, Dante Simbulan, Andy Perez, Norman Quimpo, Fernando Tayag, Bonifacio P. Ilagan, Jose F. Lacaba, Domingo M. Luneta, Mila Garcia, Ricardo Ferrer and Dolores Feria.

The Times Journal, Bulletin Today and Daily Express, on Thursday, August 29, 1974, carried the news that a secret arm of the Communist Party of the Philippines engaged exclusively in the manufacture of explosives for sabotage and other anti-government operations has been uncovered by the military, following a series of raids by government security agents on underground houses, two of which are business establishments providing funds for the purchase of chemicals and other raw materials for the manufacture of explosives. The documents seized in the raids indicated that the "explosives movement" was a separate subversive group organized in early 1972 under the direct supervision of the CPP military arm and was composed of elite members knowledgeable in explosives and chemical research.

The Times Journal, Bulletin Today and Daily Express, on Sunday, September 1, 1974, carried news of a nationwide "communist-insurgent conspiracy" to "unite all groups opposing the New Society, arm them and urge them to fight and overthrow the government, and establish a coalition government under the leadership of the Communist Party of the Philippines." According to documents seized by the military, "local communists and other insurgents stepped up efforts in mid-1973 to set up a so-called National Democratic Front." The Department of National Defense revealed that the armed forces are continuing military operations in Cotabato, Lanao, Sulu and Zamboanga.

[44] 35 Colo. 154, 91 Pac. 738, 740 (1905).

[45] WHO vs. Aquino, L-35131, Nov. 29, 1972, 48 SCRA 242.

[46] Willoughby calls this situation "martial law in sensu strictiore." (Willoughby, *The Constitutional Law of the United States*, 2nd ed., 1939, Vol. 3, pp. 1586 and 1595).

[47] The corresponding provision in the 1973 Constitution is art. IX, sec. 12.

[48] See 5 Laurel, *Proceedings of the Philippine Constitutional Convention*, 249-259 (1966).

[49] President Jose P. Laurel, in a speech on the draft of the 1935 Constitution, gave as reasons for the adoption of the Commander-in-Chief Clause (a) the desire of the members of the 1934 Constitutional Convention to afford the state with an effective means for self-defense (the experience of the Latin-American countries was an object lesson for the Convention), and (b) the sense of the Convention that the executive power should be made stronger (Malcolm and Laurel, *Philippine Constitutional Law*, p. 200, footnote no. 4).

[50] *Barcelon vs. Baker*, 5 Phil. 87 (1905).

[51] 91 Phil. 882 (1952).

[52] L-33964, Dec. 11, 1971, 42 SCRA 448.

[53] *Sterling vs. Constantin*, 287 U.S. 378, 77 L. ed. 375 (1932); *Martin vs. Mott*, 12 Wheat, 19, 6 L. ed. 537 (1827); *Luther vs. Borden*, 7 How. 1, 12 L. ed. 581 (1849); *Moyer vs. Peabody*, 212 U.S. 78, 53 L. ed. 410 (1809).

[54] 4 Wall. 2, 18 L. ed. 281 (1866).

[55] 327 U.S. 304, 90 L. ed. 688 (1946).

- [56] White was convicted of embezzlement, while Duncan was convicted of brawling.
- [57] King, *The Legality of Martial Law in Hawaii*, 30 *California L. Rev.* 599, 62???? (1942).
- [58] *Montenegro vs. Castañeda*, 91 *Phil* 882 (1952).
- [59] Fairman, *The Law of Martial Rule and the National Emergency*, 55 *Harv. L. Rev.* 1253-1254 (1942).
- [60] Rossiter, *The Supreme Court and Commander-in-Chief*, 36 (1951).
- [61] Winthrop, *id.*, p. 817; see also *Elphinstone vs. Bedreechund*, 1 Knapp. P.C. 316; *D.F. Marais vs. The General Officer Commanding the Lines of Communication of the Colony (i.e., the Cape of Good Hope)*, 1902 *Appeal Cases* 109; 14 *Encyclopaedia Britannica*, p. 977 (1969); 14 *Encyclopaedia Britannica*, p. 985 (1955).
- [62] 17 *Sup. Ct. Rep.*, *Cape of Good Hope*, 340 (1900), cited by Charles Fairman in *The Law of Martial Rule*, Chapter 10.
- [63] *Luther vs. Borden*, 7 *How.* 1, 12 *L. ed.* 581, 600 (1849).
- [64] 212 *U.S.* 78, 53 *L. ed.* 410 (1909).
- [65] 287 *U.S.* 378, 77 *L. ed.* 375 (1932).
- [66] 35 *Colo.* 159, 85 *Pac.* 190 (1904).
- [67] "The proclamation [of martial law] is a declaration of an existent fact and a warning by the authorities that they have been forced against their will to have recourse to strong means to suppress disorder and restore peace. It has, as Thurman Arnold has written, merely 'emotional effect' and cannot itself make up for the absence of the conditions necessary for the initiation of martial law." (Clinton L. Rossiter, *Constitutional Dictatorship (Crisis Government in the Modern Democracies)*, p. 146 (1948).
- [68] 1973 *Const.*, Art. IV, sec. 15.
- [69] *Id.*, Art. XVII, sec. 3(2).
- [70] *Javellana vs. Executive Secretary*, L-36142, March 31, 1973, 50 *SCRA* 30.
- [71] Clinton L. Rossiter, *Constitutional Dictatorship (Crisis Government in the Modern Democracies)*, pp. 145-146 (1948).
- [72] Frederick B. Wiener, *A Practical Manual of Martial Law*, p. 8 (1940). (See also *The Suspension of the Privilege of the Writ of Habeas Corpus: Its Justification and Duration* by Florida Ruth Pineda and Augusto Ceasar Espiritu; 22 *Philippine Law Journal*, No. 1, February 1952, pp. 19, 37).
- [73] By General Order No. 3 dated September 22, 1972, as amended by General Order No. 3-A of the same date, the President ordered, inter alia, that "the Judiciary shall continue to function in accordance with its present organization and personnel, and shall try and decide in accordance with existing laws all criminal and civil cases, except the following cases: 1. Those involving the validity, legality, or constitutionality of Proclamation No. 1081, dated September 21, 1972, or of any decree, order or acts issued, promulgated or performed by me or by my duly designated representative pursuant thereto."
- [74] Ferdinand E. Marcos, *Notes on the New Society of the Philippines*, 99, 100 (1973).

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SEPARATE OPINION

ESGUERRA, J.:

A. PRELIMINARY STATEMENT

On September 21, 1972, the President issued Proclamation No. 1081 placing the whole Philippines under martial law. This proclamation was publicly announced by the President over the television and radio on the evening of September 23, 1972. The grounds for the proclamation are recited in detail in its preamble, specifically mentioning various acts of insurrection and rebellion already perpetrated and about to be committed against the Government by the lawless elements of the country in order to gain political control of the state. After laying down the basis for the establishment of martial law, the President ordered:

"NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested upon me by Article VII, Section 10, Paragraph (2) of the Constitution, do hereby place the entire Philippines as defined in Article I, Section 1 of the Constitution under martial law and, in my capacity as their commander-in-chief, do hereby command the armed forces of the Philippines to maintain law and order throughout the Philippines, prevent suppress all forms of lawless violence as well, as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees orders and regulations promulgated by me personally or upon my direction.

In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion; and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such, other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative."

Issued shortly after the proclamation was General Order No. 2, followed by No. 2-A, dated September 26, 1972, to which was attached a list of the names of various persons who had taken part in the various acts of insurrection, rebellion and subversion mentioned in the proclamation, and given aid and comfort in the conspiracy to seize political and state power in the country and take over the government by force. They were ordered to be apprehended immediately and taken into custody by the Secretary of National Defense who was to act as representative of the President in carrying out martial law.

The petitioners herein were on September 22 and 23, 1972, arrested and taken into military custody by the Secretary of National Defense pursuant to General Order No. 2-A of the President for being included in said list as having participated, directly or indirectly, or given aid and comfort to those engaged in the conspiracy and plot to seize political and state power and to take over the Government by force. They ask this Court to set them at liberty, claiming that their arrest and detention is illegal and unconstitutional since the proclamation of martial law is arbitrary and without basis and the alleged grounds therefor do not exist and the courts are open and normally functioning.

For the respondents the Solicitor General in his answer maintains that Proclamation No. 1081 is Constitutional and valid, having been issued in accordance with the Constitution; that the orders and decrees issued thereunder are valid; that the arrest and detention of petitioners pursuant thereto is likewise valid, legal and constitutional, and that this Court should refrain from issuing the desired writs as these cases involve a political question.

After joinder of issues, these cases were heard on September 26 and 29, 1972, and on October 6, 1972, followed by the filing of Memoranda and Notes on the arguments of both parties.

After submission of these cases for decision, petitioner Jose W. Diokno filed a motion to be allowed to withdraw his petition. To the motion is attached a handwritten letter of said petitioner to his counsel stating the reasons why he wished to withdraw his petition. The principal reasons advanced by him for his action are his doubts and misgivings on whether he can still obtain justice from this Court as at present constituted since three of the Justices among the four who held in the ratification cases that there was no valid ratification of the New Constitution signed on November 30, 1972, and proclaimed ratified by the President on January 17, 1973 (the then Chief Justice having retired), had taken an oath to support and defend the said Constitution; that in filing his petition he expected it to be decided by the Supreme Court under the 1935 Constitution, and that with the oath-taking of the three remaining members, he can no longer expect to obtain justice.

After the motion to withdraw had been deliberated upon by the Court, seven justices voted to grant and five voted to deny the motion. There being no majority to grant the motion, it was denied. Those who voted to deny the motion are of the view that it is not simply a matter of right to withdraw because of the great public interest involved in his case which should be decided for the peace and tranquility of the nation, and because of the contemptuous statement of petitioner Diokno that this Court is no longer capable of administering justice to him. This question should no longer stand on the way to the disposition of these cases on the merits.

B. THE ISSUES

Prescinding from the question of jurisdiction which the Solicitor General raised by reason of the President's General Order No. 3, dated September 22, 1972, as amended by General Order No. 3-A, dated September 24, 1972, which allowed the judicial courts, to regularly function but inhibited them from taking cognizance of cases involving the validity, legality or constitutionality of the Martial Law Proclamation, or any decree, order or acts issued, promulgated or performed by the President or his duly authorized representative pursuant thereto, from which position he relented and he has, accordingly, refrained from pressing that issue upon the Court, the main issues for resolution are the validity of Proclamation No. 1081 declaring and establishing martial law and whether this Court can inquire into the veracity and sufficiency of the facts constituting the grounds for its issuance.

I maintain that Proclamation No. 1081 is constitutional, valid and binding; that the veracity or sufficiency of its factual bases cannot be inquired into by the Courts and that the question presented by the petitions is political in nature and not justiciable.

Proclamation No. 1081 was issued by the President pursuant to Article VII, Section 10, paragraph 2, of the Constitution of 1935, which reads as follows:

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

This provision may, for present purposes, be called the Commander-in-Chief clause.

The above provision has no counterpart in the Constitution of the United States or in that of any state thereof except that of Alaska to a limited extent. To comprehend the scope and extent of the President's power to declare martial law, let us trace the background and origin of this provision.

To suppress the great rebellion in the United States, known as the Civil War, which was aimed to wreck the Federal Union, President Lincoln exercised powers not granted to him by the Constitution of the United States but pertaining to the Congress. He had suspended the privilege of the writ of habeas corpus; proclaimed martial law in certain areas and Military Commissions were organized where it was deemed necessary to do so in order to subdue the rebels or prevent their sympathizers from promoting the rebellion. Lincoln justified his acts by saying:

"I did understand . . . that my oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving, by every indispensable means that government — that nation — of which that Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but, a life is never, wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it ..." (2 Nicholay and Hay, Abraham Lincoln Complete Works, 508 (1902)).

Sydney G. Fisher in his work entitled "Suspension of Habeas Corpus during the War of the Rebellion," 3 Pol. Science Quarterly, expressed the same idea when he said:

"... Every man thinks he has a right to live and every government thinks it has a right to live. Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self-defense. So every government, when driven to the wall by a rebellion, will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law, but it is fact." (Pp. 454, 484-485)

But the difficulty occasioned by the absence of a constitutional power to suspend the privilege of the writ of habeas corpus and to proclaim martial law, which greatly hamstrung Lincoln in coping effectively with the civil war, was obviated when our own Constitution expressly provided for the grant of that presidential power (Art. VII, Section 10, par. 2). Unlike the legislative power under the Bill of Rights of our Constitution (Article III, Section 1, paragraph 14, 1935 Constitution), the President can suspend the privilege of the writ of habeas corpus and impose martial law in cases of imminent danger of invasion, insurrection or rebellion when the public safety requires it. The Congress could not have been granted the power to suspend in case of imminent danger as it is not by the nature of its office in a position to determine promptly the existence of such situation. It can only see or witness the actual occurrence thereof and when they happen, Congress is also empowered to suspend the privilege of the writ of habeas corpus as an exercise of legislative power when the President fails to act; but under no circumstances can it declare martial law as this power is exclusively lodged in the President as Commander-in-Chief.

When the Philippine Constitution of 1935 was written, the framers decided to adopt the provisions of Section 3, paragraph 7, of the Jones Law, which became Article III, Section 1, paragraph 14, of the 1935 Constitution, and those of Section 21 of the Jones Law which became Article VII, Section 10, paragraph 2, of the same. The Jones Law provisions read as follows:

Section 3, paragraph 7 of the Jones Law provided:

That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor-General, wherever during such period the necessity for such suspension

shall exist.

And Section 21 of the same law in part provided that:

. . . (H)e (referring to the Governor-General) may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Islands, or any part thereof, under martial law: Provided That whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof, together with the attending facts and circumstances, and the President shall have power to modify or vacate the action of the Governor-General.

Before the Jones Law, the Philippine Bill of 1902 provided as follows:

"That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor-General with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist."

(Section 2, par. 7)

The Philippine Bill of 1902 had no provision pertaining to the declaration of martial law.

The adoption of the Jones Law provisions was prompted by the prevailing sentiment among the delegates to the 1934-1935 Constitutional Convention to establish a strong executive, as shown by its proceedings reported by two of its prominent delegates (Laurel and Aruego) who recounted in their published works how the delegates blocked the move to subject the power to suspend the privilege of the writ of habeas corpus, in cases of invasion, insurrection or rebellion, to the approval of the National Assembly, but did nothing to block, and allowed, the grant of the power, including that to declare martial law, to the President as Commander-in-Chief of the Armed Forces. What is evident from this incident is that when it comes to the suspension of the privilege of the writ of habeas corpus and establishment of martial law in case of imminent danger of the contingencies mentioned therein, and the public safety requires it, the clear intent was to exclusively vest in the President that power, whereas Congress can only suspend under the Bill of Rights provision when there is actual occurrence of these events for reasons already adverted to above. And when martial law is proclaimed, the suspension of the privilege of the writ of habeas corpus necessarily follows, for the greater power includes the less. Nobody will ever doubt that there are greater restrictions to individual liberty and freedom under martial law than under suspension of the privilege of the writ of habeas corpus. In the former he can even close the courts if necessary and establish in their place military commissions. In the latter, the action proceeds from the premise that the courts are open but cannot grant the writ.

When the Constitution of 1935 was being framed, the prevailing jurisprudence on the matter was that laid down in *Barcelon vs. Baker*, 5 Phil. 87, September 30, 1905. In that case the question presented and decided is identical to what is raised the petitioners here. This Court (1905) ruled that the judiciary may not inquire into the facts and circumstances upon which the then Governor General suspended the privilege of the writ under Section 5 of the Philippine Bill of 1902, which granted him the same power now vested in the President, and that the findings of the Governor General were "final and conclusive" upon the courts. Aware of this rule, the framers of the 1935 Constitution granted to the President the powers now found in Article VII, Section 10, paragraph 2, of the 1935 Constitution.

On October 22, 1950, Proclamation No. 210 suspending the privilege of the writ of habeas corpus was issued by the late President Quirino. Assailed before this Court in *Montenegro vs. Castañeda and Balao*, 91 Phil. 882, as unconstitutional and unfounded, this Court said:

"And we agree with the Solicitor General that in the light of the views of the United States Supreme Court thru Marshall, Taney and Story quoted with approval in *Barcelon vs. Baker* (5 Phil. 87, pp. 98 and 100) the authority to decide whether the exigency has arisen requiring suspension belongs to the President and 'his decision is final and conclusive' upon the courts and upon all other persons."

But in *Lansang vs. Garcia*, L-33964, decided December 11, 1971, 42 SCRA, 448, this Court asserted the power to inquire into the constitutional sufficiency of the factual bases supporting the President's action in suspending the privilege of the writ of habeas corpus under Proclamation No. 889, dated August 21, 1971. In departing from the rule established in the *Baker* and *Castañeda* cases, this Court said:

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

I maintain that we should return to the rule in the *Baker* and *Castañeda* cases and jettison the *Lansang* doctrine which denies the grant of full, plenary and unrestricted power to the President to suspend the privilege of the writ of habeas corpus and declare martial law. This denial of unrestricted power is not in keeping with the intent and purpose behind the constitutional provision involved.

The Act of Congress of 1795 involved in *Martin & Mott* (12 Wheat 19 (1827)) which is the main prop of the *Baker* case, held inapplicable in *Lansang* case, provided:

"That whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion . . ."

The distinction made by this Court between the power of the President to call out the militia and his power to suspend the privilege of the writ of habeas corpus and declare martial law does not warrant a different treatment. The important and decisive point to consider is that both powers are expressly conferred upon the President by the same Section, exercisable only upon the existence of certain facts and situations. Under the 1935 Constitution (Article VII, Section 10, paragraph 2,) both powers are embraced in the President's power as Commander-in-Chief of the Armed Forces.

The *Baker* decision should not have been emasculated by comparing the position then of the Governor General "as the representative of the Sovereign" in relation to the Filipinos who were its "subjects". Under prevailing conditions and democratic principles, there would be greater justification for relying on the judgment of the President of the Philippines who is the chosen representative of the Filipino people and hence more authoritative in speaking for the nation than on that of an American Governor General who then personified the burden of an imposed sovereignty upon us. And as the Executive of this Government who is charged with the responsibility of executing the laws, he is as much a guardian of the rights and liberties of the people as any court of justice. To judicially undercut the force and efficacy of the *Baker* and *Montenegro* doctrine is to ride rough shod over the intent of the framers of the 1935 Constitution. Parenthetically, it may be stated that the Commander-in-Chief

clause was retained in the 1973 Constitution.

Although the *Lansang* case tried to cushion the blow administered to the constitutional provision involved by adopting the test of "reasonableness" in the exercise of the President's power, without meaning to substitute its judgment for that of the President, yet the effect of the ruling is so far reaching that it may lead to a serious confrontation between the Courts and the President. The power to inquire into the constitutional sufficiency of the factual bases of the habeas corpus proclamation (grounds for the issuance of which are the same as those for martial law) presupposes the power, to know what are the facts to be tested by the constitutional provision. This is the essence of an inquiry; the determination of the constitutional sufficiency of those facts simply follows. Suppose this Court says they are not sufficient to justify martial law and the President says they are because the evidence on which he acted shows the existence of invasion, insurrection or rebellion, or the imminent danger thereof, what will happen? The outcome is too unpleasant to contemplate. Let us not try to repeat in our country what transpired between President Lincoln and Chief Justice Taney when the latter issued a writ of habeas corpus to set free one held by the military and President Lincoln practically said: "Taney has issued his writ. Let him enforce it". *Ex parte Merryman*, 17 Fed. Casa 144 (No. 9487) (C.C.D. Md. 1861):

President Lincoln, in the face of the grave danger then to the nation, simply ignored it and nothing could be done about it.

The test of reasonableness, or absence of arbitrariness in the exercise of the presidential power, is all a play of words. The determination of the reasonableness of the act of the President calls for a consideration of the availability and choice of less drastic alternatives for the President to take, and when that is done the Court will in effect be substituting its judgment for that of the President. If the Court were to limit its powers to ascertaining whether there is evidence to support the exercise of the President's power, without determining whether or not such evidence is true, we would have the curious spectacle of this Court having no choice but to give its imprimatur to the validity of the presidential proclamation, as it did in the *Lansang* case where it merely accepted the reports of the military on the facts relied upon by the President in issuing Proclamation No. 889, without judicially determining whether or not the contents of those reports were true. In so doing, this Court simply displayed the miserable limits of its competence for having no means for checking whether or not those facts are true. It would have been more in keeping with the dignity, prestige and proper role of this Court to simply read and consider the bases for the suspension as stated in the various "whereases" of the Proclamation, and then determine whether they are in conformity with the constitution. This to me is the extent of its power. To transcend it is to usurp or interfere with the exercise of a presidential prerogative.

This Court should not spurn the reminder that it is not the source of the panacea for all ills affecting the body politic (*Vera vs. Avelino*, 77 Phil. 192). When a particular cure can come only from the political department, it should refrain from injecting itself into the clash of political forces contending for the settlement of a public question. The determination of when and how a constitutionally granted presidential power should be exercised calls for the strict observance of the time-honored principle of the separation of powers and respect for a co-equal, coordinate and independent branch of the Government. This is the basic foundation of the rule governing the handling of a political question that is beyond judicial competence (*Alejandrino vs. Quezon*, 46 Phil. 35; *Cabili vs. Francisco*, G.R. No. L-4638, May 8, 1951; *Baker vs. Carr*, 360 U.S. p. 186; 82 S. Ct. Rep. 69; 7 L. Ed. 2nd, 663). It is high time to reexamine and repudiate the *Lansang* doctrine and give the President the sole authority to decide when and how to exercise his own constitutional powers. A return to the sanity and wisdom of the *Baker* and *Castañeda* doctrine and a realization that judicial power is unwelcome when a question presents attributes that render it incapable of judicial determination, because the power to decide it devolves on another entity, is urgently needed. It is worthwhile recalling what this Court in its sobriety and wisdom, unperturbed by the formidable

turmoils, the fierce passions and emotions and the stresses of our times, said in the Baker case: (The term "Governor General" should read "President").

"If the investigation and findings of the President, or the Governor-General with the approval of the Philippine Commission, are not conclusive and final as against the judicial department of the Government, then every officer whose duty it is to maintain order and protect the lives and property of the people may refuse to act, and apply to the judicial department of the Government for another investigation and conclusion concerning the same conditions, to the end that they may be protected against civil actions resulting from illegal acts.

"Owing to conditions at times, a state of insurrection, rebellion or invasion may arise suddenly and may jeopardize the very existence of the State. Suppose, for example, that one of the thickly populated Governments situated near this Archipelago, anxious to extend its power and territory, should suddenly decide to invade these Islands, and should, without warning, appear in one of the remote harbors with a powerful fleet and at once begin to land troops. The governor or military commander of the particular district or province notifies the Governor-General by telegraph of this landing of troops and that the people of the district are in collusion with such invasion. Might not the Governor-General and the Commission accept this telegram as sufficient evidence and proof of the facts communicated and at once take steps, even to the extent of suspending the privilege of the writ of habeas corpus, as might appear to them to be necessary to repel such invasion? It seems that all men interested in the maintenance and stability of the Government would answer this question in the affirmative ...

"But suppose some one, who has been arrested in the district upon the ground that his detention would assist in restoring order and in repelling the invasion, applies for the writ of habeas corpus, alleging that no invasion actually exists; may the judicial department of the Government call the officers actually engaged in the field before it and away from their posts of duty for the purpose of explaining and furnishing proof to it concerning the existence or nonexistence of the facts proclaimed to exist by the legislative and executive branches of the State? If so, then the courts may effectually tie the hands of the executive, whose special duty it is to enforce the laws and maintain order, until the invaders have actually accomplished their purpose. The interpretation contended for here by the applicants, so pregnant with detrimental results, could not have been intended by the Congress of the United States when it enacted the law.

"It is the duty of the legislative branch of the Government to make such laws and regulations as will effectually conserve peace and good order and protect the lives and property of the citizens of the State. It is the duty of the Governor-General to take such steps as he deems wise and necessary for the purpose of enforcing such laws. Every delay and hindrance and obstacle which prevents a strict enforcement of laws under the conditions mentioned necessarily tends to jeopardize public interests and the safety of the whole people. If the judicial department of the Government, or any officer in the Government, has a right to contest the orders of the President or of the Governor-General under the conditions above supposed, before complying with such orders, then the hands of the President or the Governor-General may be tied until the very object of the rebels or insurrectors or invaders has been accomplished. But it is urged that the President, or the Governor-General with the approval of the Philippine Commission, might be mistaken as to the actual conditions; that the legislative department — the Philippine Commission — might, by resolution, declare after investigation, that a state of rebellion, insurrection, or invasion exists, and that the public safety requires the suspension of the privilege of the writ of habeas corpus, when, as a matter of fact, no such Conditions actually existed; that the President, or Governor-General acting upon the authority of the Philippine Commission, might by proclamation suspend the privilege of the writ of habeas corpus without there actually existing the conditions mentioned in the act of Congress. In other words, the applicants allege in their argument in support of their application for the writ of habeas corpus, that the legislative and executive branches of the Government might reach a wrong conclusion from their investigations of the actual conditions, or might, through a desire to oppress and harass the people, declare that a state of rebellion, insurrection, or invasion existed and that public safety required the suspension of the privilege of the writ of habeas corpus when actually and in fact no such

conditions did exist. We can not assume that the legislative and executive branches will act or take any action based upon such motives.

"Moreover, it can not be assumed that the legislative and executive branches of the Government, with all the machinery which those branches have at their command for examining into the conditions in any part of the Archipelago, will fail to obtain all existing information concerning actual conditions. It is the duty of the executive branch of the Government to constantly inform the legislative branch of the Government of the condition of the Union as to the prevalence of peace or disorder. The executive branch of the Government, through its numerous branches of the civil and military, ramifies every portion of the Archipelago, and is enabled thereby to obtain information from every quarter and corner of the State. Can the judicial department of the Government, with its very limited machinery for the purpose of investigating general conditions, be any more, sure of ascertaining the true conditions, throughout the Archipelago, or in any particular district, than the other branches of the Government? We think not."

C. THE CONCLUSION

The resolution of the question of validity of Proclamation No. 1081 and all acts done under it, by delving into the sufficiency of the grounds on which the declaration of martial law is premised, involves a political question. Whether or not there is constitutional basis for the President's action is for him to decide alone. I take it for a fact that he is not an irresponsible man and will act reasonably and wisely, and not arbitrarily. No President in his right mind will proclaim martial law without any basis at all but merely to fight the hobgoblins and monsters of his own imagination. In the exercise of that power this Court should not interfere or take part in any manner, shape or form, as it did in the *Lansang* case. When this Court required the Army officers, who furnished the President with the facts on which he acted, to present proofs to establish the basis of the habeas corpus suspension, this Court practically superimposed itself on the executive by inquiring into the existence of the facts to support his action. This, is indeed unfortunate. To inquire is to know the facts as basis of action. To inquire is to decide, and to decide includes the power to topple down or destroy what has been done or erected. This is the ultimate effect of the *Lansang* doctrine.

When the security and existence of the state is jeopardized by sophisticated, clandestine and overseas means of destruction and subversion; when open avowals of attempts to dismember the Philippines are politically and financially encouraged and supported by foreign powers; when the advocates of a sinister political and social ideology are openly storming even the bastions of military power and strength with the use of smuggled arms furnished by those who wish this nation ill, let us leave to the Executive the unhampered determination of the occasion for the exercise of his power, as well as the choice of the weapons for safeguarding the nation. This Court should not, by a process of subtle reasoning and rhetorical display of legal erudition, stand on the way to effective action by virtually crippling him. Instead, it should be a rock of refuge and strength for those who are called upon to do battle against the forces of devastating iconoclasm and ruthless vandalism that ruled our streets, our public squares and our schools before the establishment of martial law. Instead of imposing cramping restrictions on the executive and thereby giving the enemy aid and comfort, this Court should allow the political department a full and wide latitude of action.

It follows that all orders, decrees or acts of the President under the Martial Law Proclamation, including those of the respondent Secretary of National Defense as his authorized representative, are valid and binding. The people have ratified those acts by the adoption and ratification of the New Constitution as proclaimed by the President on January 17, 1973, and by the Referendum held on July 27-28, 1973. For us to declare them valid in our decision now has become merely an anti-climax after we have decided in the *Javellana* case that the people have ratified and accepted the New Constitution and there remains no more judicial obstacle to its enforcement.

Consequently, the arrest and detention of the petitioners, including their further detention after the ratification and acceptance of the New Constitution, and even up to the present, are valid and constitutional. The duration of their detention, especially as regards petitioner Jose W. Diokno, is a matter addressed to the sound discretion of the President. As to petitioner Benigno S. Aquino, Jr., his detention is no longer open to question as formal charges of subversion, murder and illegal possession of firearms have been filed against him with the proper Military Commission.

D. THE JUDGMENT

By this separate opinion I might incur the displeasure of my senior brethren who conceived and labored in bringing forth the Lansang decision which I am openly advocating to be discarded because this Court practically interfered with the exercise of a purely executive power under the guise of inquiring into the constitutional sufficiency of the factual bases of the habeas corpus proclamation. By requiring the representatives of the President to present evidence to show the reasonable exercise of his power, I repeat that this Court trenched upon a constitutionally granted power of the President. In expressing my honest thoughts on a matter that I believe is of supreme importance to the safety and security of the nation, I did so unmindful of the possible condemnation of my colleagues and fearless of the judgment of history.

FOR ALL THE FOREGOING, I vote to dismiss all petitions.

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SEPARATE OPINION

FERNANDEZ, J.:

I

PROLOGUE

I have decided to write this Separate Opinion even before the main opinion has been written, for no other cases in the history of the Republic have assumed such transcendental importance as the cases which directly arose out of the proclamation of martial law on September 21, 1972. No other cases presented before this Court have aroused such widespread attention, speculation, controversy, and concern. And in the language of one of the petitioners, "the decision in these case(s), whatever it may be, will be cited in history books many, many years from now. And it will be quoted wherever lovers of freedom ask the question — What did the Court do in that difficult hour?"

Our decision in the various petitions now before this Tribunal like Our decision in the Ratification Cases (L-36142, Javellana vs. The Executive Secretary, et al.; L-36165, Roxas, et al., vs. Melchor, etc., et al.; L-36232, Monteclaro, et al. vs. The Honorable Executive Secretary, et al.), must uphold the validity of constitutionalism in our country and our steadfast adherence to the Rule of Law. The decision should set the pattern and the thrust of Our continuous effort to locate that elusive boundary between individual liberty and public order. It should reconcile the claims to individual or civil rights with the equally and, at times, even more compelling needs of community existence in a spirit of Constitutionalism and adherence to the Rule of Law.

Through our New Constitution, the Delegates to the Constitutional Convention and the voters in the ratification referendum alike have given our government a fresh mandate and new guidelines in the charting of a truly independent existence and the emergence of a dynamic and progressive order. It is now the task of this Court to concretize and make clearly visible the connecting links between the 1935 Constitution and the 1973 Constitution, and to consider the constitutionality of the martial law proclamation (No. 1081) now being vehemently challenged in these cases -- its constitutionality as initially proclaimed under the old Constitution, and the constitutionality of its continuation which now falls under the present Charter.

It is also the function of this Tribunal to help give flesh and substance to our people's aspirations for secure and self-sufficient if not abundant existence even as justice, peace, liberty, and equality are guaranteed and assured. It must strike the correct balance, given specific times and circumstances, between the demands of public or social order and equally insistent claims of individual liberty.

The issues raised regarding the force and effectivity of the 1973 Constitution have been thoroughly discussed in other cases. They should now be a settled matter but have been raised anew. These were discussed at length in the earlier stages of the instant petitions. The mass of pleadings and lengthy oral arguments dwelt not only on the validity of Proclamation No. 1081 and the legality of the arrest and detention of the petitioners but also on the effectivity of the new Constitution and other related matters as right to counsel, jurisdiction of military tribunals, applications for amnesty, visits of relatives, conditions inside the detention camp right to withdraw the petition, and the like. While it is necessary to sift the basic issues from all secondary and incidental matters, we must also touch on important related issues. It is imperative to declare what the Constitution commands is the law on these issues.

The average citizen, as a rule, is not very interested in the detailed intricacies surrounding the resolution of constitutional questions. He usually has strong views on the final outcome of constitutional litigation but rarely bothers to inquire into the labyrinthian facets of the case or the detailed reasoning which usually supports the dispositive portion.

It is not so with regard to these habeas corpus cases. The explosive potentialities of Our ruling are known to everybody. The country awaits Our decision with keen expectations. The grounds supporting the decision are a matter of public concern. The implications of these cases have been speculated upon, although sometimes with limited comprehension and noticeable lack of fairness, even in foreign countries.

It, therefore, behooves the members of this Tribunal to render their opinions, as much as possible, in terms and in a presentation that can be understood by the people.

In *J.M. Tuason and Co., Inc. vs. Land Tenure Administration*, (31 SCRA 413, 423) this Tribunal stated that "as the Constitution is not primarily a lawyer's document, it being essential for the rule of law to obtain that it should ever be present in the people's consciousness, its language as much as possible should be understood in the sense they have in common use."

In this case, We should go one step further. We should not limit Ourselves to looking at the words of the Constitution as ordinary and simple language but Our reasoning in the decision itself should be frank and explicit. Our task is not a mere matter of constitutional construction and interpretation. Through its decision, this Court should also speak directly to the average layman, to the common people.

II

THE MARTIAL LAW PROCLAMATION

On September 23, 1972 the President announced that, on September 21, 1972 or two days earlier, he had, pursuant to Proclamation No. 1081, declared a state of martial law in the Philippines. The President cited and detailed many acts of insurrection and rebellion against the government of the Republic of the Philippines committed by lawless elements and various front organizations in order to seize political and state power. Proclamation No. 1081 concludes —

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested upon me by Article VII, Section 10, paragraph (2) of the Constitution, do hereby place the entire Philippines as defined in Article 1, Section 1 of the Constitution under martial law and, in my capacity as their commander-in-chief, do hereby command the armed forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees, orders and regulations promulgated by me personally or upon my direction.

In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms, and insignia, crimes committed by public officer, and for such other crimes as will be enumerated in Orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative.

x x x x x

III

ARREST OF THE PETITIONERS

Under a state of martial law, petitioners or the persons in whose behalf petitions for writs of habeas corpus have been filed were on various dates arrested and detained. The orders of arrest were premised on General Order No. 2 of the President dated September 22, 1972[1] which was amended by General Order No. 2-A, on September 26, 1972. General Order No. 2-A reads:

Pursuant to Proclamation Order No. 1081, dated September 21, 1972, and in my capacity as Commander-in-Chief of all the Armed Forces of the Philippines. I hereby order you as Secretary of National Defense to forthwith arrest or cause the arrest and take into your custody the individuals named in the attached lists for being participants or for having given aid and comfort in the conspiracy to seize political and state power in the country and to take over the government by force, the extent of which has now assumed the proportion of an actual war against our people and our legitimate government and in order to prevent them from further committing acts that are inimical or injurious to our people, the government and our national interest, and to hold said individuals until otherwise so ordered by me or by my duly designated representative.

Likewise, I do hereby order you to arrest or cause the arrest and take into custody and to hold them until otherwise ordered released by me or by my duly designated representative:

1. Such persons as may have committed crimes and offenses in furtherance or on the occasion of or incident to or in connection with the crimes of insurrection or rebellion as defined in Articles 134 to 138 of the Revised

Penal Code, and other crimes against public order as defined in Articles 146, 147, 148, 149, 151, 153, 154, 155, and 156 of the same Code;

2. Such persons who may have committed crimes against national security and the laws of the nation, as enumerated and defined in Title I of the Revised Penal Code;

xxx xxx xxx xxx xxx

Arrests and detentions under a martial law proclamation are not necessarily limited to those who have actually committed crimes and offenses. More specifically, those arrested and taken into custody under General Order No. 2-A fall under three general groups:

1. Those who appear to have actually committed crimes and offenses and who should be charged and punished for such crimes and offenses pursuant to our penal laws;
2. Those who have been arrested not to make them account for crimes and offenses but to prevent them from committing acts inimical or injurious to the objectives of a martial law proclamation; and
3. Those who appear to have actually committed crimes and offenses but whose prosecution and punishment is deferred because the preventive nature of their detention is, for the moment, more important than their punishment for violating the laws of the land.

Criminal charges have been filed against petitioner Benigno S. Aquino, Jr., and he therefore, may fall under Group No. 1 and the "preventive" aspect of Group No. 3. It is true that he questions the validity of the charges, raises as an issue the deprivation of fundamental rights of an accused, and challenges the jurisdiction of a military commission to try him. However, determination of these questions is properly for another proceeding and another decision. For purposes of these habeas corpus petitions, he and many others similarly situated may fall under Groups 1 and 3.

Petitioner Jose W. Diokno can fall under Group 2 and Group No. 3, as far as the record indicates. Thus, there may be persons arrested pursuant to General Order No. 2 who may fall under the second group but against whom charges could be filed as under the third group. They have not been charged for reasons obviously related to national security. The administration may have determined that, in the light of the martial law situation, it is neither wise nor expedient to file such charges now.

The constitutionality of the arrest of those arrested under Group No 1 cannot be questioned. They have committed a crime and therefore can be ordered arrested and detained.

The constitutionality of the arrest of those arrested under Group Nos. 2 and 3, under martial law finds support in the book of Justice Fernando and Senator Tañada; the pertinent part of said book reads as follows:

Once martial law has been declared, arrest may be necessary not so much for punishment but by way of precaution to stop disorder. As long as such arrest are made in good faith and in the honest belief they are needed to maintain order, the President, as Commander-in-Chief, cannot thereafter after he is out of office, be subjected to an action on the ground that he had no reasonable ground for his belief. When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individual, must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process. This is admitted with regard to killing men in the actual clash of arms and the same is true of temporary detention to prevent apprehended harm. Good faith and honest belief is the necessity of the detention to maintain order thus furnishes a good defense to any claim for liability. (Tañada and Fernando, Constitution of the Philippines. Vol. II, pp. 1013-1014, 1953 ed.)

IV

THE PETITIONS FOR WRITS OF HABEAS CORPUS

(a) The Grounds Therefor:

Petitions for writs of habeas corpus were accordingly filed in this Court by or in behalf of the arrested and detained individuals. The petitions contain substantially similar grounds and prayers.

For instance, in G.R. No. L-35539, Carmen I. Diokno pressed for the urgent and immediate release of Senator Jose W. Diokno from the custody of either the respondents, their agents, instruments, auxiliaries or servants. It is alleged that the respondents unlawfully or illegally and without any valid authority whatsoever, in violation of the petitioner's rights as a citizen of the Republic, seized his person from his residence and moved him to a place of confinement and detention. The petition also alleges that no charges have been filed against Jose W. Diokno for committing or having committed insurrection or rebellion or subversion and that the memorandum directing his arrest is neither an order of arrest nor a warrant of arrest.

The petition in G.R. No. L-35546 alleges that petitioners Benigno S. Aquino, Jr., Ramon V. Mitra, Jr., Francisco S. Rodrigo, and Napoleon Rama have been illegally detained and unlawfully deprived of their personal liberty beyond the period authorized by law without any formal complaint for any specific offense having been instituted against them before our courts of law and without any judicial writ or order, having been issued authorizing their confinement. It is alleged that the petitioners have not committed any crime nor violated any law, rule or regulation whether individually or in collaboration with other person or persons for which they may be detained and deprived of their personal liberty without any formal charge or judicial warrant.

A common allegation in the various petitions challenges the validity of Presidential Proclamation No. 1081. It is asserted that Proclamation No. 1081 declaring martial law is illegal and unconstitutional and, therefore, null and void because the conditions under which martial law may be declared by the President do not exist. The petition in G.R. No. L-35546 states that assuming argumenti gratis that the conditions for the valid exercise of the extraordinary power to declare martial law exist, Proclamation No. 1081 and Presidential Decrees and Orders issued pursuant thereto are unconstitutional and illegal in extent and scope because they deprive the Supreme Court of its constitutional power and authority to determine the constitutionality, legality and validity of the decrees, orders, rules and regulations issued pursuant to the proclamation. It is alleged that the proclamation is unconstitutional and illegal because it divests and ousts the civil courts throughout the Philippines of the jurisdiction to decide and punish certain offenses under the existing laws of the land. The petition emphasizes that civil courts continue to remain open and have in fact never ceased to function. The petition challenges the validity of Proclamation No. 1081 because it grants to the President powers which are otherwise vested by the Constitution in other departments of the Government.

Corollary to the above allegations G.R. No. L-35546, is the allegation of petitioners Veronica L. Yuyitung and Tan Chin Hian in G.R. No. L-35556 that assuming without admitting the validity of Proclamation No. 1081, the issuance of such a proclamation is not a valid justification to arrest any person whimsically or arbitrarily or without the necessary basis or foundation inherent in proper arrest or detention.

The petition in G.R. No. 35547 alleges that petitioner E. Voltaire Garcia II has not committed the crimes of insurrection, rebellion or subversion nor any crime similar thereto nor any crime at all. It states that his continued illegal detention prevents him from performing his function as member of the Constitutional Convention and, therefore, deprives his district of representation which is obviously against public policy and public interest. The petition asks the Supreme Court to take judicial notice of the fact that there was no invasion, insurrection, or

rebellion or imminent danger thereof before and/or after the date of Proclamation No. 1081 that may require for the public safety the placing of any part of the country under martial law. Reiterating the allegations in the other petitions, it outlines how, throughout the length and breadth of the country especially in the Greater Manila area, all, executive offices are functioning in complete normalcy; how all courts from the lowest municipal courts to the Supreme Court are in full operation; and how the different legislative bodies from barrio councils up to Congress are likewise functioning smoothly according to law.

Petitioner Ernesto Rondon in G.R. No. L-35573 alleges that pursuant to Proclamation No. 1081 the President issued General Order. No. 3 which creates military tribunals to take jurisdiction over certain acts and crimes to the exclusion of civil courts. The petition, alleges that the creation of such military tribunals and the vesting thereof with judicial functions are null and void because civil courts are, open and functioning. It questions the intent to try the petitioner before the military tribunals for any crime which the respondents may impute to him. The petitioner alleges that he has not engaged in any of the criminal activities defined in Proclamation No. 1081, that, at best, he is only a critic of the policies of the Government and, at worst, a civilian citizen amenable to the processes of civilian law, if at all he has committed any offense.

(b) Present Status of Petitioners:

As things now stand, the different petitioners may be divided into four (4) groups:

1. Some petitioners like Veronica L. Yuvitung, Tan Chin Hian, Bren Guiao, Hernando J. Abaya, Ernesto Granada, Luis Beltran, Ruben Cusipag and Willie Baun have already been released from custody of the respondents and are no longer under detention. These petitioners earlier filed motions to withdraw their cases and the Court readily approved the withdrawal of the petitions.
2. Some petitioners like Joaquin V. Roces, Teodoro M. Locsin, Sr. Rolando Fadul, Rosalind Galang, Go Eng Guan, Maximo V. Soliven, Renato Constantino, Luis R. Mauricio, Juan L. Mercado, Roberto Ordoñez and Manuel Almario have likewise been released from respondents custody and are also no longer detained. However, after an initial period of silence following their release, the petitioners have manifested that they have only been conditionally released subject to various conditions and continuing restrictions thus implying they expect a decision on their petitions. Petitioner Francisco S. Rodrigo has also filed a manifestation stating that while he was released from detention at Fort Bonifacio, Quezon City, on December 5, 1972, his release was conditional and subject to certain restrictions. His manifestation was filed for the purpose of showing that insofar as he is concerned, his petition for habeas corpus is not moot and academic. Petitioner Francisco S. Rodrigo is, therefore, asking this Court to render a decision on his petition for a writ of habeas corpus.
3. On the other hand, petitioner Jose W. Diokno was under detention until very recently. For reasons which will be discussed later, he has, however, asked for and insisted upon the withdrawal of his petition in spite of the fact that he is under detention. Before this opinion could be promulgated, however, he has been ordered released by the President on the occasion of His Excellency's birthday, September 11, 1974, together with some other detainees under martial law.
4. Petitioner Benigno S. Aquino, Jr. is still under detention. Charges have been filed before a military commission for various crimes and offenses but the petitioner challenges the jurisdiction of military courts. He has not filed any motion to withdraw his petition. Based on his pleadings and his challenge to the jurisdiction of military tribunals, the petitioner states that it is incumbent upon this Court to rule upon the merits of the petition. He wants information filed before civilian courts and invokes constitutional rights to free him from military detention. Petitioner Benigno S. Aquino Jr., is insistent that this Court render a decision on his petition for a writ of habeas corpus.

V

ANSWER OF RESPONDENTS: THE ISSUES

The answer of the respondents states that on September 21, 1972, the President of the Philippines, in the exercise of powers vested in him by Article VII, Section 10, paragraph 2 of the Constitution, issued Proclamation No. 1081 placing the entire Philippines under martial law. All the acts questioned by the petitioners are justified by orders and instructions of the President issued pursuant to the proclamation of martial law. The main question that confronts the Tribunal is therefore, the validity of Proclamation No.1081. If it is tainted with unconstitutionality, then all the acts taken pursuant to the proclamation are void. It will then follow that the arrest and detentions of the petitioners are void.

On the other hand, if the proclamation of martial law is sustained, we still have to determine its scope and effects. We must answer these questions: May we inquire into the validity of its continuation? Is a suspension of the privilege of the writ of habeas corpus automatically included in a proclamation of martial law?

Other questions also arise which, however, need be decided by Us only in a general manner in the present cases. May the Commander-in-Chief issue orders with the force and effect of legislation? May such legislation cover subjects which are not directly related to the conquest of the particular crisis? In other words, does the proclamation of martial law give the President authority to pass legislation not directly related to invasion, insurrection, rebellion, or imminent danger thereof? If civilian courts are open and functioning, may the President issue decrees and orders which transfer some of the jurisdiction to military tribunals?

Incidental issues have also been raised in the light of the main issue of martial law. One is no longer before this Court but may be mentioned in passing. The 1973 Constitution increased the composition of the Court from eleven (11) to fifteen (15). At a time when there were only nine (9) members carried over from the old Court, may these nine members — the Acting Chief Justice and eight members — validly hear a constitutional issue? Is there a quorum under Article X. Section 2 (2)? which reads:

[2] All cases involving the constitutionality of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court en banc, and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of at least ten Members. All other cases which under its rules are required to be heard en banc shall be decided with the concurrence of at least eight members.

We now have a Chief Justice and eleven members so the problem of a quorum is solved.

Another incidental issue is the power of this Court to inquire into the conditions of detention of petitioners. And still another issue is whether one of the petitioners may, at a time when a decision is ready to be promulgated, withdraw his petition and avoid a decision on the issues he has raised.

VI

ON PETITIONER DIOKNO'S MOTION TO WITHDRAW

The first issue to resolve is an incidental but important one. It is also the most recent.

(a) Arguments Pro and Con:

In a Motion to Withdraw dated December 29,1973, petitioner Jose W. Diokno asked leave of court to withdraw the petition for habeas corpus filed in his behalf. He asked for the withdrawal of the main petition other pleadings filed in the case. The reason given for the withdrawal was "First, though I am convinced beyond any nagging

doubt that we are on the side of right and reason, law and justice, I am equally convinced that we cannot reasonably expect either right or reason, law or justice to prevail in my case ... (and) Second, in view of the new oath that its members have taken the present Supreme Court is a new Court functioning under a new Constitution, different from the Court under which I applied for my release. I was willing to be judged by the old Court under the old Constitution but not by the new Court under new Constitution because as Albert Camus' judge penitent said in the novel 'The Fall': 'he who clings to a law does not fear the judgment that puts him in his place within an order he believes in. But the keenest of human torments is to be judged without law.'

On being required to comment on the petitioner's motion to withdraw, the Solicitor General stated that the petitioner* should not be allowed to remove his case from this Court. Three reasons were given: (a) that the charge is unfair to the Supreme Court and its members; (b) that it is untrue and (c) that in the main, it is contemptuous. The Solicitor General disputed as unfair, the charge that justice cannot be expected from the Supreme Court. He pointed out that the Supreme Court did not inject itself into the controversy but it was the petitioner who invoked the Court's jurisdiction not only in this case but the plebiscite cases as well. The Solicitor General noted that the scorn with which the Court is treated in the motion to withdraw stands in sharp contrast with the praise lavished on it when petitioners began these proceedings.

It may be noted that the Supreme Court was then characterized as having the greatest credibility among the three branches of government. It was described as a dispenser of justice and as the last citadel of their liberties.

In his Memorandum, petitioner manifested and stressed the importance of a decision — "the decision in this case, whatever it may be, will be cited in history books many, many years from now. And it will be quoted wherever lovers of freedom ask the question ... What did the Court do in that difficult hour?" (Underscoring supplied).

The petitioner further stated in the Memorandum that "the duty of this Court is awesome indeed. Its responsibility to Our people and to history is heavier and more enormous than words and phrases can possibly describe."

In contrast to this insistence on a decision, a portion of the motion to withdraw cited by the respondents may be repeated:

(I)t seems to me that our people have the right to expect members of the highest court of the land to display a conscience more sensitive, a sense of mental honesty more consistent than those generally displayed in the market place. And it has pained me to note that, in swearing to support the new 'Constitution', the five members of the Court who had held that it had not been validly ratified, have not fulfilled our expectations. I do not blame them. I do not know what I would have done in their place. But, at the same time, I cannot continue to entrust my case to them; and I have become thoroughly convinced that our quest for justice in my case is futile. (p. 6).

Issue was also taken by the respondents with the petitioner's charge that despite the finding of a majority that the new Constitution had not been validly ratified, the Court nonetheless dismissed the petitions seeking to stop the enforcement of the Constitution. The allegation that the justices of this Court took an oath to support the Constitution because they had been allowed to continue in office was challenged as false by the respondents.

The third ground for the respondents' opposition to the motion to withdraw is the allegedly contemptuous nature of the motion. The Comment states that attacks on the Court are most serious; none of those made in the past has put the court's integrity and capacity for justice in serious question as much as the petitioner's motion to withdraw. According to the Solicitor General, the charge in the case at bar goes to the very foundation of our system of justice and the respect that is due to it, that it is subversive of public confidence in the impartiality and independence of courts and tends to embarrass the administration of justice. The Solicitor General manifested that "we cannot shape the world of the Supreme Court as we want to see it and, later seeing the world of reality, lash at

the Supreme Court for betraying our illusions."

In succeeding pleadings, petitioner Diokno pressed his motion to withdraw with even greater vigor. Counsel for petitioners stated that the so-called charge "unfair to the Court and its members, untrue, and contemptuous" — was never made at all and that the Solicitor General was putting up a strawman and proceeding to demolish it.

In a forty-six (46) page Reply, he pointed out that the factual bases for deciding to withdraw the case have not been specifically denied, as indeed they are undeniable. It should be noted, however, that the cited factual bases go into the very merits of the petition for the writ of habeas corpus:

- (1) On the question of the validity of ratification, six (6) members of the Court held that the proposed Constitution was not validly ratified.
- (2) On the question of acquiescence by the Filipino people, only a minority of four (4) justices held there was acquiescence, two (2) holding that there was no acquiescence, and four (4) holding they had no means of knowing to the point of judicial certainty, whether the people have accepted the Constitution.
- (3) The Court did not rule that the "new Constitution" was in effect.
- (4) The ratification cases were nevertheless dismissed.

The petitioner added "undeniable facts":

- (1) The petition for habeas corpus was filed September 23, 1972 while the ratification cases were filed January 20 and 23, 1973.
- (2) From the filing of the petition to the date petitioner Diokno asked his counsel to withdraw the case, 460 days had elapsed.
- (3) On the date the reply was filed, 531 days had elapsed without charges being filed or trial and conviction for any offense being held.
- (4) All the members of the old Court, who had taken an oath to "preserve and defend" the 1935 Constitution, took an oath on October 29, 1973 to defend the "new Constitution".

In disputing the Solicitor General's charge that the Supreme Court is treated with scorn in the Motion to Withdraw, the petitioner stated that the tone of the motion may be one of dismay or frustration but certainly not of scorn. The petitioner called the charge gratuitous and totally bare of foundation.

The petitioner also pointed out that there could be no contempt of court in the motion to withdraw because the factual bases of his letter are indisputable and the motion comes under the protection of the constitutional right to a fair hearing. He invoked his right to free expression as a litigant and stressed that a citizen of the Republic may express himself thoughtfully sincerely and reputably without fear of reprisal. The petitioner also pointed out that both principle and precedent justify grant of the motion to withdraw.

(b) My original stand: Motion should be denied: Reasons:

My present stand: In view of the release of Diokno before this opinion could be promulgated, I now vote to grant his motion to withdraw his petition the same having become moot and academic.

But, I would like to discuss the merits of the motion if only to establish guidelines for similar cases that may arise in the future.

As a general rule, the right of the plaintiff to dismiss his action with the consent of the Court is universally recognized. If the plaintiff believes that the action he has commenced in order to enforce a right or to rectify a

wrong is no longer necessary or he later discovers that the right no longer exists, he should be allowed to withdraw his case. If in the course of litigation, he finds out that the course of the action shall be different from that he had intended, the general rule is that he should be permitted to withdraw the same, subject to the approval of the Court.

The plaintiff should not be required to continue the action when it is not to his advantage to do so. Litigation should be discouraged and not encouraged. Courts should not allow parties to litigate when they no longer desire to litigate.

It should be noted, however, that the Rules of Court do not allow automatic approval of the plaintiff's motion to dismiss after service of the answer or of a motion for summary judgment. Under Rule 17,* once the issues are joined, an action can be dismissed upon the plaintiff's instance only upon order of the Court and upon such terms and conditions as the Court deems proper.

The requirement in the Rules that dismissal is discretionary upon the Court is not without significance. In fact, the petitioner does not deny the authority of the Court to reject his motion as long as there are reasons for such rejection. He is simply arguing that there is no valid reason to deny the motion thus implying that a denial would, in effect, be an abuse in the exercise of a discretionary power.

In the Court's deliberations, the view was advanced that petitioner's motion for withdrawal made his confinement voluntary. I disagreed, for said motion, in the light of the other pleadings and memoranda submitted by him, can still be considered as a protest against his confinement. In other words, petitioner has not made any statement upon which we can base a conclusion that he is agreeing voluntarily to his continued confinement and thereby making his case moot and academic.

I submit there can be no debate over the principle that the right to withdraw a petition at this stage is not an absolute right. What faces this Court is not its power to grant or deny the motion but whether there are sound reasons why the motion to withdraw should be denied. If there are no sound reasons, the motion should be granted.

According to the petitioner, there are only two instances when a Court may validly deny such withdrawal —

- (1) When the withdrawal would irreparably injure other parties to the case such as, for example, in class results, in probate proceedings, or in ordinary civil actions when the adverse party has pleaded a counterclaim that cannot be decided without first deciding the main case; and
- (2) When the withdrawal would irreparably injure the public interest by depriving the Court of the opportunity to prevent or to correct a serious violation of the Constitution or of the laws.

I am not prepared to accept the proposition or to render an abstract opinion that there are indeed only two such exceptions. The infinite number of factual situations that can come before this Court could conceivably add one or two or even more exceptions.

It would be imprudent or precipitate to make such a categorical assertion. Were it not for the release of Diokno, I would have pressed on my firm belief that the importance of this case and the issues raised by the petitioner call for denial of the motion to withdraw. The points ably raised by Solicitor General Estelito P. Mendoza and Assistant Solicitor General Vicente V. Mendoza, who have shown remarkably splendid performance in shouldering almost entirely the government's defense, against some of the country's most distinguished lawyers, notably former Senator Lorenzo M. Tanada and a battery of other lawyers whose names are a veritable list of "Who is Who" in the legal profession, can be condensed into only one argument —the petitioners have brought before this Court a case of such transcendental importance that it becomes a duty to our legal institutions, to our

people, and to posterity to decide it. We must not leave the resolution of such grave issues to a future day.

Furthermore, among the present habeas corpus cases now before this Court, the best forum for Our decision would have been the Diokno case for, before his release, he was the only petitioner who was actually detained but without charges, while there are already charges filed against Aquino, and with respect to the others whose cases are still pending before Us, they are only under detention within the Greater Manila area or are under community arrest.

The petitioner seeks to distinguish his case from *Krivenko vs. Register of Deeds*, 79 Phil. 461. In that case, this Court ruled --

According to Rule 52, section 4, of the Rules of Court, it is discretionary upon this Court to grant a withdrawal of appeal after the briefs have been presented. At the time the motion for withdrawal was filed in this case, not only had the briefs been presented, but the case had already been voted and the majority decision was being prepared. The motion for withdrawal stated no reason whatsoever, and the Solicitor General was agreeable to it. While the motion was pending in this Court, came the new circular of the Department of Justice instructing all register of deeds to accept for registration all transfers of residential lots to aliens. The herein respondent-appellee was naturally one of the registers of deeds to obey the new circular, as against his own stand in this case which had been maintained by the trial court and firmly defended in this Court by the Solicitor General. If we grant the withdrawal, the result would be that petitioner-appellant Alexander A. Krivenko wins his case, not by a decision of this Court but by the decision or circular of the Department of Justice, issued while this case was pending before this Court. Whether or not this is the reason why appellant seeks the withdrawal of his appeal and why the Solicitor General readily agrees to that withdrawal is now immaterial. What is material and indeed very important, is whether or not we should allow interference with the regular and complete exercise by this Court of its constitutional functions, and whether or not after having held long deliberations and after having reached a clear and positive conviction as to what the constitutional mandate is, we may still allow our conviction to be silenced, and the constitutional mandate to be ignored or misconceived, with all the harmful consequences that might be brought upon the national patrimony. For it is but natural that the new circular be taken full advantage of by many with the circumstance that perhaps the constitutional question may never come up again before this court, because both vendors and the vendees will have no interest but to uphold the validity of their transactions, and very unlikely will the register of deeds venture to disobey the orders of their superior. Thus the possibility for this court to voice its conviction in a future case may be remote, with the result that our indifference of today might signify a permanent offense to the Constitution. (pp. 466-467)

There are indeed certain differences between the facts of the *Krivenko* case and the facts of the current petitions. If the factual situations were completely similar, former Senator Lorenzo M. Tanada would have been the last person to insist of the *Diokno* motion for withdrawal. He was the Solicitor General in 1947. He is completely familiar with the ramification of the *Krivenko* case.

I cannot, however, agree with counsel Tanada that the deviations from the *Krivenko* facts call for a different ruling in the instance petitions. The Supreme Court has grappled at length and in depth validity of the proclamation of martial law. It has closely examined the resultant curtailments of such liberties as the right to a writ of habeas corpus or to freedom of expression. When it is on the verge of issuing a decision it is suddenly asked to drop the case and the issues raised simply because the petitioner is no longer interested in the decision. To my mind, a granting of the motion would be recreancy and unfaithfulness to the Court's sworn duties and obligations.

As in the *Krivenko* case, the reasons for the withdrawal are no longer significant. It is the non-silencing of this Court on issues of utmost public importance which really matters. It is true that petitioner *Diokno* is alone in

seeking withdrawal at the stage of the case. The fact that a decision could possibly still be rendered on remaining cases is, however, no justification to grant the motion. The issue is whether one or two or all of the petitioners may ask for a withdrawal of his or their petitions and hope to bring about a non-decision on the issues because of the rendering moot and academic of the case. My answer is categorically in the negative. In fact, even if the case is mooted at this stage by the release of the petitioners, I would still vote for a decision on the questions raised.

This may be a simple motion for withdrawal. Yet, I see no difference in the need to answer vital questions that have been presented. The public interest that is affected is equally pressing and serious if the petitions are compared to instances in the past when the Court insisted on rendering a decision. In fact, there is an even stronger need to interpret the meaning of the constitutional provision in spite of urgings that it should refrain from doing so.

As early as 1937, this Court, speaking through justice Laurel in *People of the Philippine Island vs. Vera* (65 Phil. 56, 94) emphatically stated that when the country awaits a decision on an important constitutional question, a relaxation of general rules is called for. A decision must issue.

x x x All await the decision of this Court on the constitutional question. Considering, therefore, the importance which the instant case has assumed and to prevent multiplicity of suits, strong reasons of public policy demand that the constitutionality of Act No. 4221 be now resolved. x x x In *Yu Cong Eng vs. Trinidad*, supra, an analogous situation confronted us. We said: "Inasmuch as the property and personal rights of nearly twelve thousand merchants are affected by these proceedings, and inasmuch as Act No. 2972 is a new law not yet interpreted by the courts, in the interest of the public welfare and for the advancement of public policy, we have determined to overrule the defense of want of jurisdiction in order that we may decide the main issue. We have here an extraordinary situation which calls for a relaxation of the general rule." Our ruling on this point was sustained by the Supreme Court of the United States. A more binding authority in support of the view we have taken can not be found.

In the case of *Avelino vs. Cuenco* (83 Phil. 17), the Supreme Court had very sound reasons to resolve on March 4, 1949 not to decide whether or not Senator Cuenco had validly been elected Senate President. The Court ruled that the subject matter of the quo warranto proceeding to declare the petitioner the rightful President of the Philippine Senate and to oust the respondent was not a matter for the Supreme Court in view of the separation of powers doctrine, the political nature of the controversy, and the constitutional grant to the Senate of the power to elect its own President. The power to elect its President should not be interfered with nor taken over by the judiciary.

On March 14, 1949 or only ten (10) days later, the Court, by a majority of seven, decided to resolve the questions presented to it. The Court could very well have insisted on its earlier stand that it should render no decision. Election of the Senate President was still a matter which only the Senate should decide. And yet, in the light of subsequent events which justified its intervention, partly for the reasons stated in the March 4, 1949 resolution of the Court; and partly because of the grounds stated in the various individual opinions. The Court was constrained to declare positively that there was a quorum in the session where Cuenco was elected Acting Senate President. The Court decided to reverse a categorical position taken only ten (10) days earlier. It is clear from the circumstances of the case that the Court was impelled by strong policy considerations to make a definite pronouncement in the case in order to conform to substantial justice and comply with the requirements of public interest. As pointed out by Justice Perfecto in his concurring opinion. "This case raises vital constitutional questions which no one can settle or decide if this Court should refuse to decide them."

In *Gonzales vs. Commission on Elections*. (27 SCRA 835, 853), the words of Justice Laurel were recalled in order to overcome objections to an extended decision on a case which had become moot and academic.

"In the course of the deliberations, a serious procedural objection was raised by five members of the Court

(Chief Justice Concepcion and Justices Reyes, Makalintal, Teehankee and Barredo.) It is their view that respondent Commission on Elections not being sought to be restrained from performing any specific act, this suit cannot be characterized as other than a mere request for an advisory opinion. Such a view, from the remedial law standpoint, has much to recommend it. Nonetheless, a majority would affirm the original stand that under the circumstances, it could still rightfully be treated as a petition for prohibition.

"The language of Justice Laurel fits the case: 'All await the decision of this Court on the constitutional question. Considering, therefore, the importance which the instant case has assumed and to prevent multiplicity of suits, strong reasons of public policy demand that (its) constitutionality x x x be now resolved.' (65 Phil. 56, 94 (1937) Cf. *Yu Cong Eng vs. Trinidad*, 47 Phil. 385 (1926), 271 US 500; 70 Law ed., 1059). It may likewise be added that the exceptional character of the situation that confronts us, the paramount public interest, and the undeniable necessity for a ruling, the national elections being barely six months away, reinforce our stand.

"It would appear undeniable, therefore, that before us is an appropriate invocation of our jurisdiction to prevent the enforcement of an alleged unconstitutional statute. We are left with no choice then we must act on the matter.

In *De la Camara vs. Enage* (41 SCRA, 1) this Court was similarly impelled to make a decision because of strong policy considerations. A petition to reduce the P1,195,200.00 bail imposed by the trial court had become moot and academic. The petitioner had escaped from the provincial jail. The Court could no longer grant any relief. It, however, decided the case "to set forth anew the controlling and authoritative doctrines that should be observed in fixing the amount of the bail sought in order that full respect be accorded to such a constitutional right:" (at page 4). Education, especially of trial judges, was the reason for answering the issues squarely.

I would like to reiterate, however, that in view of the fact that petitioner Diokno has been released on the occasion of President Marcos' birthday (September 11), I now vote to grant the Diokno motion to withdraw his petition for a writ of habeas corpus, the same having become moot and academic.

VII

COURT'S DUTY TO DECIDE ALL IMPORTANT ISSUES — ON THE PETITIONS OF THE PETITIONERS

But as already stated under the topic IV (b) "Present Status of the Petitioners", many of them, notably Aquino and Rodrigo, still insist on a decision. This we must now do, for the resolution of the controversy in favor of the petitioners or for the respondents is not the compelling consideration. What is important and essential is that the Court declare in a manner that cannot be misunderstood what the Constitution commands and what the Constitution requires.

It is true that the Court should not formulate a rule of constitutional law broader than is required by precise facts to which it is applied. It is true that a decision on a question of a constitutional nature should only be as broad and detailed as is necessary to decide it.

There are, therefore, those who would limit a decision solely on the Transitory Provisions of the 1973 Constitution. The exercise of martial law powers under Article VII, Section 10, paragraph 2 of the former Constitution or Article VII, Section 12 of the 1973 Constitution have been subjected to intensive, searching and well-published challenges.¹ If we decide the case solely on the transitory provision, uncertainty and confusion about martial law would remain. The provisions on martial law would still be unexplained and unresolved by this Court. It is easy to see the patent undesirability of such a situation.

In these petitions, our people await the decision of this Court on the constitutional question. Considering, therefore, the importance which the instant petitions have assumed, We must set forth the controlling and

authoritative doctrines.

VIII

THE THREE PRINCIPAL ISSUES

The Solicitor General stated the respondents' position as a narrow one — whether the arrest and detention of the petitioners were legal.

It is true that habeas corpus is intended for cases of illegal confinement or detention by which a person is deprived of his liberty (Section 1, Rule 102, Rules of Court). Its essential object is to inquire into all manner of involuntary restraint and to relieve a person therefrom, if such restraint is illegal (*Villavicencio vs. Lukban*, 39 Phil. 778; *Culauag vs. Director of Prisons*, 17 SCRA 429) While the issue may be presented in seemingly narrow terms, its scope and implications are not that simple. The respondents argue that this Court is precluded by the Constitution from inquiring into the legality of the detentions. They argue that such an inquiry is possible only where the privilege of the writ of habeas corpus is available and inasmuch as the privilege of the writ has been suspended by the President upon the proclamation of martial law, it follows that We should inhibit Ourselves from asking for the reasons why the petitioners were arrested and detained. It is argued that the Constitution has vested the determination of the necessity for and legality of detentions under martial law exclusively in the Presidency a co-equal department of government.

The principal issues, therefore, revolve around first the validity of Proclamation No. 1081. Second, assuming its original validity, may We inquire into the validity of its continuation? And third, has the privilege of the writ of habeas corpus also been suspended upon the proclamation of martial law? The extent of Our inquiry into the legality of the detentions and their efforts is dependent on the answers to the foregoing issues.

IX

PROCLAMATION NO. 1081; A DEVIATION FROM THE TRADITIONAL CONCEPT OF MARTIAL LAW; ARGUMENTS ON ITS VALIDITY

In Proclamation No. 1081, dated September 21, 1972, President Ferdinand E. Marcos placed the entire Philippines as defined in Article I, Section 1 of the Constitution under martial law by virtue of the power vested in the President of the Republic of the Philippines by Article VII, Section 10, par. (2) of the Constitution which reads

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

(a) What is martial law?

As the Solicitor General pointed out when asked to submit definitions of martial law, there are as many definitions as there are court rulings and writers on the subject. The response of the petitioners gives the same impression.

As good definitions as any that may have been made in the past are the following:

"Generally speaking, martial law or more properly, martial rule, is the temporary government and control by military force and authority of territory in which, by reason of the existence of war or public commotion, the civil government is inadequate to the preservation of order and the enforcement of law. In strictness it is not

law at all, but rather a cessation of all municipal law, as an incident of the *jus belli*, and because of paramount necessity, and depends, for its existence, operation and extent, on the imminence of public peril and the obligation to provide for the general safety. It is essentially a law or rule of force, a purely military measure, and in the final analysis is merely the will of the officer commanding the military forces. As the off-spring of necessity, it transcends and displaces the ordinary laws of the land, and it applies alike to military and non-military persons, and is exercisable alike over friends and enemies, citizens and aliens." (C.J.S. Vol. 93, pp. 115--116, citing cases).

"Martial law is the exercise of the power which resides in the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety". (Luther vs. Borden, 7 Hos. (US) 1, 45, 12 L. ed. 581, 600): "It is a law of necessity to be prescribed and administered by the executive power. Its object, the preservation of the public safety and good order, defines its scope, which will vary with the circumstances and necessities of the case. The exercise of the power may not extend beyond what is required by the exigency which calls it forth." (Mitchell vs. Harmony, 13 How. (US) 115, 133, 14 L ed 75, 83; United States vs. Russell, 13 Wall. (US) 623, 628, 20 Led 474, 475; Raymond vs. Thomas, 91 US 712, 716, 23 L ed 434, 435; Sterling vs. Constantin, 190.) (Concurring opinion, Duncan vs. Kahanamoku, 327 U.S. 334, 335, 90 L ed 706 [1945-1946]).

It has been held, therefore, that martial law is a "law of actual military necessity in actual presence of war, and is administered by the general of the army whose will it is, subject to slight limitations." (Constantin vs. Smith, D.C. Text, 57 F. 2d 239). Under this same ruling, martial law is strictly no law at all. It is a cessation of all municipal law.

In another decision, it has been held that

"All respectable writers and publicists agree in the definition of martial law that it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power; and every citizen or subject, in other words, the entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty and property of all in the palm of his hands. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge and executioner." (In re: Egan, 8 Fed. Cas. p. 367).

Other definitions may be cited:

"Martial law . . . is not statutory in character and always arises out of strict military necessity. Its proclamation or establishment is not expressly authorized by any of the provisions of the Constitution; it comes into being only in the territory of an enemy or in a part of the territory of the United States in time of war or in time of peace in which the proper civil authority is, for some controlling reason, unable to exercise its proper function." (Charles Warren, "Spies, and the Power of Congress to Subject Certain Classes of Civilian to Trial by Military Tribunal", The American Law Review, LIII (March-April, 1919), 201-202).

"The term martial law refers to the exceptional measures adopted whether by the military or the civil authorities, in times of war or of domestic disturbance, for the preservation of order and the maintenance of the public authority. To the operation of martial law all the inhabitants of the country or of the disturbed district, aliens as well as citizens, are subject." (Moore. Int. Law Digest II, 186. As to the subjection of aliens to Martial Law, See Moore, II, 196).

"Martial law relates to the domestic territory in a condition of insurrection or invasion, when the Constitution and its civil authorities, state or federal as the case may be, have been rendered inoperative or powerless by the insurrectionary or invading forces. It is part of our domestic or municipal law." (Arnold F., "The Rationale of Martial Law", 15 ABAJ 551).

A Philippine author has tried to reconcile the many definitions.

"Whatever the previous obscurity which has enveloped martial law in both the British Empire and the United States, it is settled today that martial law is (1) the exercise of military jurisdiction; (2) by the military over the civilian population; (3) in a domestic territory; (4) on occasion of serious public emergencies such as insurrection, rebellion invasion or imminent danger thereof; (5) according to an unwritten law; and (6) as necessity requires it." (Santos, Martial Law, p. 81).

The existing definitions are all based on the traditional concepts. They were made at a time when invasions were preceded by 48-hour ultimatums followed by a formal declaration of war, and when insurrections, and rebellions involved frontal clashes between opposing and well-defined forces. If one group was overcome by the other, the losers would surrender their swords and guns. The winners, in turn, might magnanimously offer to return the swords and allow the losers to retain their side arms, rifles, and horses for home use. In short, there were clear and sporting rules of the game which were generally followed.

(b) Modern Martial Law

Martial law pursuant to Proclamation No. 1081, however, does not completely follow the traditional forms and features which martial law has assumed in the past. It is modern in concept, in the light of relevant new conditions, particularly present day rapid means of transportation, sophisticated means of communications, unconventional weaponry, and such advanced concepts as subversion, fifth columns, the unwitting use of innocent persons, and the weapons of ideological warfare.

The contingencies which require a state of martial law are time-honored. They are invasion, insurrection and rebellion. Our Constitution also allows a proclamation of martial law in the face of imminent danger from any of these three contingencies. The Constitution vests the power to declare martial law in the President under the 1935 Constitution or the Prime Minister under the 1973 Constitution. As to the form, extent, and appearance of martial law, the Constitution and, our jurisprudence are silent.

Martial law pursuant to Proclamation No. 1081 has, however, deviated from the traditional picture of rigid military rule superimposed as a result of actual and total or near total breakdown of government.

Martial law was proclaimed before the normal administration of law and order could break down. Courts of justice were still open and have remained open throughout the state of martial law. The nationwide anarchy, overthrow of government, and convulsive disorders which classical authors mention as essential factors for the proclamation and continuation of martial law were not present.

More important, martial law under Proclamation No. 1081 has not resulted in the rule of the military. The will of the generals who command the armed forces has definitely not replaced the laws of the land. It has not superseded civilian authority. Instead of the rule by military officials, we have the rule of the highest civilian and elective official of the land, assisted by civilian heads of executive departments, civilian elective local officials and other civilian officials. Martial law under Proclamation No. 1081 has made extensive use of military forces, not to take over civilian authority but to insure that civilian authority is effective throughout the country. This Court can very well note that it has summoned and continues to summon military officers to come before it, sometimes personally and at other times through counsel. These military commanders have been required to justify their acts according to our Constitution and the laws of the land. These military officers are aware that it is not their will much less their caprice but the sovereign will of the people under a rule of law, which governs under martial law pursuant to Proclamation No. 1081.

It is this seemingly paradoxical nature of martial law in the Philippines that leads to the various questions raised in

the instant petitions. It is also this apparently variant form and its occasionally divergent scope and effects which require this Court to explain just what the martial law provision of the Constitution means.

We must, perforce, examine the arguments of the parties on this matter.

(c) Respondents' Arguments

The respondents contend that when martial law was proclaimed on September 21, 1972, the rebellion and armed action undertaken by the lawless elements of the communist and other armed aggruppations organized to overthrow the Republic of the Philippines by armed violence and force had assumed the magnitude of an actual state of war against our people and the Republic of the Philippines. This declaration is found in the last "whereas" of Proclamation No. 1081. The following assertions of the factual situation on September 21, 1972 are also found in Proclamation No. 1081.

1. There is a group of lawless elements who are moved by a common or similar ideological conviction, design, strategy, and goal. Their prime purpose is to stage, undertake, and wage an armed insurrection and rebellion against the government of the Republic of the Philippines in order to forcibly seize political and state power in this country. They have in fact actually staged undertaken, and waged this insurrection and rebellion. They want to overthrow the duly constituted government and supplant our existing political, social, economic, and legal order with an entirely new one. This new form of government, its system of laws, its conception of God and religion, its notion of individual rights and family relations, and its political, social economic, legal and moral precepts are based on the Marxist, Leninist, and Maoist teachings and beliefs.

2. These lawless elements have entered into a conspiracy and have joined and banded their resources and forces. They use seemingly innocent and harmless although actually destructive front organizations. These organizations have been infiltrated or deliberately formed by them through sustained and careful recruitment from among the peasantry, laborers, professionals, intellectual, students, and mass media personnel. Their membership has been strengthened and broadened. This control and influence has spread over almost every segment and level of our society throughout the land.

3. The foregoing group of lawless elements enjoy the active, moral, and material support of a foreign power to the months of May, June and July 1972, they brought into the country at Digoyo Point, Palanan, Isabela and other points along the Pacific coast of Luzon, substantial quantities of war materials consisting of around 3,500 M-14 rifles, several dozens of 40 mm rocket launchers, large quantities of 80 mm rockets and ammunitions and other combat paraphernalia

4. The lawless elements have an over-all revolutionary plan. They have distributed their regional program of action for 1972 to their various field commanders and party workers. The implementation of the program of action from the intensification of recruitment to the assassination of high government officials and the establishment of a provisional revolutionary government in various towns and cities has actually commenced. Various incidents of bombings, strikes, robberies, sabotage and demonstrations are actually in implementation of the program of action. Liquidation missions aimed at ranking government officials were about to be implemented by the fielding of so-called Sparrow Units.

5. There is an equally serious disorder in Mindanao and Sulu resulting in actual war among Christians, Muslims, Ilagas, Barracudas, the Mindanao Independence Movement and government troops. Violent disorder in Mindanao and Sulu resulted in over 3,000 casualties and more than 500,000 injured, displaced and homeless persons. The economy of Mindanao and Sulu is paralyzed.

6. There is throughout the land a state of anarchy, lawless chaos, disorder, turmoil and destruction of magnitude equivalent to an actual war between government forces on the one hand and the New People's Army and satellite organizations on the other.

7. The Supreme Court in the 1971 habeas corpus cases has found that in truth and in fact there exists an actual insurrection and rebellion in the country. Portions of the Supreme Court decision are cited. It was concluded by the Supreme Court that the unlawful activities of the aforesaid elements pose a clear, present, and grave danger to public safety and the security of the nation is also cited.

(d) Petitioners' Arguments

On the other hand, the petitioners state that in the Philippines "there has been no disruption at all; all government offices were performing their usual functions; all courts were open and in the unobstructed exercise of their jurisdiction at the time martial law was declared." The petitioners state that we have no Civil War in the Philippines and that no province, no city, no town throughout the Philippines has seceded from the Republic. They state that there is no status of war and no status of belligerency. There is no armed struggle carried on between two political bodies, each of which exercises de facto sovereignty over persons within a determinate territory, and commands an army which is prepared to observe the ordinary laws of war.

On rebellion, the petitioners point out that the rebels have not established an organized civil government nor occupied a substantial portion of the national territory and, in fact, are described as mere "lawless elements."

The petitioners state that "the thrust of martial law cases is this — that for the requirement of public safety to be satisfied, civil authority must have either fallen away or proved inadequate for the emergency, the courts are actually closed, and it is impossible to administer criminal justice according to law, and that where rebellion really exists, there is a necessity to furnish a substitute for the civil authority, thus overthrown, and as no power is left but the military, it is allowed to govern until the laws can have their free course. For martial rule can never exist where the courts are open and in the unobstructed exercise of their jurisdiction." The petitioners cite Arnold, in his article, "The Rationale of Martial Law" (15 ABAJ 551).

"Martial law relates to the domestic territory in a condition of insurrection or invasion, when the Constitution and its civil authorities ... HAVE BEEN RENDERED INOPERATIVE OR POWERLESS by the insurrectionary or invading forces."

After citing the foregoing, petitioners asked this Court to take judicial notice of the following:

1. Congress was in session and was in the unobstructed exercise of its functions when martial law was proclaimed;
2. The Supreme Court, the Court of Appeals, the Courts of First Instance in the Greater Manila Area — where petitioners had been arrested — indeed, even the municipal and city courts were, at the time martial law was publicly announced, open and are still open and functioning throughout the length and breadth of the land; no proof has been shown that any court has been rendered "unable to administer justice," due to the activities of the rebels. Ironically, it is General Order No. 3, as amended by General Order No. 3--A, issued pursuant to Proclamation No. 1081, that seeks to render them powerless, in many cases, to administer justice, according to the Constitution and the laws of the land;
3. The Constitutional Convention — the so-called "fourth branch" — had been holding its sessions when martial law was proclaimed. Despite martial law, or probably because of it, it decided to work with greater efficiency, it has just finished its work. A "plebiscite" under martial law is being called on January 15, 1973, so the people can "ratify" the proposed Constitution;
4. In the Greater Manila Area, contrary to the speech of September 23, 1972, no university, college, or school was closed due to the activities of the rebels;
5. All instruments of mass communications were in operation up to September 22, 1972. The next day, free speech and free press — the very heart of free inquiry and the search for truth — became nothing but empty

memories. Only the "safe newspapers and radio-tv-stations" were allowed to open. Political dissent was suppressed;

6. All agencies and instrumentalities of government, national as well as local, were functioning when martial law was proclaimed. By General Order No. 3. they were ordered "to continue to function under their present officers and employees and in accordance with existing laws .. ."

The petitioners state why Proclamation No. 1081 is unconstitutional:

These indisputable facts which require no introduction of proof — because they all fall within the scope of judicial notice, under Rule 129 of the Rules of Court — show that at the time martial law was declared there was absolutely no justification for it, in fact and in law. Hence, Proclamation No. 1081 is unconstitutional and void, because:

1. It is predicated on the existence of "the magnitude of an actual war" or an "actual status of war" that does not exist;
2. It is allegedly based on the "status of belligerency" which no State in the world, not even the Philippines, has extended to the rebels or the lawless elements described in the Proclamation;
3. Although there may be rebellion in some remote places, as in Isabela, there is no justification for the declaration of martial law throughout the Philippines, since
 - a) no large-scale, nationwide rebellion or insurrection exists in the Philippines;
 - b) public safety does not require it, inasmuch as no department of government, no government agency or instrumentality, and even more important, no civil court of appellate or original jurisdiction was, at the time martial law was proclaimed, unable to open or function, or has been, at any time since the incumbent President came into power "rendered powerless or inoperative" due to the activities of the rebels or the lawless elements described in the Proclamation;
 - c) The President himself declared that the armed forces can handle the situation without "utilizing the extraordinary powers of the President" (January 1, 1972), that long before martial law was proclaimed, the Government had the "rebellion " and the "rebels and their supportores" under control, as the Army knew the step-by-step plot of the Communists and had an hour-by-hour monitoring of the movements of the subversive leaders;
 - d) The problem in the Greater Manila Area where petitioners were seized and arrested — was, at the time martial law was proclaimed, plain lawlessness and criminality. As the President described the situation in his speech of September 23, 1972:

Lawlessness and criminality like kidnapping, smuggling, extortion, blackmail, gun-running, hoarding and manipulation of prices, corruption in government, tax evasion perpetrated by syndicated criminals, have increasingly escalated.

The petitioners pointed out that neither any of these or a combination of all, constitute either the occasion or the justification for the imposition of martial rule. Otherwise, since these crimes have always been with us for many years, we would never see the end of martial law in this country.

It is argued that since Proclamation No. 1081 is unconstitutional and void, the General Orders, issued in pursuance thereto and by way of its implementation, must inevitably suffer from the same congenital infirmity.

(e) Authorities cited by the Parties —

Petitioners and respondents, alike premise their arguments on the martial law provision of the Constitution. Both cite decisions of foreign courts and treatises of foreign writers expounding on martial law. And yet, completely

divergent opinions on the meaning of the provision is the result.

Martial law is based on a law of necessity and is utilized as a measure of governmental self-defense. It is, therefore, an inherent power. It needs no constitutional or statutory grant before it may be wielded. As the petitioners state (Addendum, pages 80-81), it is a recognized institution in the constitutional systems of both England and America, notwithstanding lack of express provisions on martial law in written constitutions.

We accept judicial decisions of these countries as highly persuasive, if not as precedents. The absence of express recognition in the constitutions or statutes of these countries helps explain why there is disagreement on a precise definition. More important, it explains why the necessity, scope, and extent of martial law proclamations have to be determined by the regular courts and why the decisions are, themselves, conflicting. The Constitutions and statutes are silent or different from each other. The Courts have been forced to go to the common law and to general principles of Constitutional Law to look for bases of power and to resolve problems arising out of states of martial law. The various authorities cited by both petitioners and respondents in their pleadings and oral arguments undoubtedly have valuable worth and applicability. They are very helpful in resolving the momentous issues raised by the petitions. The fact remains, however, that they deal with an exercise of power which is undefined. For the United States Supreme Court, the power is not specifically prescribed in the federal Constitution. This has led foreign courts to naturally and logically look for the confining limits and restrictions of ambiguous, cryptic, and perplexing boundaries. Since the power is not defined, the natural tendency is not to describe it but to look for its limits. Anglo-American authorities may assist but should not control because, here, the limits are present and determined by no less than the fundamental law.

In the Philippines, there is an ubiquitous and mandatory guide. The Constitution speaks in clear and positive terms. Given certain conditions, the Philippines or any part thereof may be placed under martial law. To resolve the instant petitions, it is necessary to find out what the Constitution commands and what the express words of its positive provision mean. It is the Constitution that should speak on the circumstances and qualifications of the initiation and use of an awesome emergency power.

(b) More arguments of the Respondents:

According to the respondents, the Constitution plainly provides that the circumstances when martial law maybe declared, its scope and its effects are beyond judicial examination. The respondents contend that this Court lacks jurisdiction to take cognizance of the instant petitions for habeas corpus. The Solicitor General has consistently pleaded throughout these proceedings that the questions involved are political and non-justiciable. He states that the President, sworn to defend the Constitution and the Republic, proclaimed martial law pursuant to authority expressly conferred by the Constitution. It is argued that his decision is beyond controversion because the Constitution has made it so and that only history and the Filipino people may pass judgment on whether the President has correctly acted in a time of supreme crisis.

(a) More arguments of the petitioner's:

Petitioners, on the other hand, contend that this Tribunal is the ultimate interpreter of the Constitution. As such, it has the power and duty to declare Proclamation No. 1081 unconstitutional and void because the President has exceeded his powers. It is argued that where basic individual rights are involved, judicial inquiry is not precluded. On the argument that martial law is textually and exclusively committed to the President, the petitioners answer that under the same Constitution, the President may not disable the Court and oust them, particularly the Supreme Court of their jurisdiction to hear cases assigned to Constitution and the laws. Petitioners stress that the Court should act now or the time will come when it can no longer act, however, much it may wish to for it shall have completely lost then the moral force and authority it still possesses and the valid claim it may still have of being

independent, fearless, and just.

X

POLITICAL QUESTIONS AND COURT'S JURISDICTION OVER THEM

The respondents' assertion that the questions raised in these petitions are political and non-justiciable raises a point which is easily misunderstood.

What is a political question?

In *Mabanag vs. Lopez* (78 Phil. 1, 4), this Court recognized the problems in trying to make a definition:

"It is a doctrine too well established to need citation of authorities, that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred upon the courts by express constitutional or statutory provision. (16 C.J.S., 431). This doctrine is predicated on the principle of the separation of powers, a principle also too well known to require elucidation or citation of authorities. The difficulty lies in determining what matters fall within the meaning of political question. The term is not susceptible of exact definition, and precedents, and authorities are not always in full harmony as to the scope of the restrictions, on this ground, on the courts to meddle with the actions of the political departments of the government.

I think it is time for this Court to distinguish between jurisdiction over a case and jurisdiction over the issues raised in that case. It is erroneous to state that when a petition raises an issue which is political in nature, this Court is without jurisdiction over the case. It has jurisdiction.

The Supreme Court has jurisdiction to receive the petition and to find out whether the issues are indeed political or not. A finding of political question is the province of the Court in all cases. A mere allegation of political questions does not automatically divest the Court of its jurisdiction. The Court may, therefore, require the parties to the case to prove or refute the existence of a political question. The Court has jurisdiction to receive the pleadings to listen to the arguments and to make up its mind.

Once the Court, however, finds that the issue is political in nature, it should rule that it has jurisdiction to decide the issue one way or another still renders a decision. It must still state that according to the Constitution, this matter is not for the judiciary but for the political departments to decide. This is the task we must perform in these petitions. When we decide whether or not the issues are political in nature, we exercise jurisdiction. If we find a political question, we still have jurisdiction over the case but not over the specific issue.

A lot of emotionalism is directed against the Court when it rules that a question is political. It is alleged that the Court has surrendered its powers. The political question, it is said, "applies to all those questions of which the Court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes, it will result from the feeling that the Court is incompetent to deal with the type of question involved. Sometimes, it will be induced by the feeling that the matter is too high for the Courts" (Finkelstein, "Judicial Self Limitation", 38 Harvard Law Review 328, 344). The political question doctrine is, therefore, described as a doctrine of judicial opportunism. Like Pontius Pilate, the Court is accused of tossing the hot issue for others to determine. It is charged with washing its hands off a difficult or explosive situation. A political question, it is alleged, is nothing more than any question which the Court does not want to decide. It is understandable why courts should have a seemingly natural or spontaneous tendency to reject a political question argument. The charge that the Court is abdicating a function or running away from responsibility can strike to the

very marrow of any judge's feelings.

I do not share these misgivings. I positively reject them as wrong impressions. This Court is discharging a constitutional duty when it determines that an issue is a political question. Because of its implications, however, this is a fact which the Court must also explain in the simplest terms possible.

The Constitution defines and limits the powers entrusted by the sovereign people to their government. First, it declares the boundaries where the powers of government cannot go further because individual rights would be impaired. Second, it divides the powers given to the entire government among the various departments and constitutional bodies. Its provisions are, therefore, both a grant and a limitation of power.

In other words, the Constitution may be likened to a map. This map shows how the powers of sovereignty have been distributed among the departments of government. It shows where there is a sharing of powers or where checks and balances may be found. It also shows where there is a dividing line between government power and individual liberty. In plainer language, the constitutional map, like any other map, carries different boundaries. The boundaries are the delimitations of power.

The function of the Court is to fix those boundaries whenever encroachments are alleged. In doing so, the Court interprets the constitutional map. It declares that this power is executive, that power is legislative, and that other power is judicial. It may sometimes state that a certain power, like impeachment, is judicial in nature. Nonetheless, the constitutional map has included impeachment within the boundaries of legislative functions. The Court has to declare that the judicial power of impeachment is exclusively for the legislature to exercise.

This task of allocating constitutional boundaries, I must repeat, is given to this Court. It cannot be divested of this jurisdiction. It cannot yield this power.

However, when the Court finds that a certain power is given by the Constitution to a co-equal department, it must defer to the decision of that department even if it appears to be seemingly judicial. It should declare that the Constitution has vested this determination in the executive or the legislature. The Court must, therefore, state that it cannot go any further. The sovereign people through the Constitution have drawn a boundary which this Court has ascertained and which it must respect. When the Court finds a political question, it is not, therefore, shirking or avoiding a duty. It is, in fact, complying with its duty. Much as it wants to go into the issues and decide the questions, it has to decline. The Constitution has given the power of determination to another department. As interpreter of the Constitution, the Court has to lead in respecting its boundaries.

If we examine this Court's definition of a political question in *Tañada vs. Cuenco* (G.R. No. L-10520, February 28, 1957), We find that it conforms to the foregoing explanation.

In short, the term "political question" connotes, in legal parlance, what it means in ordinary parlance, namely, a question of policy. In other words, in the language of *Corpus Juris Secundum* (supra), it refers to "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislature or executive branch of the Government." It is concerned with issues dependent upon the wisdom not legality, of a particular measure. (Emphasis supplied)

This is a determination of constitutional boundaries. The Court has found that the Constitution has assigned a political question to the people through a referendum or either one or both of the political departments.

A more complete definition is found in *Baker vs. Carr* (369 U.S. 186, 7L Ed. 2d 663, 1962), to wit:

"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, which identifies it as essentially a function of the separation of powers.

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Again, the Court makes a determination that the Constitution has vested the making of a final decision in a body other than the Court.

XI

PROCLAMATION NO. 1081 IS VALID — IT IS POLITICAL IN NATURE AND THEREFORE NOT JUSTICIABLE

How does the Court determine whether a martial law proclamation is a political question or not? The respondents argue that only the President is authorized to determine when martial law may be proclaimed. The petitioners insist that this Court may examine and nullify the Presidential determination as beyond his constitutional powers.

Has the Constitution vested the power exclusively in the President? Are the petitioners correct or is it the claim of respondents which is valid?

The rule in constitutional construction is to give effect to the intent of the authors. The authors are, first, the framers who are ordered by the sovereign people to represent them in the specific assignment of drafting the fundamental law and second, the people, themselves, who by their ratification confirm what their delegates have wrought and manifested as expressions of the sovereign will.

How, then, do we ascertain the intent of the authors on the grant of martial law powers?

A search for intent must necessarily start within the four corners of the document itself.

x x x The question is one then of constitutional construction. It is well to recall fundamentals. The primary task is one of ascertaining and thereafter assuring the realization of the purpose of the framers and of the people in the adoption of the Constitution.

We look to the language of the document itself in our search for its meaning. We do not of course stop there, but that is where we begin. x x x (Tuazon & Co. vs. Land Tenure Administration, 31 SCRA 413, 422)

The Constitution is sufficiently explicit in locating the power to proclaim martial law. It is similarly explicit in specifying the occasions for its exercise. "In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he (the President as Commander-in-Chief of all armed forces of the Philippines) may suspend the privileges of the writ of habeas corpus or place the Philippines or any part thereof under martial law."

This provision on martial law is found in Article VII of the 1935 Constitution. This Article refers to the Presidency. Section 10, where the provision appears as the second paragraph, is exclusively devoted to powers conferred by the Constitution on the President. This is in sharp contrast to the Constitution of the United States where the suspension of the privilege of the writ of habeas corpus appears, not as a grant of power under Article II on the Executive nor in the first ten amendments constituting their Bill of Rights, but in Article I on the Legislature. It is given not as a grant of power but as a limitation on the powers of the Federal Congress.

It is significant that, as regards the suspension of the privilege of the writ of habeas corpus, the Philippine

Constitution treats it both as a grant of power in the article on the Presidency and as a limitation to government action in the article on the Bill of Rights. On the other hand, there is no dual treatment of martial law. There is only a grant of power in Article VII to meet certain grave dangers to the Republic. Nowhere in the Constitution is it treated in terms of limitation.

In *J. M. Tuazon & Co., Inc. vs. Land Tenure Administration*, 31 SCRA 41,3, 423, this Court ruled:

"Reference to the historical basis of this provision as reflected in the proceedings of the Constitutional Convention, two of the extrinsic aids to construction along with contemporaneous understanding and the consideration of the consequences that flow from the Interpretation under consideration, yields additional light on the matter."

Let us, therefore, look at the history of the provision. It is important to be guided by the authors of the Constitution more than by citations from foreign court decisions and quotations from constitutional law writers which petitioners and respondents can seem to unendingly cull to sustain their diametrically opposed positions.

The Philippine Bill of 1902 had no provision on martial law, although it provided:

"SECTION 5. . . .

That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor, with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist."

Both executive and legislative shared in deciding when the privilege of the writ may be suspended.

The Jones Law or Philippine Autonomy Act of 1916 required a similar sharing of power as the Philippine Bill of 1902. Instead of approval of the Philippine Commission, however, it provided that the President of the United States must be notified whenever the privilege of the writ of habeas corpus has been suspended or martial law has been proclaimed.

"SECTION 21 . . He shall be responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands, and whenever it becomes necessary he may call upon commanders of the military and naval forces of the United States in the Islands, or summon the posse comitatus, or call out the Militia, or other locally created armed forces, to prevent or suppress lawless violence, invasion, insurrection, or rebellion; and he may, in case of rebellion or invasion or imminent danger thereof, when the public safety requires it, suspend the privileges of the writ of habeas corpus, or place the islands, or any part thereof, under martial law; Provided. That whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof together with the attending facts, and circumstances, the President shall have power to modify or vacate the action of the Governor-General."
(Italics supplied)

The treatment of both martial law and habeas corpus as part of the limitations in the Bill of Rights and as part of the grant of powers of the Chief Executive started with the Jones Law. This organic act also added "imminent danger" as a ground for suspension.

This was the status of our Constitutional Law on habeas corpus and on martial law when the 1935 Philippine Constitution was drafted. The most learned Philippine lawyers were among the delegates to the 1934 Constitutional Convention. The delegates had before them the Philippine Bill of 1902 requiring approval of the legislature before the Chief Executive may exercise his power. They had before them the provision of the Jones Law qualifying the Governor-General's power with supervision and control by the President of the United States

who may modify or vacate the former's action. They chose to vest the power exclusively in the President of the Philippines.

They expanded the wide scope of his authority by including "imminent danger" as an occasion for its exercise, thus deliberately adopting the Jones Law provision minus the limitation. Their proposal on martial law was overwhelmingly ratified by the people.

The choice was no perfunctory or casual one. It was the product of thorough study and deliberation. While the debates in the 1935 Constitutional Convention centered on habeas corpus, they necessarily apply to martial law because the two are inextricably linked in one and the same provision. The Solicitor-General has summarized these deliberations on habeas corpus and martial law.

"As a matter of fact, in the Constitutional Convention, Delegate Araneta proposed the following provisions:

'In case of rebellion, insurrection, or invasion, when the public safety requires it, the National Assembly may suspend the privilege of the writ of habeas corpus. In case the National Assembly is not in session, the President may suspend the privilege of the writ of habeas corpus with the consent of the majority of the Supreme Court, but this suspension of the privilege of the writ of habeas corpus will be revoked if the President does not call a special session of the National Assembly within fifteen days from the decree suspending the writ of habeas corpus or if the National Assembly fails to confirm the action of the President within 30 days. (5 J. Laurel, Proceedings of the Philippine Constitutional Convention; 259, (S. Laurel ed. 1966)

"In support of' his proposal, Araneta argued, first, that the power to suspend the privilege of the writ of habeas corpus should be vested in the National Assembly because that power was "essentially" legislative. (Id. 249--50) and second, that in case the National Assembly was not in session, thus making it necessary to vest the power in the President, that the exercise of the power be subject to the concurrence of the Supreme Court and even when the Court has concurred in the decision of the President that the suspension would be effective only for a certain period unless the National Assembly was convened and its ratification was secured. (Id., at 255).

"He was interpellated by various delegates; Delegate Perez and Grageda, especially, were concerned, lest the requirement of securing the concurrence of other branches of government in the decision of the President deprives him of effective means of meeting an emergency. (Id., at 255-56). The Committee on Sponsorship headed by Delegate Sotto opposed the amendment. When finally put to vote, the amendment was rejected. (Id., at 259).

"There are a number of points we should note regarding the proposal. First, the proposal refers only to the suspension of the privilege of the writ of habeas corpus. It did not apparently contemplate the proclamation of martial law. Second, the proposal would vest the power of suspension in the National Assembly and in the President only when the National Assembly is not in session. Third, exercise of the power by the President, is subject to the concurrence of the Supreme Court and the confirmation of the National Assembly.

"The Constitutional Convention must have been aware of the experience of President Lincoln during the American Civil War. They must have been aware of the views expressed then that it was the legislature and not the President who may suspend the privilege of the writ of habeas corpus or proclaim martial law. Surely, they were cognizant of the vast implications incident to a suspension of the privilege of the writ of habeas corpus and more so to the proclamation of martial law. This is reflected in the following records of the proceedings:

'During the debates on the first draft, Delegate Francisco proposed an amendment inserting, as a fourth cause for the suspension of the writ of habeas corpus, imminent danger of the three causes included herein. When submitted to a vote for the first time, the amendment was carried.

After his Motion for a reconsideration of the amendment was approved, Delegate Orense spoke against the amendment alleging that it would be dangerous to make imminent danger a ground for the suspension of the writ of habeas corpus. In part, he said:

'Gentlemen, this phrase is too ambiguous, and in the hands of a President who believes himself more or less a dictator, it is extremely dangerous; it would be a sword with which he would behead us.'

'In defense of the amendment, Delegate Francisco pointed out that it was intended to make this part of the bill of rights conform to that part of the draft giving the President the power to suspend the writ of habeas corpus also in the case of an imminent danger of invasion or rebellion. When asked by Delegate Rafols if the phrase, imminent danger, might not be struck out from the corresponding provision under the executive power instead, Delegate Francisco answered:

'Outright, it is possible to eliminate the phrase, imminent danger thereof, in the page I have mentioned. But I say, going to the essence and referring exclusively to the necessity of including the words, of imminent danger or one or the other, I wish to say the following: that it should not be necessary that there exist a rebellion, insurrection, or invasion in order that habeas corpus may be suspended. It should be sufficient that there exists not a danger but an imminent danger, and the word, imminent should be maintained. When there exists an imminent danger, the State requires for its protection, and for that of all the citizens the suspension of the habeas corpus.

'When put to vote for the second time, the amendment was defeated with 72 votes against and 56 votes in favor of the same. (I Aruego's Framing of the Philippine Constitution, 180-181)''

"But the Convention voted for a strong executive, and wrote Article VII, Section 10 (2) into the Constitution.

"The conferment of the power in the President is clear and definite. That the authority to suspend the privilege of the writ of habeas corpus and to proclaim martial law was intended to be exclusively vested in the President, there can be no doubt." (Memorandum for Respondents dated November 17, 1972, pp. 11-14)"

The only conclusion I can make after ascertaining the intent of the authors of the Constitution is that the power to proclaim martial law is exclusively vested in the President. The proclamation and its attendant circumstances therefore form a political question.

Unless this Court decides that every act of the executive and of the legislature is justiciable there can be no clearer example of a political question than Proclamation No. 1081. It is the exercise by the highest elective official of the land of a supreme political duty exclusively entrusted to him by the Constitution. Our people have entrusted to the President through a specific provision of the fundamental law the awesome responsibility to wield a powerful weapon. The people have entrusted to him the estimation that the perils are so ominous and threatening that this ultimate weapon of our duly constituted government must be used.

The Supreme Court was not given the jurisdiction to share the determination of the occasions for its exercise. It is not given the authority by the Constitution to expand or limit the scope of its use depending on the allegations of litigants. It is not authorized by the Constitution to say that martial law may be proclaimed in Isabela and Sulu but not in Greater Manila. Much less does it have the power nor should it even exercise the power, assuming its existence, to nullify a proclamation of the President on a matter exclusively vested in him by the Constitution and on issues so politically and emotionally charged. The Court's function in such cases is to assume jurisdiction for the purpose of finding out whether the issues constitute a political question or not. Its function is to determine whether or not a question is indeed justiciable.

Petitioners want this Court to examine the bases given by the President in issuing Proclamation No. 1081. They want the Court to find or to take judicial notice of the absence of an insurrection or rebellion — of the absence of

an imminent danger thereof. Petitioners would have this Court dispute and nullify the findings of facts of the President himself in a matter that is peculiarly executive in nature.

Why should We honor the President's findings?

In cases where the issues are indisputably judicial in nature, the findings of the President are still given utmost respect and deference. In the matter of the declaration of martial law, a power that is exclusively vested in the President, may the Court differ with the findings? No, because as We have already stated, the valid reason for this exclusive grant of power is that the President possesses all the facilities to gather the required data and information and has a broader perspective to properly evaluate them, better than any facility and perspective that the Court can have.

At what state in an insurrection or how serious and manifest should subversive activities become before the Court decides the particular point when martial law may be proclaimed? The petitioners, relying on the classic stages of governmental overthrow as experienced by pre-World War II examples, would wait until all civil courts are closed and the country is in complete chaos. Petitioners do not realize that long before the courts are closed, the President would have been killed or captured and the enemy irrevocably entrenched in power. The authors of the Constitution never envisioned that the martial law power so carefully and deliberately included among the powers of the President would be withheld until such time as it may not be used at all.

It is my firm view that the decision to proclaim martial law is an exclusive function of the President. If he finds that invasion, insurrection, or rebellion or imminent danger of any of the three is present, such finding is conclusive on the Court. If he finds that public safety requires the entire country should be placed under martial law, that finding is conclusive on the Court. In the exercise of such an emergency power intended for the supreme and inherent right of self-defense and self-preservation, the Constitution cannot be read to mean otherwise.

In *Lansang vs. Garcia* (42 SCRA 448, 480) this Court stated that "in the exercise of such authority (to suspend the privilege of the writ of habeas corpus), the function of the Court is merely to check — not to supplant — the Executive, or to ascertain merely whether he has gone beyond the constitutions limits of his jurisdiction, not to exercise the power vested in him or to determine the wisdom of his act."

I do not see how, both from the legal and practical points of view, the Court can check the President's decision to proclaim martial law. The same may, perhaps, be done as regards a suspension of the privilege of the writ of habeas corpus although I reserve a more definitive statement on that issue when a case squarely in point on the matter is raised before Us. However, martial law poses entirely different problems. A proclamation of martial law goes beyond the suspension of the privilege of the writ of habeas corpus, whose effects are largely remedied with the release of detainees.

Upon proclaiming martial law, the President did not limit himself to ordering the arrest and detention of the participants and others having a hand in the conspiracy to seize political and state power. Under martial law, the President ordered the takeover or control of communications media, public utilities, and privately owned aircraft and watercraft. Foreign travel was restricted. Curfew was imposed all over the country. A purge of undesirable government officials, through resignations or summary investigations, was effected. The entire executive branch of government was reorganized. A cleanliness and beautification campaign, with martial law sanctions to enforce it, was ordered. This was only the beginning.

Consequences of Proclamation No. 1081 are many and far-reaching. They permeate every aspect and every activity in the life of the people. A court decision is not needed nor is it the proper place to enumerate them. Most obvious, of course, are the President's acts of legislation on the very broad range of subjects that Congress used to

cover. As early as November 8, 1972, the petitioners prepared a Memorandum stressing this point.

It may be pointed out that since martial law was declared, the President has been exercising legislative power that is lodged by the Constitution in Congress. A good number of the decrees promulgated have no direct relation to the quelling of the disorders caused by the lawless elements. They are aimed at building a New Society, but they cannot be justified as a valid exercise of martial, rule. (at page 94)

These implications and consequences of martial law serve to bolster my view that the Constitution never intended that this Court could examine and declare invalid the President's initial determination. The Constitution did not intend that the Court could, in the detached and peaceful aftermath of successful martial law, reach back and invalidate everything done from the start. That would result in chaos.

I am, of course, aware of the *Chicot County Drainage District vs. Baxter's State Bank* (308 U.S. 371, 374) doctrine which this Court adopted in *Municipality of Malabang vs. Pangandapun Benito, et al.* (27 SCRA 533, 540):

The Courts below have proceeded on the theory that the Act of Congress having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. (*Norton vs. Shelby County*, 118 U.S. 425, 442; *Chicago, I. & L. Ry. Co. vs. Hackett*, 228 U.S. 559, 566). It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

It may be argued that the actual existence of Proclamation No. 1081 is an operative fact and that its consequences should not be ignored.

The operative fact doctrine, however, has no application in this situation where, faced with insurrection and rebellion, the President proclaims martial law. Even assuming that every single member of this Court doubts the President's findings, We have to consider that the Constitution vests the determination in him. The stakes involved are supreme and the determination must be made immediately and decisively.

There is the possibility that the President has an exaggerated appreciation of the dangers and has overreacted with the use of the awesome measure of martial law. The fact remains, however, that the authors of the Constitution were aware of this possibility and still provided that the power exclusively belongs to him. It would be stretching the plain words of the Constitution if we weigh our personal findings against the official findings of the President. He possesses all the facilities to gather data and information and has a much broader perspective to properly evaluate them. He is performing a function which is, of course, required by the Constitution to be discharged by the President.

And for us to venture into a judicial inquiry on the factual basis of the constitutionality of the martial law proclamation would be to ignore the well-established principle of presidential privilege which exempts the President from divulging even to the highest court of the land facts which if divulged would endanger national security. As a matter of fact, in the latest case on this matter which was that filed against President Richard M. Nixon, although the Supreme Court of the United States ordered the President to produce the tapes of his

conversation with some of his aides pursuant to a subpoena for use in a criminal prosecution against one of his aides, because the claim that "disclosures of confidential conversation between the President and his close advisors ... would be inconsistent with the public interest ... cannot outweigh ... the legitimate needs of the judicial process" in a criminal prosecution, the Court, however, made the statement from which we can infer that if President Nixon had only claimed that the tapes contain "military, diplomatic or sensitive national security secrets", it would have sustained the refusal of Nixon to produce them.

"... However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide."

"In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. In *C. & S. Air Lines vs. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948), dealing with presidential authority involving foreign policy considerations, the Court said:

"The President, both as Commander-in-chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Id.* at 111

In the *United States vs. Reynolds*, 345 U.S. 1 (1952), dealing with a claimant's demand for evidence in a damage case, against the Government, the Court said:

'It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.'

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."

(*United States, Petitioner, vs. Richard M. Nixon, President of the United States, et al., Richard M. Nixon, President of the United States, Petitioner, vs. United States*; July 24, 1974; Nos. 73-17666 and 73-1834; Supreme Court of the United States)

It is for the above reasons that, as far as the proclamation is concerned, the Court should revert to the rule in *Barcelon vs. Baker* (6 Phil. 87) and *Montenegro vs. Castaneda* (91 Phil. 886). The only questions which the judiciary should look into are (1) Did the Constitution confer the authority to suspend the privilege of the writ of habeas corpus and proclaim martial law on the President? and (2) Did the President declare that he is acting under such authority and in conformance with it? The authority being exclusively vested in the President, his decision is final and conclusive upon the Court.

Insofar as the President's decision to proclaim martial law is concerned, it is, therefore, my view that under the Constitution, the Supreme Court has no authority to inquire into the existence of a factual basis for its proclamation. The constitutional sufficiency for the proclamation is properly for the President alone to determine.

XII

GRANTING THAT PROCLAMATION NO. 1081 IS NOT POLITICAL BUT JUSTICIABLE, IT IS STILL VALID BECAUSE THE PRESIDENT HAS NOT ACTED ARBITRARILY IN ISSUING IT

It should be noted that Proclamation No. 1081 is not a mere conclusion that there is insurrection and rebellion in the country. The President did not limit himself to a curt and laconic declaration that on the basis of his findings, there is insurrection or a rebellion and that he has proclaimed martial law.

Proclamation No. 1081 specifies in twenty-six (26) printed pages the various findings which led to its promulgation. The conspiracy to overthrow the government, the rapidly expanding ranks of the conspirators, the raising of funds and materials under centralized direction, the maintenance of a rebel army, the massive propaganda campaign, the acts of sabotage and armed insurrection or rebellion, the previous decision of this Court, the lawlessness and disorder in the country, the violent demonstrations led by Communist fronts, the armed clashes between rebels and government troops, the active moral and material support of a foreign power, the importation of firearms and war material by rebels, the presence of a well-scheduled program of revolutionary action, the organization of liquidation squads, the serious disorder in Mindanao and Sulu, the activities of the Mindanao Independence Movement, the thousands killed and hundreds of thousands of injured or displaced persons, the inadequacy of simply calling out the armed forces or suspending the privilege of the writ of habeas corpus, the alarmingly rapid escalation of rebel or subversive activities, and other evidence of insurrection or rebellion are specified in detailed manner.

The findings of the President are given in a positive, detailed, and categorical form. As a matter of fact, subsequent events, related to the Court in a series of classified briefings made to it by the Army, the last one being on August 15, 1974, confirm the over-all validity of the President's basis. There is constitutional sufficiency for his conclusion that martial law be proclaimed. Proclamation No. 1081 does not, therefore, suffer any constitutional infirmity of arbitrariness, granting that this test can be applied to it.

It appears proper, at this point, to elucidate further on the test of arbitrariness.

The Court's decision in *Lansang vs. Garcia* (42 SCRA 448) has been interpreted and, to my mind, misunderstood by many people to mean that the Court had completely reversed *Barcelon vs. Baker* and *Montenegro vs. Castaneda*. There are, of course, certain statements in the decision that give rise to this conclusion. For instance, the Court stated that the weight of *Barcelon vs. Baker*, as precedent, is diluted by two factors, namely, (a) it relied heavily upon *Martin vs. Mott* (6 L. ed. 537) involving the U.S. President's power to call out the militia and (b) the fact that suspension of the privilege of the writ of habeas corpus was by the American Governor-General, the representative of the foreign sovereign. The Court stated that in the *Barcelon* case it went into the question — Did the Governor-General act in conformance with the authority vested in him by the Congress of the United States? In other words, the Court stated that it made an actual determination whether or not the Chief Executive had acted in accordance with law. The Court also added that in the *Montenegro* case, it considered the question whether or not there really was a rebellion. The Court reviewed American jurisprudence on suspension of the privilege. It stated that the tenor of the opinions, considered as a whole, strongly suggests the Court's conviction that the conditions essential for the validity of proclamations or orders were in fact present. It stated that whenever the American courts took the opposite view, it had a backdrop permeated or characterized by the belief that said conditions were absent.

In truth, however, the decision in *Lansang vs. Garcia* does not state that the Court may conduct a full examination into the facts which led the President to issue the proclamation. The Court's decision categorically asserts that the examination presidential acts by the Court is limited to arbitrariness. The Court accepted the view —

... that judicial inquiry into the basis of the questioned proclamation can go no further than to satisfy the Court not that the President's decision is correct and that public safety was endangered by the rebellion and justified the suspension of the writ, but that in suspending the writ, the President did not act arbitrarily.

The Court adopted as the test of validity, the doctrine in *Nebbia vs. New York*. 291 U.S. 502 —

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

For purposes of comparison and emphasis, the Court, in *Lansang vs. Garcia*, went into the judicial authority to review decisions of administrative bodies or agencies. It stated that the reviewing court determines only whether there is some evidentiary basis for the contested administrative findings and does not undertake quantitative examination of supporting evidence. Therefore, the Court stated that it interferes with an administrative finding only if there is no evidence whatsoever in support thereof and said finding is actually arbitrary, capricious, and obviously unauthorized. The Court ruled that this approach of deferring to the findings of administrative bodies cannot even be applied in its aforesaid form to test the validity of an act of Congress or of the Executive. The presumption of validity is of a much higher category. The Court emphasized that the co-equality of coordinate branches of the government under our constitutional system demands that the test of validity of acts of Congress and of those of the Executive should be fundamentally the same. And this test is not correctness but arbitrariness.

It follows, therefore, that even if I were to subscribe to the view that *Lansang vs. Garcia* should not be categorically reversed as erroneous doctrine, my decision would be the same. Even under *Lansang vs. Goria* martial law is valid.

There is nothing arbitrary in the decision to promulgate Proclamation No. 1081. It is not unconstitutional.

XIII

THE CONTINUATION (AND EVENTUAL LIFTING) OF THE STATE OF MARTIAL LAW IS A POLITICAL QUESTION

The continuation of the state of martial law and the resulting continued restrictions on individual liberties are, of course, serious aspects of the main issue with which this Court is concerned.

In fact, this is the more difficult question — The President having acted upon an initial and positive finding that martial law is necessary, may the Court inquire into the bases for its duration or the need for its continued imposition?

Towards the end of this separate opinion, I answer the arguments of the petitioners questioning the effectivity and legality of the new Constitution. It is my unqualified view, as explained later, that this Court in the Ratification Cases declared the new Constitution to be legally in force and effect.

I have to mention this view, at this juncture, because martial law was proclaimed under the old Constitution. However, its continuation and eventual lifting are now governed by the new Constitution.

The exercise of martial law power may be likened to the jurisdiction of a court. A court may have jurisdiction

under an old law but the jurisdiction may be removed or modified by a new statute. In other words, is the continuing state of martial law valid under the new Constitution? Is it also a political question under the present Charter?

Article IX of the new Constitution on the Prime Minister and the Cabinet provides:

"SEC. 12. The Prime Minister shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion in case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law."

It should be noted that the above provision is a verbatim reiteration of Article VII, Section 10, Paragraph (2) of the old Constitution.

What was the intent of the framers in adopting verbatim the provision found in the old Constitution?

At this point, modesty and prudence should inhibit me from advancing my own views as the only member of this Tribunal who was a delegate to the 1971 Constitutional Convention. In *Vera vs. Avelino* (77 Phil. 192), this Court stated —

"The theory has been proposed — modesty aside — that the dissenting members of this Court who were delegates to the Constitutional Convention and were "co-authors of the Constitution" "are in a better position to interpret" that same Constitution in this particular litigation.

"There is no doubt that their properly recorded utterances during the debates and proceedings of the Convention deserve weight, like those of any other delegate therein. Note, however, that the proceedings of the Convention "are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives." (Willoughby on the Constitution, Vol. I, pp. 54, 55.)

"Their writings (of the delegates) commenting or explaining that instrument, published shortly thereafter, may, like those of Hamilton, Madison and Jay in *The Federalist* — here in the Philippines, the book of Delegate Aruego, *supra*, and of others — have persuasive force. (Op. cit., p. 55.)

"But their personal opinion on the matter at issue expressed during our deliberations stand on a different footing: If based on a "fact" known to them, but not duly established or judicially cognizable, it is immaterial, and their brethren are not expected to take their word for it, to the prejudice of the party adversely affected, who had no chance of rebuttal. If on a matter of legal hermeneutics, their conclusions may not, simply on account of membership in the Convention, be a shade better, in the eyes of the law. There is the word "deference" to be sure. But deference is a compliment spontaneously to be paid — never a tribute to be demanded.

"And if we should (without intending any disparagement) compare the Constitution's enactment to a drama on the stage or in actual life, we would realize that the intelligent spectators or readers often know as much, if not more, about the real meaning, effects or tendencies of the event, or incidents thereof, as some of the actors themselves, who sometimes become so absorbed in fulfilling their emotional roles that they fail to watch the other scenes or to meditate on the larger aspects of the whole performance, or what is worse, become so infatuated with their lines as to construe the entire story according to their prejudices or frustrations. Perspective and disinterestedness help certainly a lot in examining actions and occurrences.

"Come to think of it, under the theory thus proposed, Marshall and Holmes (names venerated by those who have devoted a sizeable portion of their professional lives to analyzing or solving constitutional problems and

developments) were not so authoritative after all in expounding the United States Constitution — because they were not members of the Federal Convention that framed it! (pp. 215-216)"

I wish to follow the example, however, of my distinguished colleague, Mr. Justice Calixto O. Zaldivar in *Philippine Constitution Association vs. Mathay* (18 SCRA 300) where, with characteristic humility, he stated in a concurring opinion -

"My opinion in this regard is based upon a personal knowledge of how the constitutional proviso, Article VI, Section 14 of the Constitution, which is now in question, became a part of our present Constitution. It was the Second National Assembly which amended our original Constitution. I was a humble Member of the Second National Assembly, representing the province of Antique.

* * * * *

"I still have vivid recollections of the important points brought up during the deliberations in caucus over proposed amendments and of the agreements arrived at. I remember too the influences that worked, and the pressures that were brought to bear upon the Assemblymen, in the efforts to bring about agreements on very controversial matters and thus secure the insertion of the desired amendments to the Constitution. The discussions on the proposed amendments affecting the legislative branch of the government were specially of interest to us then because we were in some way personally affected, as most of us were interested in running for re-election.

"It is not my purpose here to impose on anyone my recollections of matters that were brought up during our caucuses then, but I only wish to emphasize the fact that my concurring opinion in the decision of the case now before Us has for its basis my honest and best recollections of what had transpired, or what had been expressed, during the caucuses held by the Members of the Second National Assembly in the deliberations which later brought about the 1940 amendments.

* * * * *

"I have endeavored to make a discourse of facts as I know them, because I sincerely believe that the interpretation, embodied in the opinion penned by my esteemed colleague, Mr. Justice J.B.L. Reyes, of the pertinent provision of Article VI, Section 14 of our Constitution is in consonance with the facts and circumstances as I remember them, and as I know them. As I have stated at the early part of this concurring opinion, it is not my purpose to impose on anyone my recollection of what transpired, or of what had been discussed about, or of what had been agreed upon, by the Members of the Second National Assembly during the deliberations which brought about the 1940 amendments to our Constitution. My perception and my memory areas frail as those of any other human being, and I may have incurred myself in error. It just happened that the facts and the circumstances that I have herein narrated, as I remember them, have engendered in my mind an opinion, nay a conviction, which dovetails with the opinion of my illustrious colleague that has penned the opinion for the majority of the Court in this case." (at pp. 316, 317 and 327-328)

Justice Zaldivar's recollections on the intent of the Second National Assembly meeting as a constituent body in 1940 are most helpful. There are no existing records of the deliberations on the Article VI Section 14 amendment to the 1935 Constitution. The amendment discussions and debates which took place during legislative caucuses are unrecorded and this Court has Justice Zaldivar to thank for his recollections.

It is in this spirit that I venture my own recollections. I am also fairly certain that when the proceedings of the 1971 Constitutional Convention are published, my observations will be sustained. When the last Constitutional Convention approved the New Constitution on November 29, 1972, the delegates were aware of pre-convention proposals to subject exercise of the power by the Executive to judicial inquiry. Studies on the wisdom of having a joint exercise of the power by the Executive and the Legislature were before the delegates. (U.P. Law Center

Constitution Revision Project, 1970. pp. 104-108) There were even constitutional law scholars who questioned the power altogether and wanted it removed. They claimed that whether or not martial law is in the Constitution, it will be declared when absolutely necessary and, therefore, anticipating its use through a constitutional provision serves no useful purpose.

The delegates were fully aware of the Government stand on the habeas corpus and martial law provision. The *Lansang vs. Garcia* decision was fairly recent. The powers of the Chief Executive were extensively debated. The delegates knew that in the *Lansang vs. Garcia* proceedings, the Solicitor General had consistently and forcefully argued that *Barcelon vs. Baker* and *Montenegro vs. Castañeda* were correct interpretations of the President's power to suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law.

More significant is the fact that when the new Constitution was finalized and the draft corrected and approved prior to submission to the people, we were already under a state of martial law. The petitioners had been arrested and various petitions filed. In fact, petitioner E. Voltaire Garcia II included in his petition the argument that his detention pursuant to Proclamation No. 1081 deprived his constituency of their representation in the Constitutional Convention. The delegates were aware that Proclamation No. 1081 was challenged before this Court and that the Solicitor General's answer to all the petitions was invariably the doctrine of political question.

If it was the intent of the Constitutional Convention to subject the Prime Minister's exercise of the power to judicial inquiry and/or control, the provision on martial law would have been accordingly amended. In fact, during deliberations of the Committees on Civil and Political Rights and Executive Power, there were proposals that the power to proclaim martial law be subjected to control, confirmation, or reversal by Congress or the Supreme Court, but the Convention did not accept any of these proposals and decided to simply reiterate the earlier provision.

It would be enlightening for us to peruse the pertinent portions of the proceedings of the Committee on Civil and Political Rights and Executive Power, and I quote:

Republic of the Philippines

1971 CONSTITUTIONAL CONVENTION

Manila

COMMITTEES ON CIVIL AND POLITICAL RIGHTS AND EXECUTIVE POWER

MINUTES OF THE MEETING (Joint Public Hearing)

WEDNESDAY, SEPTEMBER 8, 1971 Session Hall, Manila Hotel

COMMITTEE ON CIVIL AND POLITICAL RIGHTS

PRESENT

Chairman

Delegate De la Serna Vice Chairman:

Delegate Abueg

Members:

1. Delegate Abad
9. Delegate Pepito
2. Delegate Bedelles
10. Delegate Reyes C.
3. Delegate Garcia L. P.
11. Delegate Santillan
4. Delegate Gunigundo
12. Delegate Sevilla
5. Delegate Guzman V.
13. Delegate Sumulong
6. Delegate Laggui
14. Delegate Veloso I.
7. Delegate Mendiola
15. Delegate Zafra
8. Delegate Opinion

COMMITTEE ON EXECUTIVE POWER

PRESENT

Chairman:

Vice Chairman

Delegate Espina

Delegate Exmundo

Members:

1. Delegate Corpus
3. Delegate Santillan
2. Delegate Garcia L.M.
4. Delegate Zafra

Non-Members:

1. Delegate Benzon
5. Delegate Mastura
2. Delegate Calderon C.

6. Delegate Rosales
3. Delegate Caliwara
7. Delegate Yancha
4. Delegate Castillo

Guest:

Justice Enrique Fernando

Minutes . . . September 8, 1971

Committees on Civil and Political Rights and Executive Power

OPENING OF THE MEETING

1. At 9:50 a.m., Chairman Victor De la Serna called the meeting to order.
2. Upon certification of the Secretary, the Chair announced the existence of a quorum.
3. The Chair then announced that the Committee has furnished the body resolutions regarding the suspension of the privilege of the writ of habeas corpus. The Chair mentioned six Resolutions Numbered 176, 260, 531, 1415, 239 and 2394.
4. The Chair further said that the resolutions can be grouped into three schools of thought — the first, refers to the absolute prohibition against suspension of the privilege of the writ of habeas corpus by any authority in any and all events; the second supports the theory that it may be suspended by the President with the concurrence of Congress or the Supreme Court; and the third, refers to the removal of the power to suspend from the President and transfer the same to the Supreme Court.
5. The Chair then introduced to the members the guest speaker, Justice Enrique Fernando of the Supreme Court of the Philippines. He expressed few words of welcome to the Justice in behalf of the two Committees conducting the public hearing.
6. Justice Fernando started his remarks by clarifying that he would only answer questions that will not conflict with his role as Justice of the Supreme Court, since there was a pending case before the said Court where the Power of the President to suspend the writ of habeas corpus is placed at issue. He said that he considered the privilege of the writ of habeas corpus as the most important human right. He is of the view that it might be preferable if the Bill of Rights make it clear and explicit that at no time and under no circumstances should the privilege of the writ be suspended. He clarified that even if this power to suspend the privilege of the writ were removed from the President, he still has enough powers to prevent rebellion, sedition, insurrection or imminent danger thereof because of his power to call the armed forces in case the need for it arises.
7. The Chair asked the first question to Justice Fernando. Because the Justice said that it was not necessary to grant the President the power to suspend the writ since Congress can always pass a law that would lengthen the period of detention of prisoners, the Chair asked if it would not be very cumbersome for Congress to enact such a law in times of national emergency.
8. Justice Fernando, in answer to the Chair's query, said that Congress can pass a law to that effect without a national emergency.
9. In answer to question propounded by Delegate Ceniza, Justice Fernando said in 1951 in the Hernandez case

he expressed the opinion that even if the privilege of the writ were suspended, the right to bail could still be availed of. He admitted, however, that up to now there is no clear-cut ruling on the matter. He also said that the President, should have the sole power to declare Martial Law.

10. Delegate Mendiola also asked Justice Fernando who would determine the circumstances that would warrant the detention of prisoners for a longer period than what is now provided under the Revised Penal Code. The Justice answered that if the prisoner is held for crimes against public order, then the ordinary rules of criminal law will govern. The arresting authorities, in collaboration with the Fiscal, will determine said circumstances.

11. Delegate Laggui asked Justice Fernando whether he would still deny the power to suspend the writ to the President if the Convention writes into the Constitution safeguards against abuse of said power. The Justice said he would still say that the power be denied the President because he considers the privilege of the writ of habeas corpus as the most important human right.

12. Delegate Gunigundo interpellated the Justice and asked whether the latter would favor preventive detention of political prisoners or political offenders. The Justice said we should follow the Constitutional Provisions regarding probable cause, and the rights of the accused should always be respected.

13. Delegate Santillan asked Justice Fernando whether he would favor the proposal to delete the phrase "imminent danger thereof" and to limit the suspension of the writ from 10 to 15 days unless Congress or the Supreme Court would extend the same. Justice Fernando said, since he was for the denial of the power to suspend the writ, anything less than that would not be in consonance with his stand.

14. Delegate Zafra asked Justice Fernando if it would not be dangerous for a President to declare Martial Law because if he did, the military might take over the government and topple down the President and even Congress, thereby establishing military dictatorship. Justice Fernando said that the danger exists.

15. Delegate Exmundo interpellated Justice Fernando and asked the latter what the President of the Philippines should have done instead of suspending the privilege of the writ of habeas corpus, considering the chaos and turmoil that prevailed prior to the suspension. The Justice said that since it is the duty of the President to faithfully execute the laws, he should and he could have called out the armed forces to suppress insurrection, invasion, and rebellion.

16. Others like Delegates Mastura, Adil, Guzman, Pepito, Veloso, Bengzon, Leviste (O.), and Ceniza interpellated Justice Fernando. The Chair then thanked the Justice for his enlightening speech. He expressed the hope that at some future time, the Justice would again favor the Committee with, his appearance so that the members could propound more questions.

ADJOURNMENT OF MEETING

17. The meeting was adjourned at 12 noon.

PREPARED BY:

HONORABLE MACARIO CAMELLO

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Republic of the Philippines

1971 CONSTITUTIONAL CONVENTION

Manila

COMMITTEES ON CIVIL AND POLITICAL RIGHTS AND EXECUTIVE POWER**MINUTES OF THE JOINT MEETING**

No.

WEDNESDAY, SEPTEMBER 15, 1971

CIVIL AND POLITICAL RIGHTS**PRESENT**

Chairman:

Vice Chairman:

Delegate De la Serna

Delegate Abueg

Members:

1. Delegate Abalos E.

2. Delegate Abad

9. Delegate Opinion

3. Delegate Aruego

10. Delegate Padua C.

4. Delegate Calderon J.

11. Delegate Pepito

5. Delegate Gunigundo

12. Delegate Reyes. C.

6. Delegate Guzman

13. Delegate Santos O.

7. Delegate Laggui

14. Delegate Siguion Reyna

8. Delegate Mendiola

15. Delegate Zafra

Non-Members:

1. Delegate Adil

6. Delegate Garica L.

2. Delegate Azcuna
7. Delegate Molina
3. Delegate Claver
8. Delegate Rama
4. Delegate De Pio
9. Delegate Seares
5. Delegate Garcia E.
10. Delegate Tupaz D.

Guest:

Senator Jose W. Diokno

ABSENT

Members:

1. Delegate Aldeguer
8. Delegate Guiao
2. Delegate Badelles
9. Delegate Mastura
3. Delegate Catubig
10. Delegate Purisima
4. Delegate Ceniza
11. Delegate Santillan
5. Delegate De la Paz
12. Delegate Sevilla
6. Delegate Falgui
13. Delegate Sumulong
7. Delegate Fernandez
14. Delegate Veeloso I.

Minutes ... September 15, 1971

Committees on Civil and Political Rights and Executive Power

EXECUTIVE POWER

PRESENT

Chairman:

Delegate Espina

Members:

1. Delegate Alano
12. Delegate Nuguid
2. Delegate Astilla
13. Delegate olmedo
3. Delegate Barrera
14. Delegate Piit
4. Delegate Britanico
15. Delegate Ramos
5. Delegate Cabal
16. Delegate Sagadal
6. Delegate Corpus
17. Delegate Saguin
7. Delegate Flores A.
18. Delegate Sambolawan
8. Delegate Garcia L.M.
19. Delegate Sanchez
9. Delegate Gonzales
20. Delegate Toca
10. Delegate Juaban
21. Delegate Velez
11. Delegate Mutuc
22. Delegate Uniguez

ABSENT

Vice Chairman:

Delegate Exmundo

Members

1. Delegate Araneta S.

8. Delegate Nepomuceno
2. Delegate Davide
9. Delegate Santillan
3. Delegate Duavit
10. Delegate Serrano
4. Delegate Gaudiel
11. Delegate Sinco
5. Delegate Liwag
12. Delegate Triliana
6. Delegate Luna
13. Delegate Yap
7. Delegate Marino
14. Delegate Zosa

OPENING OF MEETING

1. At 9:30 a.m. Chairman Victor De la Serna called the meeting to order and declared the existence of a working quorum.
2. Chariman Gerardo S. Espina stated that it was a joint hearing of the Committee on Civil and Political Rights and the Committee on Executive Powers.
3. The Chair confirmed the statement of Chairman Espina and further slated that it was the second joint hearing of the two Committees and introduced Senator Jose W. Diokno, guest speaker for the hearing.
4. Senator. Diokno thanked the joint body for giving him an opportunity to discuss with them the power to suspend the privilege of the writ of habeas corpus and the power to declare martial law. To be able to resolve the problem, he propounded the questions: (1) should the President have the power to suspend the privilege of the writ of habeas corpus, (2) assuming he was given the power, under what circumstances should he be allowed to exercise it, and (3) what safeguards should be placed upon the exercise of that power. He surmised that in his opinion, if the only legal basis for the grant of the power is to bide time to be able to bring persons to court for it to decide on the matter, as such time is always available to the government, he saw no reason in suspending the privilege of the writ of habeas corpus, since the same objective can be attained by the imposition of martial law, which is not a graver step and is not gravely abused in the practical point of view that no President will declare martial law unless he can have the armed forces agree with him that there is actual invasion, rebellion or insurrection. He stated that the present Constitution only allowed the suspension of the privilege in cases of extreme emergency affecting the very sovereignty of the State, which in his belief, is only in cases of invasion, rebellion or insurrection. He did not agree that there should be a safeguard provided, prior to the issuance of the proclamation suspending the privilege of the writ but rather after the writ has been suspended, by requiring either the courts or Congress to pass upon the necessity of the suspension of the writ. He dissented with the idea that there should be a definite time period for its validity, because it is difficult to determine what should be an adequate period, however, the Supreme Court or Congress could always be required to act within a definite period on the validity of the suspension which he considered, already a proper safeguard.

He added further that the power to place any part of the national territory under martial law should be limited to cases only of actual invasion, rebellion or insurrection. However, he strongly favored the deletion 'of the provision "on imminent danger", which he stressed, is an excuse for a dictatorial President to declare martial law on the ground that there is imminent danger when there is none. There is a possibility, he said, that the armed forces will be broken up, in the sense that one group may favor the President and the other may refuse to allow themselves to be used when there is actually no "imminent danger", so that instead of their helping preserve peace and order it "would provide an occasion for bringing about revolutions:

5. The Chair asked the Senator if the President should declare martial law in places where imminent danger actually exists and the civil authorities are still functioning. He further qualified in the phrase "martial law" that the civil authorities call upon the military authorities to help them or is it a complete and arbitrary substitution of authority by the military.

5.1. Senator Diokno replied that the President's action in his personal opinion, is arbitrary and illegal, but who could stop him from doing that. Even the Supreme Court is reluctant to act because it has the army to reckon with. He construed that martial law could be legally exercised only in places where actual fighting exists and the civil authorities are no longer exercising authority, in which case the military can supplant the civil authorities. He added that it is also possible to declare a limited martial law in certain areas where the military may impose curfew and temporary detention of persons charged of causing and participating in chaotic situations.

6. Chairman Espina recognized Delegate Britanico who had the first option to interpellate the Senator.

6.1 Delegate Britanico wanted to know from the Senator whether, in his opinion, the power to suspend the writ be altogether removed from the President, and that in the event this power is retained, how should it be exercised by the President?

6.2 Senator Diokno replied that if this power is retained it should be exercised by the President alone but subject to review by either Congress or the Parliamentary Body that may eventually be adopted.

6.3 Delegate Britanico wanted the view of the Senator if he was agreeable to have the President share the power with the Vice President, Senate majority and minority floor leaders, Senate President, Justices of the Supreme Court, the Comelec Chairman and other heads of constitutional organizations.

6.4 Senator Diokno replied that, he is averse to sharing powers because it could not be done expediently. The Senator reminded the group that as a general rule, the President and the President of the Senate belong to the same party and even the justices of the Supreme Court fall under the same situation, and it would then still be the President who will decide.

7. The Chair called on Delegate Olmedo on his reservation to ask the next question.

7.1 Delegate Olmedo wanted to clarify if there is any technical distinction between suspension of the privilege of the writ of habeas corpus and the writ itself.

7.2 Senator Diokno replied that the writ itself is the order of the court to the person having custody of the subject to produce him in court, and that the subject has the privilege to post bail pending the filing of the case against him if he is to be heard for an offense. He cited the decision of the Confederate Authority which says that the privilege of the writ refers to criminal arrests in which the persons arrested have the privilege to be released on bail, which is the privilege that is suspended.

7.3 Delegate Olmedo asked whether the Senator's stand on the abolition of the power to suspend the privilege of the writ or as an alternative, the suspension be exercised with the participation of other agencies, is because of the anti-administration group clamoring for its abolition from the constitutional provisions?

7.4 Senator Diokno reiterated his statement that it is his personal belief that martial law is a better measure than

the suspension of the privilege of the writ, which the President claims to have exercised to dismantle the communist apparatus in the country. Whether this is justified or not remains an issue. Assuming that the Communists are arrested now, new leaders will come up and take over command, and these new ones are not yet known to the military authorities and so the same communistic situation continues to exist and the cycle goes on unresolved.

7.5 As a last question, Delegate Olmedo sought to be clarified on the alternative view of the Senator — that of retaining the power but its exercise be with the concurrence of Congress and the Supreme Court.

7.6 The Senator reiterated that he is for the abolition of the power, but if the Constitutional Convention believes it necessary to retain it, then its exercise by the executive must be subject to review and reversal, if need be, by Congress and the Supreme Court. He maintained that the exercise of the power to suspend the privilege of the writ is determined by two factors: (1) legality and, (2) wisdom. The Supreme Court shall determine the legality and Congress determines the wisdom of the President's exercise of the power, and it is the convention that can resolve this problem.

8. Chairman Espina called on Delegate Barrera, however, requested the Members to limit their questions to only two to allow everybody the opportunity to question the guest.

8.1 Delegate Barrera stated that the Senator is for the discarding of the constitutional provision on the power to suspend the privilege of the writ of habeas corpus, but is for the right of an organ of government to declare martial law but limited to an actual existence of invasion, rebellion or insurrection. This was confirmed by the Senator. Delegate Barrera inquired whether the Senator agrees or not to the fact that in places where actual fighting or actual invasion, rebellion or insurrection exists, declaration of martial law is unnecessary since the commander-in-chief has the full responsibility of exercising every step necessary to protect and preserve the welfare of the nation.

8.2 Senator Diokno replied that while it is true that the power to take all the necessary steps to preserve peace and order and protect the people, is inherent power of sovereignty, yet it would certainly be safer to provide his power of formal declaration to prevent individual arbitrary exercise of power by military commanders in the field. He stressed the need for a specific for a specific constitutional provision which must be clearly stated and defined as to the extent of the exercise of such powers.

9. Delegate Padua (C.) disclosed that he is an author of a resolution removing powers of the President to suspend the privilege of the writ of habeas corpus as well as to declare martial law, and his point of concern lies in the subsequent grant of emergency powers that are complimentary to exercise of martial law by the President now given in the present Constitution. He asked the Senator whether the criterion in the exercise of martial law to actual invasion only — that is, remove the terms "rebellion and insurrection" as part of the criteria, would diminish the presidential power excesses and abuses. Delegate Padua cited the view of Justice Fernando that people have the right to rebel, and this would tend to justify exclusion of rebellion and insurrection as prerequisites to impose martial law.

9.1 Senator Diokno opined that the complimentary emergency powers of the President was intended by the Constitution to allow the President to legislate in the absence of Congress but qualified this statement by revealing that he has not made deeper studies along this particular point. He also stated that the state has to have power to protect itself from any form of change other than through constitutional processes and this concept is shared not only by democratic but by any form of government in existence. In answer to Delegate Padua, he suggested to define what the word rebellion in the provision mean, and the term "insurrection" should be removed since insurrection is a small rebellion, which does not merit declaration of martial law. This provision could well fit in the Bill of Rights instead as "the State or any portion thereof, may be placed under martial law only in case of actual invasion or rebellion, when the public safety so requires." Then eliminate the provision granting power to suspend the privilege of the writ of habeas corpus and place the power to declare martial law among the powers of the President in Section 10, Article VII, perhaps.

10. Delegate Piit sought clarification as to the stand of the Senator on the President being already Commander-In-Chief of the Armed Forces, and is then capable of quelling rebellion, therefore the power of martial law need not be specified in the Constitution or that if it has to be, then it has to be in aid to civilian authorities only. He further sought the Senator's opinion upon whom to lodge the power to suspend the privilege of the writ of habeas corpus, as well as power to declare martial law, since he is a proponent of a form of government that would have both a President as head of state and prime minister as head of government.

10.1 The Senator clarified his statement to Delegate Barrera that to declare martial law is a recognized power inherent to the sovereignty of the state and so, need not be mentioned in the Constitution, a case in point is the United States Constitution. In reply to the second query, he stressed that, to him, there should not be such powers lodged on anyone anywhere. But if there has to be, the Prime Minister, since the President is generally ceremonial officer, and would not be kept abreast officially on every circumstance and happening of the day in the country.

11. Delegate Siguion Reyna pointed out that from the discussions, it would be safe to assume that the only thing that matters to an executive when he is allowed to suspend the privilege of the writ or not, in his equivalent right to arrest and detain people beyond the statutory requirement. He inquired whether the Senator entertains the same thinking that the provision has outlived its usefulness since this provision was established during the days when third degree was accepted as a means of getting at the truth and confessions from people. In the absence of third degree method, there is nothing to be gained in detaining people unless by the psychological idea that a detainee would soften to confession, which is unlikely.

11.1 The Senator explained that the objective of suspending the privilege of the writ is to hold people incommunicado citing as an example, the Philippines, if it is threatened by a Red-Chinese invasion and the authorities suspected Mr. Chan, Mr. Tan, etc. to be spies, then suspension of the privilege of the writ would enable the government to take immediate hold of Mr. Chan, Mr. Tan and company and keep them under detention without right to bail. This would put them out of circulation and disable their operations. The justifying reason therefore, lies in the need of the Armed Forces for essential time to devote on the fight against the invaders or rebels instead of consuming time to formulate charges against these detainees and the filing of charges against these detainees can be put aside until such time when the invasion or rebellion is under control. In short, it is to enable the Armed Forces to buy essential time. He reiterated that power to suspend the privilege of the writ of habeas corpus and power to declare martial law are justified only on actual invasion or rebellion, and he still maintained that the former case is unnecessary.

11.2 Delegate Siguion Reyna further queried the Senator how the State can meet the security problem in a case of imminent invasion and the power to suspend the privilege of the writ is no longer provided for, taking as a case in point, the Philippine situation during the period prior to the Japanese war when Japanese spies were all over the country preparing the grounds for its invasion in Japan. How can the President or the Prime Minister meet the problem if he has no power to suspend the privilege of the writ.

11.3 The Senator replied that in situations like this, the State should undertake surveillance work as is done in the U.S. The suspects are kept under surveillance and when enough evidence is acquired the authorities spring the trap on them and bring them to court or in case the suspect is found operating within an area where an actual fighting is on, then the commander of the Armed Forces in the area, by virtue of his inherent military power to restrict movement of civilians in the area can apprehend and take them to custody until the fight is over without the need for suspending the privilege of the writ. It is part of military power. He suggested as an alternative that a degree of flexibility in the manner of legislation can be resorted to. Citing as an example the legislation on matters of crimes against the security of the state, detention period prior to filing the case in court can be enlarged. There are laws at present falling under this category. Wire tapping is unlawful under normal conditions but it is allowed in cases involving security and rebellion.

12. In the follow-up clarification by Chairman De la Serna, the attention of the Senator was directed back to his former statement that pending the privilege of the writ only allows the government to hold the detainee incommunicado but the detainee has other rights as the right to communicate with relatives.

12.1 Senator Diokno agreed that the detainee is still entitled to other rights as the right to be represented by counsel, but once detained, he is subject to restrictions and control by the jailer.

12.2 Delegate De la Serna asked if there is a difference in the treatment of detainees when the privilege of the writ is suspended and detainees arrested when the privilege is not suspended; Whether to hold a person incommunicado, a jailer is under instruction to impose certain degree of restrictions to this person which is not true with the ordinary prisoners.

12.3 Senator Diokno replied that there was really no distinction or difference written in the law but the jailer, in the exercise of his duty, has a certain degree of unwritten power over his detainees. The Senator however disclosed what happened recently to people detained which he experience as their counsel. The lawyers were allowed to talk to the detainees after a number of days had lapsed, and in fact after their statements were already taken, after the process of interrogations were terminated. He revealed that he was informed that the detainees were never harmed nor subjected to physical pressure but the process of interrogation continued for hours and hours, and even at an unholy hour of midnight they were awakened for further interrogation. Methods designed to inflict mental and physical torture to tire out the detainees.

13. The Chair recognized Delegates Molina and Mendiola who jointly engaged the Senator into a series of interpellations regarding the Senator's personal opinions and views on the incumbent President's exercise of his powers (Proclamation 889 and 889-A) suspending the privilege of the writ of habeas corpus.

14. Delegate Mutuc asked the Senator if there is no difference between the *Barcelon vs. the Baker* case and the *Montenegro vs. Castaneda* cases.

14.1 The Senator replied that there was a difference and explained: (1) In the former case, the suspension of the privilege of the writ should not have been done but it was done only upon joint hearing by the Philippine Commission and the Governor-General to grant action While in the latter case, the suspension was the exclusive action of the President of the Philippines. (2) The situation in the former case were such that at the very beginning our courts were manned by American Jurists intended to be later on manned by Filipino Jurists. This being so, the courts found it hard to rule and make a doctrine. Such action could be interpreted as tantamount to allowing Filipino Jurists to overrule an American Governor General and by implication, overrule the President of the U.S. since under the Jones Law, the privilege of the writ can be suspended by the President of the U.S. This can be held later on (today) that the Filipino Supreme Court could review the findings of the President of the U.S., which is impossible under the relation between a colony and its colonizer, and (3) that the standard of morality and truth were observed with greater fidelity at that time than they are today.

14.2 Delegate Mutuc sought clarification in the event that the Supreme Court rules that the anti-subversion law is not a Bill of Attainder, the Senator begged off. He stated that he preferred not to discuss the details and merits of his position in this case, but strongly urged the Convention to consider rewriting the provisions on the freedom of association.

15. The Chair wanted to know whether suspension of the writ and the right to bail is not suspended.

15.1 The Senator stated that in his opinion the right to bail prior to filing the case in court is suspended. When the case is filed in court, the custody of the person accused goes from the executive to the judiciary. On a follow-up question by the Chairman seeking clarification for the distinction pointed out by the Senator that right to bail prior to filing the case in court is suspended, the Senator explained that the provision of the privileged of the writ consists of the right of a person to be released if the arrest is found illegal by court, or the detention is arbitrary or in absence of a prima facie evidence against the person, so if the privilege of the writ is

suspended, it follows that all the other rights are also suspended.

15.2 The Chair sought the view of the Senator on the opinion of both Secretary Abad Santos and Solicitor Antonio that during suspension of the privilege of the writ, an order of warrant of arrest is necessary. Senator Diokno agreed with this opinion. The Chair pointed out that if, as the Senator said, the purpose of the privilege of the writ is to question the legality of arrest and detention, it could be so, even if there is a valid warrant of arrest. This would seem to point out that the issuance of the warrant of arrest is unnecessary. The Senator replied, NO, and pointed out that if no care can be produced against a person detained, the arrest is unlawful and the arresting officer is subject to prosecution. The suspension of the privilege of the writ merely makes it impossible for the courts to order the release of the detainee. The senator agreed substantially with the observation of the Chair that this long legal process required to be followed defeats the very purpose of the suspension of the privilege of the writ, and stated that this is the reason the executive and the military authorities resort to illegal shortcuts in taking people into custody. Many of the detainees today were not issued legal warrants, but were just invited to the military headquarters. Because of these observations cited, the Senator urged the joint Body to review and rewrite the provisions on the issuance of warrants of arrest.

16. Delegate Tupaz (d.) engaged the Senator in a series of clarificatory questions which delved on points already discussed by the Senator in previous interpellations by Delegates Mutuc, Barrera, Reyes, Laggui and Siguion Reyna. The Senator however reiterated his statement that he is for the retention of the exercise of martial law, not that it is less harmful, but that it is less subject to abuse than the suspension of the privilege of the writ.

17. Delegate Gunigundo's interpellations were on the subject of effectivity and validity of Presidential Proclamation as Proclamations No. 889 and 889-A. The Senator emphasized that the effectivity of proclamations hinges on the time it was made public, not necessarily though that it be published in the Official Gazette, nor copies of the contents be furnished the metropolitan newspapers for publication.

18. Senator Diokno categorically answered Delegate Sanchez that he was suggesting a proposal to totally remove the power to suspend the writ of habeas corpus in the proposed Constitution, since being silent about it will allow Congress or the President to exercise its power of such procedure. In answer to Delegate Calderon (J.), he reiterated that the suspension of the writ of habeas corpus can be exercised with or without being provided for in the Constitution.

19. Delegate Aruego was informed by Senator Diokno that those detained can only apply for bail if a case is filed against a detainee in court, so what is done is to file a petition for habeas corpus, which includes the right to bail, if the case is bailable.

20. Delegate Velez explained that he was recommending two alternative proposals to the Executive Power Committee: 1) to prevent forever the suspension of the privilege, or 2) to put safeguards, meaning the President may suspend it but only in actual cases of invasion or rebellion for a specific period of time in specific areas where public safety requires it, with the concurrence of two-thirds vote of the members of Congress, if in session, and if not, it will be subject to the automatic review by the Supreme Court.

20.1 Senator Diokno was in favor of Delegate Velez' first proposal, however, in the event the thinking of the Convention does not agree, the Senator did not want to limit the President, or whoever exercises the power to suspend, for a specific period, because it will be inflexible and meaningless. He was not agreeable to a concurrence by Congress because he does not want to tie the hands of the President in cases of emergency, since it is very hard to muster a quorum in both houses of Congress. However, he was for its review by the Supreme Court. He was for the immediate proclamation, but a limit of time should be set within which, the review should be made.

20.2 Delegate Barrera insisted that the right to protect itself is an inherent sovereign right of any State, so that for any organization of government to exercise those means of protection (declaration of martial law and

suspension of the privilege of the writ) should be so stated in the Constitution, and the necessary, safeguards provided for.

21. Delegates Barrera and Siguion Reyna engaged the Senator in a discussion criticizing the actuations of the incumbent President in connection with the suspension of the writ of habeas corpus.

ADJOURNMENT OF MEETING

22. The Chair thanked Senator Diokno for his elucidation and participation in the discussions of the topics for the day, and adjourned the joint public hearing at 12:10 p.m.

Knowing the Government's stand and the President's action, the Constitutional Convention decided to retain the martial law power verbatim in the new Constitution. The framers not only ratified the validity of the existing state of martial law but reaffirmed the President's interpretation as the correct meaning of the constitutional provision for future occasions requiring its exercise. The political character of a martial law proclamation with its continuation was then confirmed by the Constitutional Convention.

The political character of continued martial law is also sustained by the parliamentary system under the new Charter. The power to declare martial law is vested exclusively in the Prime Minister by Article IX, Section 12. Following established precedents, such a vesting of power is supposed to mean that its exercise is to the exclusion of all others who may want to share in the power. In practice, however, this will no longer be true.

The 1973 Constitution joined together the Executive and the Legislative departments of the government, which were distinctly separate from each other under the 1935 Constitution. The New Charter provides: The legislative power shall be vested in a National Assembly." (Article VIII, Sec. 1) "The Executive power shall be exercised by the Prime Minister with the assistance of the Cabinet." (Article IX, Sec. 1); "The Prime Minister shall be elected by a majority from among themselves." (Article IX, Sec. 3); "The Prime Minister shall appoint the Members of the Cabinet who shall be the heads of ministries at least a majority of whom shall come from the National Assembly, Members of the cabinet may be removed at the discretion of the Prime Minister." (Article IX, Sec. 4).

Thus, we now have a Parliamentary system of government under the New Charter. An essential feature thereof is the direct responsibility of the Prime Minister and the members of his Cabinet to the National Assembly, for they hold their positions only for as long as they enjoy the confidence of the Assembly. More accurately, Article VIII, Sec. 13(1) provides for the withdrawal of confidence through the election of a successor or a new Prime Minister by a majority vote of all members of the National Assembly.

A Prime Minister under the new Charter must always take into account the desires of the National Assembly when he makes important decisions. As a matter of fact, he and the majority of his cabinet are also members of the National Assembly. In fact, they are the leaders of the predominant party in the legislature. They control legislative policy. The Prime Minister is responsible to the National Assembly and must execute its will on the one hand and he its political leader and helps shape that will on the other. Grave public issues will be handled by the Executive and the Legislature acting together. Under the new Constitution, martial law will be a joint responsibility of the two political departments (executive, and legislative even if its formal proclamation is vested solely in the Prime Minister.

Before I could release this opinion, I was able to get the "Transcript of, the Proceedings of the 166-man Special Committee¹ Meeting No. 8 October 27, 1972" which fully sustains my view, and I quote:

TRANSCRIPT OF THE PROCEEDING OF THE 166 MAN

SPECIAL COMMITTEE — MEETING NO. 8

OCTOBER 27, 1972

PACE 88 — VOL. XVI — NO. 8

DELEGATE TUPAZ (A.): Section 4 —

THE PRIME MINISTER SHALL BE THE COMMANDER-IN-CHIEF OF ALL ARMED FORCES OF THE PHILIPPINES AND, WHENEVER IT BECOMES NECESSARY, HE MAY CALL OUT SUCH ARMED FORCES TO PREVENT OR SUPPRESS LAWLESS VIOLENCE, INVASION, INSURRECTION, OR REBELLION IN CASE OF INVASION, INSURRECTION, OR REBELLION, OR IMMINENT DANGER THEREOF, WHEN THE PUBLIC SAFETY REQUIRES IT, HE MAY SUSPEND THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS, OR PLACE THE PHILIPPINES OR ANY PART THEREOF UNDER MARTIAL LAW.

This provision is an exact copy of a provision in the present Constitution. This provision complement Section 15, Article IV on the Bill of Rights of this draft. May I, therefore, move for its approval, Mr. Chairman?

CHAIRMAN DE GUZMAN (A.): Any observation or comment? Yes, Gentleman from Batangas?

DELEGATE LEVISTE (O.): Thank you, Mr. Chairman. We notice, Your Honor, that in these two sections, Section 15 of the Bill of Rights and Section 12 of Article IX, we are, in a way of speaking, remedying the seeming discrepancy between similar provisions in the present Constitution. Both provisions will now contain the phrase "or in case of imminent danger thereof". With such a change, I believe that no conflict as to the true intent will arise in the future. But allow me, Your Honor, to recall, briefly, our recent jurisprudence on the matter of the declaration of martial law and of the suspension of the privilege of the writ of habeas corpus. Your Honor will recall that under the Jones Act, the Governor-General of the Philippines was given the power to suspend the privilege of the writ of habeas corpus and to declare martial law. When such power was questioned in court, the Supreme Court came out with the decision, in the case of *Barcelon vs. Baker*, that the findings of the Chief Executive on the existence of the grounds for the declaration of martial law or the suspension of the privilege of the writ of habeas corpus are conclusive and may not be inquired into by the courts. When the Philippine Commonwealth was established under the 1935 Constitution, the President thereof was likewise given the power to suspend the privilege of the writ of habeas corpus and to proclaim or declare martial law for any of the causes enumerated in the pertinent provisions. Sometime in the 1950's, then President Quirino suspended the privilege of the writ of habeas corpus. When a case arose, that of *Montenegro vs. Castaneda*, the Supreme Court affirmed its stand in *Barcelon vs. Baker*, that the assessment by the Chief Executive of the existence of the cause or causes giving rise to the proclamation of martial law or the suspension of the writ of habeas corpus is conclusive and may not be contested in the courts. Recently, however, only a little less than a year ago, when President Marcos suspended the privilege of the writ of habeas corpus the Supreme Court ruled, in the case of *Lansang vs. Garcia* and other companion cases, that the existence of insurrection, rebellion, invasion, or imminent danger thereof, may be properly inquired into by the courts. Now, I would like to pose before this body, whether this Convention should now affirm the latest doctrine or whether we should revert to the old theory and doctrine in the two cases of *Barcelon vs. Baker* and *Montenegro vs. Castaneda*.

DELEGATE TUPAZ (A.): In view of the fact that Chairman de Guzman is also the Chairman of Subcouncil II on Citizens' Right which conducted an exhaustive Study on this matter of martial law, may I request that he be the one to answer queries on this point?

CHAIRMAN DE GUZMAN (A.): In that case, may I request Delegate Tupaz to act as Chairman in the meantime?

(At this point, Chairman De Guzman yielded the Chair to Delegate Antonio Tupaz)

DELEGATE DE GUZMAN (A.): I am personally in favor of abandoning the doctrine laid down in the case of *Lansang vs. Garcia*, and I would recommend such a view to this Committee, and to the Convention as a whole. At this very moment, the Solicitor General, in representation of President Marcos, is urging the Supreme Court that such a doctrine be abandoned and that we revert to the old theory laid down in the cases mentioned by Your Honor. Indeed, our courts, especially the Supreme Court, where these cases are invariably taken up, are ill-equipped to make findings on the existence of rebellion, insurrection, or lawlessness.

DELEGATE LEVISTE (O.): But is not Your Honor aware that there are a number of resolutions filed in the Convention that the Chief Executive may suspend the privilege of the writ of habeas corpus or proclaim and declare martial law only for a limited period and/or with the concurrence of the Legislature?

DELEGATE DE GUZMAN (A): Yes, Your Honor, but we are not bound. This Committee is not bound by those resolutions. As already agreed upon when the 166-Man Special Committee was created, that Committee of which we are a part was merely advised to take into consideration such resolutions. We should bear in mind also that we are adopting the parliamentary system where there is more, rather than less, fusion of legislative and executive powers. We are adopting, Your Honor, the concept and principle of an executive more directly and immediately responsible to the Legislature so that the exercise by the Chief Executive of any of his powers will be subject to the ever present scrutiny of the Legislature.

DELEGATE LEVISTE (O.): But my point, Your Honor, is to emphasize the fact that the filing of those resolutions requiring even the concurrence of the National Assembly for the valid exercise by the Prime Minister of these extraordinary constitutional prerogatives indicates that there is a sentiment among the Delegates to further restrict, rather than expand, the powers. And I would say that the decision of the Supreme Court in *Lansang vs. Garcia*, which repudiated the doctrine earlier laid down in *Baker and Castaneda* lends support to that sentiment. If we are to interpret the provision under consideration in the way Your Honor would want it interpreted, in the sense that the factual findings of the Chief Executive for the suspension of the privilege of the writ of habeas corpus or the declaration of martial law would be conclusive insofar as the judicial Department is concerned, then we are retrogressing and, in effect, going against the sentiment to further restrict the exercise of these great constitutional powers.

DELEGATE DE GUZMAN (A.): I can go along with Your Honor's argument if, as I have already stated, this Convention opted for the presidential form of government. But as we have already opted and chosen the parliamentary system, I think further restriction on the powers of the Chief Executive will no longer be justified. It will be trite to repeat here, but I repeat them nevertheless, the arguments in favor of a parliamentary form of government: that this system is for a strong executive, but one who is immediately and instantly answerable to his peers at all times. Thus, should a Prime Minister suspend the privilege of the writ of habeas corpus or declare martial law arbitrarily or, even perhaps, irrationally, I don't think that there can be any better or more immediate check on such arbitrary and irrational exercise of power than the Parliament itself. The courts cannot pretend to be in a better position than the Parliament in this regard. For the Parliament on the very day, or perhaps even on the very hour, that the Prime Minister proclaims martial law or suspends the privilege of the writ of habeas corpus may file a motion to depose him and should this motion be successful, then the prevailing party with its Prime Minister will just issue another proclamation restoring normalcy and order.

DELEGATE LEVISTE (Q): Thank you, Your Honor. For the moment, Mr. Chairman, I have no more, questions to ask.

PRESIDING OFFICER TUPAZ (A.): Are there any further comments or interpellations?

DELEGATE QUIRINO: just one question, Mr. Chairman, in connection with the point raised by Delegate Leviste.

PRESIDING OFFICER TUPAZ (A.): You may proceed.

DELEGATE QUIRINO: Before I ask my question, Your Honor, let me state my position clearly lest I be misunderstood. I am asking this question not because I disagree with Your Honor's position but only for the purpose of enriching this debate with exchanges of views for future researchers and scholars. Now, if, as Your Honor puts it, the decision of the Prime Minister on the existence of grounds justifying the declaration of martial law or the suspension of the privilege of the writ of habeas corpus would no longer be opened to judicial scrutiny, would that not enable the Prime Minister to abuse his powers?

DELEGATE DE GUZMAN (A.): Your Honor was not listening. I just stated that there is a more immediate check on the part of the Parliament, and aside from this practical check, it must be understood that an act of the Chief Executive suspending the privilege of the writ of habeas corpus or proclaiming martial law is a political act and may not therefore be legally questioned in court. It being a political act, the remedy must also be political, in a political forum, be it in the Parliament or directly before our people. And it must be stated that there is no power which may not be abused. I think, Your Honor, we should once and for all agree as to the nature of this power we are investing in the Chief Executive. Once and for all, we should agree that this power is eminently political and executive in nature. The Judiciary, I submit, is not the best, much less is it the most practical agency, to possess, to exercise, or to limit this power, need for which cannot be denied.

DELEGATE QUIRINO: Well, Your Honor, I am not a lawyer, so I hope you will pardon me if I cannot fully appreciate what you are talking about. Because, to me, an act is political if it is done by a politician. That's all, Mr. Chairman.

PRESIDING OFFICER TOPAZ (A.): Let's be serious, please. All right, are there further interpellations or comments? Yes, Delegate Ortiz, what is it that you want to ask?

DELEGATE ORTIZ (A.): Well, Mr. Chairman, this is not a question but just additional observations. It is unfortunate really that the doctrine first laid down in *Barcelon vs Baker* and affirmed more than half a century later in *Montenegro vs. Castaneda* was reversed by the Supreme Court in *Lansang vs. Garcia*, I say it is unfortunate because more than anyone else, only the President is in the best position to evaluate and assess the existence of the causes which would warrant the exercise of this constitutional power. As it were, the Prime Minister is the head of the Executive Department. More than that, he is the Commander-in-Chief of all the armed forces of the Philippines. He has, therefore, all the resources and facilities not available to any other official of the government, much less too the Supreme Court, to make authoritative findings and assessments of the threats to national security. But even in the *Lansang* case, I would say that the Court had to rely on the findings of the Executive Department. I have here a copy of the decision of the Supreme Court in that case, and I would say that the Court had to rely on the findings of the Executive Department. I have here a copy of the decision of the Supreme Court in that case, and I would like to quote a portion thereof. In this decision, the Supreme court stated, and I quote:

In the year 1969, the NPA had — according to the records of the Department of National Defense — conducted raids, resorted to kidnapping and taken part in other violent incidents, summing over 230, in which it inflicted 404 casualties and, in turn, suffered 243 losses. In 1970, its record of violent incidents was about the same but the NPA casualties more than doubled.

I wish to call the attention of the Members of this Committee to the phrase appearing in this portion of the court's decision, namely, "according to the records of the Department of National Defense". This phrase is, to me, significant in the sense that even the Supreme Court itself had to rely on the records of an agency of the Executive Department, which only proves or, at least indicates an admission on the part of the Court that by itself, it is not in a position to make its own factual findings on the grounds justifying the suspension of the privilege of the writ of habeas corpus in the *Lansang* case. In short, even in the *Lansang* case where the Supreme Court repudiated the conclusiveness of executive findings on facts to justify the exercise of the power, the same court, nonetheless, had to resort to such findings made by an arm of the Executive

Department. If I may further add, I would like to say that, to my recollection, during that hearing when the Supreme Court received this evidence, or perhaps we may call them pieces of information, from the military, which information was classified, there was objections on the part of some counsel who were excluded from the hearing, to the effect that they should also be afforded the opportunity of hearing such information. All of these, of course, merely show the impracticability on the part of any court, be it the Supreme Court or a lower court, to receive evidence which is, perhaps, not even acceptable under the Rules of Court and, thereafter, to determine for itself whether such evidence or information is legally sufficient for the President or the Prime Minister to act upon. We are therefore here abandoning the Lansang doctrine.

SOME DELEGATES: No objection! No objection!

DELEGATE ADIL: So, it is then the understanding of this Committee, and I take it to be its position, that when the Prime Minister suspends the privilege of the writ of habeas corpus or declares martial law, the findings by the Prime Minister on the causes that justify such suspension or proclamation are conclusive and may not, therefore, be inquired into by the courts.

DELEGATE DE GUZMAN (A): May not be inquired into by the courts or by anyone, and Chief Executive is fully responsible for his acts. The courts, of course, are powerless to take remedies against any arbitrary acts of the Chief Executive, but such arbitrary act, if there be any, may be checked by the political branch or department of the government and, ultimately, by the people themselves.

DELEGATE LEVISTE (O.): If that is our understanding, Your Honor, why don't we put it here, in black and white, that the findings of the Prime Minister on the existence of the grounds for the suspension of the privilege of the writ of habeas corpus or the proclamation of martial law are conclusive upon the courts?

PRESIDING OFFICER TUPAZ (A.): Your Honor, I suppose you are aware that we are here drafting a Constitution and not annotating an existing one. If we are to include in this document every intent and interpretation we have on each provision, I cannot imagine the kind of bulk of such Constitutional which we shall submit to our people.

DELEGATE LEVISTE (O): I made that suggestion, Your Honor, because I want to leave no doubt on our position regarding this point.

PRESIDING OFFICER TUPAZ (A.): Well, I think the records of our deliberations here would suffice to erase that doubt.

DELEGATE LEVISTE (O): Now, Mr. Chairman, if I may go to another point, I would like to inquire whether this provision on the powers of the Chief Executive or the Prime Minister concerning the declaration of martial law is limited to the quelling or the suppression of rebellion, insurrection, invasion or lawlessness, or whether such a power includes in it the establishment of a new order of things, a new society. I say this, Your Honor, because on the evening President Marcos announced the proclamation of martial law, he underscored his action by saying that he proclaimed martial law in order, according to him, "to save the Republic and form a New Society".

PRESIDING OFFICER TUPAZ (A.): Delegate De Guzman will please answer that.

DELEGATE DE GUZMAN (A.): The question; Your Honor, brings to the fore the nature and concept of martial law. As it is understood by recognized authorities on the subject, martial law rests upon the doctrine of paramount necessity. The controlling consideration, Your Honor, is necessity. The crucial consideration is the very existence of the State, the very existence of the Constitution and the laws upon which depend the rights of the citizens, and the condition of peace and order so basic to the continued enjoyment of such rights. Therefore, from this view of the nature of martial law, the power is to be exercised not only for the more immediate object of quelling the disturbance or meeting a public peril which, in the first place, caused the declaration of martial law, but also to prevent the recurrence of the very causes which necessitated the

declaration of martial law. Thus, Your Honor, I believe that when President Marcos, to cite the domestic experience, declared that he proclaimed Martial law to save the Republic and to form a New Society, he was stating the full course which martial law must have to take in order to achieve its rational end. Because in the particular case of the Philippine situation, I agree with the President that it is not enough that we be able to quell the rebellion and the lawlessness, but that we should also be able to eliminate the many ills and evils in society which have, in the first place, bred and abetted the rebellion and the lawlessness.

DELEGATE LEVISTE (O.): I agree with you wholeheartedly, Your Honor. That's all, Mr. Chairman.

DELEGATE ADIL: It seems, Your honor, that we are revolutionizing the traditional concept of martial law which is commonly understood as a weapon to combat lawlessness and rebellion through the use of the military authorities. If my understanding is correct, Your Honor, martial law is essentially the substitution of military power for civilian authorities in areas where such civilian authorities are unable to discharge their functions due to the disturbed peace and order conditions therein. But with your explanation, Your Honor, it seems that the martial law administrator, even if he has it the meantime succeeded in quelling the immediate threats to the security of the state, could take measures no longer in the form of military operations but essentially and principally of the nature of ameliorative social action.

DELEGATE DE GUZMAN (A.): His Honor is correct when he said that we are abandoning the narrow, traditional and classic concept of martial law. But we are abandoning the same only to humanize it. For Your Honor will recall that the old concept of martial law is that the law of the camp is the law of the land, which we are not ready to accept, and President Marcos, aware as he is, that the Filipino people will not countenance any suppressive and unjust action, rightly seeks not only to immediately quell and break the back of the rebel elements but to form a New Society, to create a new atmosphere which will not be a natural habitat of discontent. State otherwise, the concept of martial law, as now being practiced, is not only to restore peace and order in the streets and in the towns but to remedy the social and political environments, in such a way that discontent will not once more be renewed.

DELEGATE ORTIZ (R.): I can feel from the discussion. Mr. Chairman, that we are having difficulty in trying to ascertain the scope and limitations of martial law. To my mind, Mr. Chairman, it is constitutionally impossible for us to place in this great document, in black and white, the limits and the extent of martial law. We are framing a Constitution and not a statute and unlike a statute, a Constitution must limit itself to providing basic concepts and policies without going into details. I have heard from some of the Delegates here their concern that we might be, by this provision and the interpretations being given to it, departing from the traditional concept of martial law. Concepts are mere concepts, Mr. Chairman, but concepts, like principles, must be tested by their application to existing conditions, whether those concepts are contained in statutes or in a Constitution. Referring specifically to the exercise of his power by President Marcos, doubts have been expressed in some quarters, whether in declaring martial law he could exercise legislative and judicial powers. I would want to emphasize that the circumstances which provoked the President in declaring martial law may not be quantified. In fact, it is completely different from a case of invasion where the threat to national security comes from the outside. The martial law declared by the President was occasioned by the acts of rebellion, subversion lawlessness and chaos that are widespread in the country. Their origin, therefore, is internal. There was no threat from without, but only from within. But these acts of lawlessness, rebellion, and subversion are mere manifestation of more serious upheavals that beset the deepest core of our social order. If we shall limit and constrict martial law to its traditional concept, in the sense that the military will be merely called upon to discharge civilian functions in areas where the civil functionaries are not in a position to perform their normal duties or, better still, to quell lawlessness and restore peace and order, then martial law would be a mere temporary palliative and we shall be helpless if bound by the old maxim that martial law is the public law of military necessity, that necessity calls it forth, that necessity justifies its existence, and necessity measures the extent and degrees to which it may be employed. My point here, Your Honor, is that beyond martial necessity lies the graver problem of solving the maladies which, in the first place, brought about the conditions which

precipitated the exercise of his martial authority, will be limited to merely taking a military measure to quell the rebellion and eliminating lawlessness in the country and leave him with no means of authority to effect the needed social and economic reforms to create an enduring condition of peace and order, then we shall have failed in providing in this Constitution the basic philosophy of martial law which. I am sure, we are embodying in it for the great purpose of preserving the State. I say that the preservation of the State is not limited merely to eliminating the threats that immediately confront it. More than that, the measure to preserve the State must go deeper into the root causes of the social disorder that endanger the general safety.

DELEGATE DE GUZMAN (A.): I need not add more, Mr. Chairman, to the very convincing remarks of my good friend and colleague, Delegate Ortiz. And I take it, Mr. Chairman, that that is also the position of this Committee.

PRESIDING OFFICER TUPAZ (A.): Yes, also this Committee.

DELEGATE ADIL: Just one more question, Mr. Chairman, if the distinguished Delegate from La Union would oblige.

DELEGATE DE GUZMAN (A.): All the time, Your Honor.

DELEGATE ADIL: When martial law is proclaimed Your Honor, would it mean that the Constitution, which authorizes such proclamation, is set aside or that at least, some provisions of the Constitution are suspended?

DELEGATE DE GUZMAN (A.): The Constitution not set aside, but the operation of some of its provisions must, of necessity, be restricted, if not suspended because their continuance is inconsistent with the proclamation of martial law. For instance, some civil liberties will have to be suspended upon the proclamation of martial law, not because we do not value them but simply because it is impossible to implement these civil liberties hand-in-hand with the effective and successful exercise and implementation of martial powers. There are certain individual rights which must be restricted and curtailed because their exercise and enjoyment would negate the implementation of martial authority. The preservation of the State and its Constitution stands paramount over certain individual rights and freedom. As it were, the Constitution provides martial law as its weapon for survival and when the occasion arises, when such is at stake, prudence requires that certain individual rights must have to be sacrificed temporarily. For indeed, the destruction of the Constitution would mean the destruction of all the rights that flow from it.

DELEGATE ADIL: Does Your Honor mean to say that when martial law is declared and I, for instance am detained by the military authorities, I cannot avail of the normal judicial processes to obtain my liberty and question the legality of my detention?

DELEGATE DE GUZMAN (A.): If I am not mistaken, Your Honor, you are referring to the privilege of the writ of habeas corpus.

DELEGATE ADIL: Yes. Your Honor, that is correct.

DELEGATE DE GUZMAN (A.): In that case, Your Honor, I take it that when martial law is proclaimed, the privilege of the writ of habeas corpus is ipso facto suspended and, therefore, if you are apprehended and detained by the military authorities, more so. when your apprehension and detention were for an offense against the security of the State, then you cannot invoke the privilege of the writ of habeas corpus and ask the courts to order your temporary release. The privilege of the writ of habeas corpus, like some other individual rights, must have to yield to the greater need of preserving the State. Here, we have to make a choice between two values, and I say that in times of great peril, when the very safety of the whole nation and this Constitution is at stake, we have to elect for the greater one. For, as have said, individual rights assume meaning and importance only when their exercise could be guaranteed by the State, and such guaranty cannot definitely be had unless the State is in a position to assert and enforce its authority.

DELEGATE ADIL: Since martial law was declared by President Marcos last September 21, 1972, and announced on September 23, 1972, the President has been issuing decrees which are in the nature of statutes, regulating as they do, various and numerous norms of conduct of both the private and the public sectors. Would you say, Your Honor, that such exercise of legislative powers by the President is within his martial law authority?

DELEGATE DE GUZMAN (A.): Certainly, and that is the position of this Committee. As martial law administrator and by virtue of his position as Commander-in-Chief of the Armed Forces, the President could exercise legislative and, if I may add, some judicial powers to meet the martial situation. The Chief Executive must not be hamstrung or limited to his traditional powers as Chief Executive. When martial law, declared, the declaration gives rise to the birth of powers, not strictly executive in character, but nonetheless necessary and incident to the assumption of martial law authority to the end that the State may be safe.

DELEGATE ADIL: I am not at all questioning the constitutionality of the President's assumption of powers which are not strictly executive in character. Indeed, I can concede that when martial law is declared, the President can exercise certain judicial and legislative powers which are essential to or which have to do with the quelling of rebellion, insurrection, imminent danger thereof, or meeting an invasion. What appears disturbing to me, and which I want Your Honor to convince me further, is the exercise and assumption by the President or by the Prime Minister of powers, either legislative or judicial in character, which have nothing to do with the conditions of rebellion, insurrection, invasion or imminent danger thereof. To be more specific. Your Honor, and to cite to you an example, I have in mind the decree issued by the President proclaiming a nationwide land reform or declaring land reform throughout the Philippines. I suppose you will agree with me, Your Honor, that such a decree, or any similar decree for that matter, has nothing to do with invasion, insurrection, rebellion or imminent danger thereof. My point, Your Honor, is that this measure basically has nothing to do with the restoration of peace and order or the quelling of rebellion or insurrection. How could we validly say that the President's assumption of such powers is justified by the proclamation of martial law?

DELEGATE DE GUZMAN (A.): As I have repeatedly stated, Your Honor, we have now to abandon the traditional concept of martial law as it is understood in some foreign textbooks. We have to look at martial law not as an immutable principle. Rather, we must view it in the light of our contemporary experience and not in isolation thereof. The quelling of rebellion or lawlessness or, in other words, the restoration of peace and order may admittedly be said to be the immediate objective of martial law, but that is to beg the question. For how could there really be an enduring peace and order if the very causes which spawned the conditions which necessitated the exercise of martial powers are not remedied? Your cite as an example the decree on land reform. Your Honor will have to admit that one of the major causes of social unrest among the peasantry in our society is the deplorable treatment society has given to our peasants. As early as the 1930's the peasants have been agitating for agrarian reforms to the extent that during the time of President Quirino they almost succeeded in overthrowing the government by force. Were we to adopt the traditional concept of martial law, we would be confined to merely putting down one peasant uprising after another, leaving unsolved the maladies that in the main brought forth those uprisings. If we are really to establish an enduring condition of peace and order and assure through the ages the stability of our Constitution and the Republic, I say that martial law, being the ultimate weapon of survival provided for in the Constitution, must penetrate deeper and seek to alleviate and cure the ills and the seething furies deep in the bowels of the social structure. In a very real sense, therefore, there is a profound relationship between the exercise by the martial law administrator of legislative and judicial powers and the ultimate objective of martial law. And I may add that in the ultimate analysis, the only known limitation to martial law powers is the convenience of the martial law administrator and the judgment and verdict of the people and, of course, the verdict of history itself.

DELEGATE LEVISTE (O.): Your Honor, just for purposes of discussion, may I know from you whether there has been an occasion in this country where any past President had made use of his martial law power?

DELEGATE DE GUZMAN (A.): I am glad that you asked that question, Your Honor, because it seems that

we are of the impression that since its incorporation into the 1935 Constitution the martial law provision has never been availed of by any President. I recall, Your Honor, that during the Japanese occupation. President Laurel had occasion to declare martial law he also assumed legislative and judicial powers. We must, of course, realize that during the time of President Laurel, the threats to national security which precipitated the declaration came from the outside. The threats, therefore, were not internal in origin and character as those which prompted President Marcos to issue his historic proclamation. If, in case — as what happened during the time of President Laurel — the declaration of martial law necessitated the exercise of legislative powers by the martial law administrator, I say that greater necessity calls forth the exercise of that power when the threats to national security are posed not by invaders but by the rebellious and seditious elements both of the left and right, from within. I say that because every rebellion, whether in this country or in other foreign countries, is usually the product of social unrest and dissatisfaction with the established order. Rebellions or the acts of rebellion are usually preceded by long suffering of those who ultimately choose to rise in arms against the government. A rebellion is not born overnight. It is the result of an accumulation of social sufferings on the part of the rebels until they can no longer stand those sufferings to the point that, like a volcano, it must sooner erupt. In this context, the stamping out of rebellion must not be the main and only objective of martial law. The Martial law administrator should, nay, must, take steps to remedy the crisis that lie behind the rebellious movement, even if in the process, he should exercise legislative and judicial powers. For what benefit would it be after having put down a rebellion through the exercise of martial power if another rebellion is again the offing because the root causes which propelled the movement are ever present? One might succeed in capturing the rebel leaders and their followers, imprison them for life or, better skill, kill them in the field, but someday new leaders will pick up the torch and the tattered banners and lead another movement. Great causes of every human undertaking do not usually die with the men behind those causes. Unless the root causes are themselves eliminated, there will be a resurgence of another rebellion and, logically, the endless and vicious exercise of martial law authority. This reminds me of the wise words of an old man in our town: That if you are going to clear your field of weeds and grasses, you should not merely cut them, but dig them out.

PRESIDING OFFICER TUPAZ (A.): With the Indulgence of the Gentlemen from La Union, the Chair would want to have a recess for at least ten minutes.

DELEGATE DE GUZMAN (A.): Thank you, Mr. Chairman. In fact, I was about to move for it after the grueling interpellations by some of our colleagues here, but before we recess, may I move for the approval of Section 4?

PRESIDING OFFICER TUPAZ (A.): Are there any objections? There being none, Section 4 is approved.

It is for the foregoing reasons that I find continued martial law to be a political question under the new Charter. The present Constitution does not give the Supreme Court any power to check the exercise of a supremely political prerogative. If there is any checking or review of martial law, the Constitution gives it, not to the Supreme Court, but to the National Assembly. Ultimately, the checking function is vested in the people. Whether the National Assembly expresses displeasure and withdraw its confidence from the Prime Minister through election of a successor or the Prime Minister asks the President to dissolve the National Assembly under Article VIII, Section 13, the issue of martial law ultimately rests with the people. Anything dependent upon the popular will is, of course political. Although the interim National Assembly has not yet been convened, the intent of the Constitutional Convention to make the question political is clear.

Exclusive of the Transitory Provisions, other provisions of the present Charter may be cited. The Bill of Rights, Article IV, Section 15 had added "or imminent danger thereof" to the 1935 provision. It now reads —

SEC. 15. The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, rebellion, or imminent danger thereof, when the public safety requires it.

Article IX, Section 16, another new provision reads--

SEC. 16. All powers vested in the President of the Philippines under the nineteen hundred and thirty-five Constitution and the laws of the land which are not herein provided for or conferred upon any official shall be deemed, and are hereby, vested in the Prime Minister, unless the National Assembly provides otherwise.

All the foregoing features of the new Constitution strengthen and do not decrease the exclusivity, and political nature of the power to proclaim martial law and to lift it.

XIV

GRANTING THAT THE CONTINUATION OF MARTIAL LAW IS NOT POLITICAL BUT JUSTICIABLE, IT IS STILL VALID UNDER THE TEST OF ARBITRARINESS.

Even if we grant that the continuation of martial law and the determination when to lift it are justiciable in character, Our decision is still the same. Correctness of the President's acts, I must repeat, is not the test. Assuming that the Court has jurisdiction to determine when martial law should be lifted, the test is still arbitrariness.

Aside from asserting that there was no basis for the initial proclamation of martial law, the petitioners insist there is no real emergency in the country today.

Petitioner Diokno cites various newspaper items reporting statements of the President and defense officials. Among them are assurances of the President that reservists won't undergo combat duty, statements of Defense Secretary Ponce Enrile citing gains in peace and order, disclosures, of commanding generals that the Mindanao rebellion is crushed and Tarlac is now peaceful, and reports from Nueva Ecija that the rebel backbone is broken. (Supplemental Petition and Motion for Immediate Release dated June 29, 1973.)

The petitioners assert that the "actual state of war" aspect was dropped from general orders as early as September 30, 1972 and that the transformation of a New Society has become the new theme.

It is the second purpose — the building of a New Society — that is now being emphasized everywhere. The instruments of mass communication that have been allowed to often drum this theme without ceasing. Very little space and time is devoted now to the idea of saving the Republic. One can, of course, handle this difficulty by a semantic manipulation, namely, that the building of a New Society is the only way of saving the Republic.

In a Manifestation dated July 8, 1974, petitioner Diokno cites other circumstances showing that peace and order conditions in the country are normal.

1. The President left the country a few weeks ago for a meeting at Menado with President Suharto of Indonesia, something he obviously would not have done if there really was an emergency.
2. Tourists and foreign investors are coming to our shores in hordes, not just to Manila but also its environs and outlying provinces, which they would certainly not do if they were not assured of security stability.
3. Basketball, chess, swimming and even karate international tournaments are being held in the Philippines. The President even attended the latter event.
4. The 1974 Miss Universe contest is scheduled to be held in Manila this month with expenses in preparation therefor amounting to million of pesos. The Government would not have been so thoughtless as to spend so much money for such an unnecessary affair, if there is really an "actual and imminent danger of insurrection and rebellion."
5. Since the proclamation of martial law, the Philippines has hosted several international conference the latest being the United Nations Development Program session which were attended by delegates and observers from

sixty-six (66) countries, twenty-six (26) United Nations Agencies, and the U.N.D.P. Secretariat. The event last mentioned brought in so many visitors that facilities of no less than fourteen (14) hotels had to be utilized. This can only happen in a country where peace and tranquility prevail.

These circumstances, — some bordering on the frivolous, coupled with the President's clear and repeated assurance that there is "no real emergency today" (Daily Express, June 22, 1973) and that "actually We have removed" martial law (Time Magazine, April 15, 1974) —all confirm that the conditions under which "persons may be detained without warrant but with due process" (to use the quotation from petitioner's cited by respondents), no longer exist, if indeed they ever existed, and that, therefore, the power of indefinite detention claimed by the Solicitor General and the respondents for the President in their last two pleadings, is actually and patently "beyond the pale of the law because it is violative of the human rights guaranteed by the Constitution."

While I believe that the continuation of a state of martial law is a political question under the new Constitution, these arguments deserve answer for the sake of our people who will read the Court's decision.

I am not convinced, at this stage of martial law, that the President is acting arbitrarily in not lifting the proclamation.

A Manifestation dated May 13, 1974 from the respondents states:

a. Pursuant to the President's constitutional powers, functions, and responsibilities in a state of martial law, he periodically requires to be conducted a continuing assessment of the factual situation which necessitated the promulgation of Proclamation No. 1081 on September 21, 1972 and the continuation of martial law through Proclamation No. 1104, dated January 17, 1973.

b. The Government's current and latest assessment of the situation including evidence of the subversive activities of various groups and individuals, indicates that there are still pockets of actual armed insurrection and rebellion in certain parts of the country. While in the major areas of the active rebellion the military challenge to the Republic and its duly constituted Government has been overcome and effective steps have been and are being taken to redress the centuries-old and deep-seated causes upon which the fires of insurrection and rebellion have fed, the essential process of rehabilitation and renaissance is a slow and delicate process. On the basis of said current assessment and of consultations with the people, the President believes that the exigencies of the situation, the continued threat to peace, order, and security the dangers to stable government and to democratic processes and institutions, the requirements of public safety, and the actual and imminent danger of insurrection and rebellion all require the continuation of the exercise of powers incident to martial law:

c. The majority of persons who had to be detained upon the proclamation of martial law have been released and are now engaged in their normal pursuits. However, the President has deemed that, considering the overall situation described above and in view of adequate evidence which can not now be declassified, the continued detention of certain individuals without the filing of formal charges in court for subversive and other criminal acts is necessary in the interest of national security and defense to enable the Government to successfully meet the grave threats of rebellion and insurrection. In this regard, the Secretary of National Defense and his authorized representatives have acted in accordance with guidelines relating to national security which the President has prescribed.

The President believes that the continued threat to peace and order, the dangers to stable government and democratic institutions and the actual and imminent danger of insurrection and rebellion require continuation of martial law. This finding is based on a continuing assessment of the factual situation which resulted in Proclamation No. 1081. On the other hand, petitioners believe otherwise.

In the exercise of judicial review, one reasonable mind assessing the factual situation now obtaining could

probably agree with the petitioners. Another reasonable mind, however, viewing the same factual situation could very understandably arrive at an opposite conclusion. Assuming We have the power, We should not try to weigh evidence on either side and determine who is correct and who is wrong. As stated earlier, the test of validity is arbitrariness and not correctness. I do not doubt the President's sincerity and good faith in making the determination outlined in the respondent's Manifestation. There can, therefore, be no finding that he is acting arbitrarily in not lifting martial law.

The "evidence" presented by petitioner Diokno weakens his arguments. If, as he claims, the mass media are controlled, the news items on rebellion that he cites should not be accorded strong probative value. It is possible that the news about rebels and insurrectionist activities is deliberately played down as part of the peace and order campaign under Martial law. The news could be intended to convince those who may waver between seeking amnesty or prolonging the rebellion to take the first course of action.

In fact, there is overwhelming a greater number of reasonable men and women who agree with the President's findings than with the petitioners' convictions. On July 27, 1973 and July 28, 1973, voters in a national referendum were asked — Do you want President Marcos to continue beyond 1973 and finish the reforms he has initiated under martial law? The Commission on Elections has reported that 18,505,216 voters answered "Yes" and 1,858,744 voted "No". The vote of the 18,505,216 people from all parts of the country who answered "Yes" can clearly be interpreted as sustaining the finding that the President is not acting arbitrarily. In fact, it can be read in no other way but to confirm even the correctness of the President's determination on the continuing need for martial law. And since other referendum are forthcoming, a more reliable gauge of arbitrariness and correctness than press clippings is available to our people as they judge the President.

The petitioners in urging this Court to decide the petitions and to decide them in their favor, raise the alarm that unless We do so. We may never be able to decide at all. We are warned that "in the face of an assault on the judiciary, it would be ridiculous, if it were not tragic, if this Court did not even so much as defend itself . . . In the face of a dismantling of the entire constitutional order of which the judiciary is a vital, indispensable part, how can it even afford the luxury of acquiescence in its own ruin? And now can it continue to inspire the high respect of the people, if it merely indulges in sculptured rhetoric and fails to protect their civil liberties in live, concrete petitions such as this?" (Reply Memorandum for Petitioners dated November 30, 1972, page 40). The petitioners speak of "constitutional suicide" (ibid. p. 60) and allege that "the gloom deepens and is encircling, and only a few lights remain. One remaining light is that provided by this Supreme Tribunal. The entire nation now looks in its direction and prayerfully hopes it will continue burning" (ibid. p. 81).

I do not share the same doomsday impressions about martial law. My decision is based not alone on my sincere conviction about what the Constitution commands and what the relevant constitutional provisions mean. Happily, my reading of the Constitution as a legal document coincides with what I feel is right, morally and conscience-wise, for our country and people. It confirms my life-long conviction that there is indeed wisdom, profundity and even genius in the seemingly short and uncomplicated provisions of our fundamental law.

XV

MARTIAL LAW AND THE SUSPENSION OF THE WRIT OF HABEAS CORPUS

Another issue in the instant petitions is whether the privilege of the writ of habeas corpus is suspended upon a proclamation of martial law. The answer is obviously in the affirmative.

The proclamation of martial law is conditioned on the occurrence of the gravest contingencies. The exercise of a more absolute power necessarily includes the lesser power especially where it is needed to make the first power

effective. "The suspension enables the executive, without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in forming the rebellion or inviting the invasion, to the imminent danger of the public safety." (Barcelon vs. Baker, 5 Phil. 87. 112). It would negate the effectivity of martial law if detainees could go to the courts and ask for release under the same grounds and following the same procedure obtaining in normal times. The President in the dispositive paragraph of Proclamation No. 1081 ordered that all persons presently detained or others who may thereafter be similarly detained for the crimes of insurrection and rebellion and all other crimes and offenses committed in furtherance or on the occasion or in connection therewith shall be kept under detention until otherwise ordered released by him or his duly designated representative. Under General Order No. 2-A, the President ordered the arrest and taking into custody of certain individuals. General Order No. 2-A directs that these arrested individuals will be held in custody until otherwise ordered by the President or his duly designated representative. These general orders clearly show that the President was precluding court examination into these specified arrest and court orders directing release of detained individuals. Martial law is intended to overcome the dangers from rebellion or insurrection. The purpose would be subverted if martial law is declared and yet individuals committing acts of direct rebellion and insurrection or acts which further the goals of the rebels cannot be detained without filing charges. If the President decides to proclaim martial law and to use all the military forces of the Philippines to preserve the Republic and safeguard the interests of the people, it is sophistry to slate that the lesser power of suspending the privilege of the writ of habeas corpus is not included. This is especially true where, as in these cases, the President has specifically ordered the detention without filing of charges of individuals who further or might further the rebellion. This appears clear from Proclamation No. 1081 itself and from pertinent general orders issued pursuant to it.

XVI

THE EFFECT OF ARTICLE XVII, SEC. 3 (2) OF THE NEW CONSTITUTION

There is another reason for denying the instant petitions.

Article XVII, Section 3, Subsection (2) of the present Constitution (ratified on January 17, 1973) has transitory provision which reads:

(2) All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after lifting of martial law or the ratification of this Constitution, unless modified, revoked, or superseded by subsequent proclamations, other acts of the incumbent President or unless expressly and or explicitly modified or repealed by the regular National Assembly.

It is noted from the foregoing that all proclamations and orders of the President, specifically Proclamation No. 1081 and the relevant orders and decrees affecting the herein petitioners and others similarly situated, are by the express words of the Constitution, part of the law of the land. In fact, the transitory provision considers them valid, legal, binding and effective even after lifting of martial law or the ratification of this Constitution. They are valid not only at the inception of but also during martial law. Only an express and explicit modification or repeal by the regular National Assembly may modify, revoke, and supersede the proclamation orders, decrees, instructions or other acts of the incumbent President under martial law. This transitory provision does not, as many people believe, merely validate Proclamation No. 1081. This section confirms the validity of the proclamation under the old Constitution and its continuing validity under the New Constitution. The Constitutional Convention concurred with the President and declared that the proclamation was validly issued under the old Charter and continues to be constitutional under the new Constitution. On the basis of the

constitutional provision alone, the declaration of martial law under Proclamation No. 1081 may, therefore, be justified and validated. Similarly, the orders of the President on the continued detention of the petitioners and, in effect, the suspension of the privilege of the writ of habeas corpus have been definitely declared valid and constitutional.

I wish to add that with the above-cited portion of the Transitory Provision, the Constitutional Convention wanted to foreclose any constitutional attack on the validity of "all proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President" mentioned therein. As a matter of fact, during the discussion of this portion of the Transitory Provision before the 166-man special committee, formed to finally draft the Constitution of which I was a member, (being the Vice-Chairman of the panel of floor leaders), answering a query from Delegate Leviste, Delegate Pacificador said:

TRANSCRIPT OF THE PROCEEDINGS OF THE 166-MAN
SPECIAL COMMITTEE — MEETING NO. 33
NOVEMBER 26, 1972

"By the provisions of Subsection 2, we are rendering the decrees of the incumbent President as more than mere statutes. We are constituting them as highly political acts, the validity of which cannot be inquired into even by our courts, but are appealable only to the people themselves. There will be no other way of revoking or repealing such decrees except by the two ways mentioned in Subsection 2 of Section 3."

Justifying martial law and the suspension of the privilege of the writ of habeas corpus by citing the transitory provisions of the present Constitution leads to another argument in the petitions. According to petitioner Diokno, the statements in the dispositive portion of the decision in the ratification cases that "there is no further judicial obstacle to the new Constitution being considered in force and effect" is clearly, not a ruling that the New Constitution is legally in force and effect. Petitioner Diokno stresses how carefully the Court, has chosen its language. According to him, the Court does not say that there is no further legal obstacle and that it says merely that there is no further judicial obstacle. Petitioner finds a world of difference between a legal and a judicial obstacle. Every illegal act, according to him, is per se barred by a legal obstacle but not necessarily by a judicial obstacle. The petitioner points out that the Court does not state that the new Constitution is in force and effect. It merely speaks of the new Constitution being considered in force and in effect. He alleges that between "being" and "being considered", there is again a world of difference. From the decision of the Supreme Court in the ratification cases, the petitioner believes that the Court was trying to make it as plain as circumstances permitted that it had not decided that the new Constitution is legally and factually in force.

Other pleadings submitted in these cases have raised basically the same major issues that were raised in the ratification cases already decided by the Court.

To my mind, the dispositive portion of the Supreme Court's decision is best interpreted by the Supreme Court itself. No amount of argumentation, submission of pleadings, play of words, and semantic niceties can overcome or ignore the fact that the Supreme Court is interpreting and applying the new Constitution. The members have taken an oath to defend this new Constitution. By both action and words, all the members of this Court have made it plain beyond any shadow of doubt that the new Constitution is legally and factually in force. The justices of this Court would be the last persons to interpret and enforce something they do not consider valid, legitimate, and effective. It is not alone the taking of an oath to support and defend the new constitution that indicates clearly what the Court meant then it rendered the *Javellana vs. Executive Secretary* L-36142 decision. The meaning of the decision is quite the fact that the Court has been enlarged beyond its earlier composition. It has reorganized itself into two divisions. Each division is now trying cases pursuant to the New Constitution. All courts are under the administrative supervision of the Supreme Court. An examination decisions rendered by the Court since the

Javellana vs. Executive Secretary decision will show that there is constant reference to the 1973 Constitution. Its provisions form the basis for its authority to interpret and expound on the laws. Whenever a provision of the Constitution is invoked, the Court turns to the 1973 Constitution as the present Constitution. I can see no clearer interpretation of a decision of this Court than these various acts of the Court itself.

XVII

A FEW OTHER POINTS

There are a few other points which I would like to answer briefly. Petitioner Francisco "Soc" Rodrigo states that while he was released from detention on December 5, 1972, his release is conditional and subject to some restrictions. He is not allowed to leave the confines of the Greater Manila area unless specifically authorized by the military. He states that his petition for habeas corpus is not moot and academic because of his release.

Considering my opinion on the constitutionality of Proclamation No. 1081, it follows that the release of petitioners Jose W. Diokno and Benigno S. Aquino may not be ordered. The petitions for their release, as in the case of detainees already released, must be directed to the President.* If such is the case with petitioners who are actually detained and confined, with more reason should the principles herein enunciated apply to those no longer confined or detained.

In the case of former Senator Benigno S. Aquino, criminal charges have been filed against him. As a rule a petition for the writ of habeas corpus is satisfactorily answered by a showing that a prisoner is detained on the basis of valid criminal charges. However, petitioner Aquino challenges the jurisdiction of the military tribunal and the validity of the charges against him.

Therefore, insofar as all issues in the case of Benigno S. Aquino vs. Military Commission No. 2. L-37364, which are common to the issues in these instant petition are concerned, this decision applies. On any other issue not common to the issues in these Petitions, I am reserving my opinion for L-37364.

XVIII

THE REMEDIES AGAINST CLEAR ABUSE OF POWER

The general remedy against an arbitrary, whimsical, or capricious exercise of the martial law power of the President, as it is the remedy on all political questions, is the voice of the people in the election when one is held, or through the Barangays which the President himself has consulted in the July 27 and 28, 1973 referendum on whether the people wanted President Marcos to continue beyond 1973 and finish the reforms he has initiated under martial law. The President has officially announced a number of times that he would consult with the Barangays periodically. Under this remedy, the people, in the exercise of their sovereign power, can base their decision, not only on whether the acts of the President have been arbitrary, whimsical, or capricious; they can base their decision on a broader basis — and that is whether, in their own opinion, the President acted correctly or not.

Or if and when the interim assembly is convened, a majority of the members thereof, as representatives of the people, can also remedy an arbitrary, whimsical, capricious, or even an unwise exercise of the power, by so advising the Prime Minister to lift martial law under pain of being deposed as Prime Minister.

As we declare the proclamation and the continuation of martial law political and therefore nonjusticiable in nature, we are only acknowledging the constitutional limitation of that power to justiciable questions only, just as we had defined the constitutional limitations of the powers of Congress and of the Executive. As the interpreter of

the Constitution, the Court has to lead in respecting its boundaries.

Our jurisprudence is replete with examples where this Court exercised its judicial power in appropriate cases (Avelino vs. Cuenco, 83 Phil. 17; Araneta vs. Dinglasan 84 Phil. 386; Nationalista Party vs. Bautista, 85 Phil. 101; Rodriguez vs. Gella, 92 Phil. 603; Rutter vs. Esteban, 93 Phil. 68; Aytona vs. Castillo, 4 SCRA 533, to name only the few), which should more than prove that no matter how grave or urgent, delicate or formidable and novel or uncommon a legal problem is, the Court will know when and how to resolve it. Specifically, it will know what to do if, as petitioners fear, a President may someday wake up and out of the blue proclaim martial law. Of course, this is already almost an impossibility under the parliamentary system established by the New Constitution.

XIX

CONCLUSION

The voluminous pleadings and the lengthy arguments supporting the petitions are generally couched in erudite and eloquent language. It is regrettable that they have been tainted in a number of instances with frenzied and biting statements indicative a sense of exasperation. I am certain, however, that these statements cannot affect the high sense of impartiality of the members of the Court as they give their opinion in these cases.

The President is the highest elective official in the country. It was no casual or perfunctory choice which elevated him to the position. It is his duty, no less than that of this Court, to save the Republic from the perils of rebellion and insurrection. In order to preserve public safety and good order, he has been forced to proclaim a state of martial law. To insure the continuation of civilian authority and democratic institutions, he has utilized the armed forces to quell the armed challenge and to remedy the ancient evils upon which rebellion and insurrection flourish.

The petitioners dispute the President's determination and question his motives. To them the exercise of his constitutional powers is an abuse of executive powers and assumption of a dictatorship. Inasmuch as the real reason for the imposition of martial law, according to petitioner Diokno, is not to preserve the nation but to keep the President in power, there is only one decision the Court should make. It should invalidate Proclamation No. 1081. The dire consequences are given by the petitioner-eventual resort to arms, shedding of blood, destruction of property and irreparable loss of invaluable lives — which, of course are the same consequences sought to be avoided when martial law was proclaimed.

The Supreme Court may be the highest court of the land. It is not, however, a super Being over and above the Executive, the Legislature and the Constitution, deciding cases on an infallible sense of Truth and a faculty of divination. Principles of liberty, right, and justice are not interpreted in an abstract and dogmatic form. They are applied in the manner the sovereign people adopted our institutions of government and formulated our written Constitution.

The Supreme Court can rule on the proclamation of martial law only insofar as its validity under the Constitution is raised as an issue. If the Constitution, the expression of sovereign will, vests the determination of the necessity for martial law in the President the Court shall so declare and respect it.

However, the determination of the wisdom of the propriety of the proclamation must rest with the people. Wisdom and propriety in the making of supremely political decisions and in the exercise of political functions are for the people to assess and determine. Under our constitutional form of government, no official or department can effectively exercise a power unless the people support it. Review by the people may not be as clearcut and frequent as judicial review but it is actual, present, and most effective.

The constitutional process and the rule of law are interpreted and enforced by the Supreme Court but then

viability and strength depend on the support and faith of the people. Consequently, if our people allow the system of government to be changed, no pronouncement of this Court can reverse the change or topple an alleged dictator from power. Only the people can do it.

Fortunately, the trend of present events clearly shows that martial law instead of destroying constitutional government as advanced by the petitioners, is, in fact, saving and strengthening it.

WHEREFORE, I vote to render judgment.

- (1) To grant the Diokno motion to withdraw his petition for habeas corpus,
- (2) Declaring that the decision proclaim martial law is a political question and the Court may not examine the grounds upon which Proclamation No. 1081 is based; granting that the Court may do so, there is sufficient constitutional factual basis for the same and certainly the President has not acted arbitrarily, whimsically or capriciously in issuing the Proclamation; that on both grounds, said Proclamation No. 1081 is constitutional;
- (3) Declaring that the privilege of the writ of habeas corpus is ipso facto suspended upon a proclamation of martial law; and in effect, General Order. No. 2-A suspended said privilege;
- (4) Declaring that the continuation of the state of martial law is similarly a political question and that it is for the President or the Prime Minister, under the New Constitution, to determine when it may be lifted; and granting that this Court may examine the factual basis for the continuation of martial law, We find sufficient basis for the same; and
- (5) Dismissing the various petitions for the writ of habeas corpus of petitioners still detained, or under "community arrest" within the Greater Manila area, without cost.

[1] General Order No. 2 reads as follows:

"Pursuant to Proclamation No. 1081, dated September 21, 1972, and in my capacity as Commander-in-Chief of all the Armed Forces of the Philippines and for being active participants in the conspiracy to seize political and state power in the country and to take over the Government by force, the extent of which has now assumed the proportion of an actual war against our people and their legitimate Government and in order to prevent them from further committing acts that are inimical or injurious to our people, the Government and our national interest, I hereby order you as Secretary of National Defense to forthwith arrest or cause the arrest and take into custody the individuals named in the attached list and to hold them until otherwise so ordered by me or by my designated representative.

"Likewise, I do hereby circler you to arrest or cause the arrest and take into custody and to hold them until otherwise ordered released by me or my duly authorized representative, such persons as may have committed in crimes and offenses in furtherance or on the occasion of or incident to or in connection with the crimes of insurrection or rebellion as well as persons who have committed crimes against national security and the law of nations, crimes against the fundamental laws of the state, crimes against public order, crimes involving usurpation of authority; title improper use of name; uniform and insignia, including persons guilty of crimes as public officers, as well as those persons who may have violated any decree or promulgated by me personally or promulgated upon my direction."

* On the issue or withdrawal, petitioner" refers to former Senator Jose W. Diokno and not any of the other petitioners.

* Although this Rule 17 falls under "Procedure in Courts of First Instance" it may also serve as a guide to this

Court in resolving a question of this nature. In the Court of Appeals, and in the Supreme Court," An appeal may be withdrawn as of right at any time before filing of appellee's brief. After that brief is filed the withdrawal may be allowed the Court in its discretion. " (Section 4, Rule 50; Section 1, Rule 36)

1 "(2)"The President shall be the commander-in--chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law."(Par 2, Sec. 10 Art. VII, 1935 Constitution).

"SEC. 12. The Prime Minister shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion in case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law." (Sec. 12 Art. IX, New Constitution).

It should be noted that the above provision is a verbatim reiteration of Article VII, Section 10, Paragraph (2) of the old Constitution.

1 Formed by the Constitutional Convention to prepare the final draft of the Constitution. I was a member of this Committee, being the Vice-Chairman of the Panel of Floorleaders.

* In fact Petition, Decision as ordered released by the Presidents on September 11, 1974

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CONCURRING AND DISSENTING OPINION

FERNANDO, J.:

The issue involved in these habeas corpus petitions is the pre-eminent problem of the times — the primacy to be accorded the claims of liberty during periods of crisis. There is much that is novel in what confronts the Court. A traditional orientation may not suffice. The approach taken cannot be characterized by rigidity and inflexibility. There is room, plenty of it, for novelty and innovation. Doctrines deeply rooted in the past, that have stood the test of time and circumstance, must be made adaptable to present needs and, hopefully, serviceable to an unknown future, the events of which, to recall Story, are locked up in the inscrutable designs of a merciful Providence. It is essential then that in the consideration of the petitions before us there be objectivity, calmness, and understanding. The deeper the disturbance in the atmosphere of security, the more compelling is the need for tranquility of mind, if reason is to prevail. No legal barrier is to be interposed to thwart the efforts of the Executive to restore normalcy. He is not to be denied the power to take what for him may be necessary measures to meet emergency conditions. So the realities of the situation dictate. There should be on the part of the judiciary then, sensitivity to the social forces at work; creating conditions of grave unrest and turbulence and threatening the very stability, not to say existence, of the political order. It is in that setting that the crucial, issue posed by these petitions is to be appraised. It may be that this clash between the primacy of liberty and the legitimate defense of authority is not

susceptible of any definite, clearcut solution. Nonetheless; an attempt has to be made. With all due recognition of the merit apparent in the exhaustive, scholarly and eloquent dissertations of Justice Barredo and my other brethren as well as the ease and lucidity with which the Chief Justice clarified the complex issues and the views of members of the Court, I would like to give a brief expression to my thoughts to render clear the points on which I find myself, with regret, unable to be of the same persuasion.

I concur in the dismissal of the habeas corpus petition of Benigno S. Aquino, Jr. solely on the ground that charges had been filed, and dissent in part in the dismissal of the petition of Francisco Rodrigo and others,* who joined him in his plea for the removal of the conditions on their release, on the view that as far as freedom of travel is concerned, it should be, on principle, left unrestricted. As originally prepared, this opinion likewise explained his dissent in the denial of the motion to withdraw in the petition filed on behalf of Jose W. Diokno, a matter now moot and academic.

1. We have to pass on habeas corpus petitions. The great writ of liberty is involved. Rightfully, it is latitudinarian in scope. It is wide-ranging and all-embracing in its reach. It can dig deep into the facts to assure that there be no toleration of illegal restraint. Detention must be for a cause recognized by law. The writ imposes on the judiciary the grave responsibility of ascertaining whether a deprivation of physical freedom is warranted. The party who is keeping a person in custody has to produce him in court as soon as possible. What is more, he must justify the action taken. Only if it can be demonstrated that there has been no violation of one's right to liberty will he be absolved from responsibility. Failing that, the confinement must thereby cease. Nor does it suffice that there be a court process, order, or decision on which it is made to rest. If there be a showing of a violation of constitutional rights, the jurisdiction of the tribunal issuing it is ousted. Moreover, even if there be a valid sentence, it cannot, even for a moment, be extended beyond the period provided for by law. When that time comes, he is entitled to be released. It is in that sense then, as so well put by Holmes, that this great writ "is the usual remedy for unlawful imprisonment." [1] It does afford, to borrow from the language of Birkenhead, "a swift and imperative remedy in all cases of illegal restraint or confinement." [2] Not that there is need for actual incarceration. A custody for which there is no support in law suffices for its invocation. The party proceeded against is usually a public official, the run-of-the-mill petitions often coming from individuals who for one reason or another have run afoul of the penal laws. Confinement could likewise come about because of contempt citations, [3] whether from the judiciary or from the legislature. It could also be due to statutory commands, whether addressed to cultural minorities [4] or to persons diseased. [5] Then, too, this proceeding could be availed of by citizens subjected to military discipline [6] as well as aliens seeking entry into or to be deported from the country. [7] Even those outside the government service may be made to account for their action as in the case of wives restrained by their husbands or children withheld from the proper parent or guardian. [8] It is thus apparent that any deviation from the legal norms calls for the restoration of freedom. It cannot be otherwise. It would be sheer mockery of all that such a legal order stands for, if any person's right to live and work where he is minded to move about freely, and to be rid of any unwarranted fears that he would just be picked up and detained, is not accorded full respect. The significance of the writ then for a regime of liberty cannot be overemphasized.

2. Nor does the fact that, at the time of the filing of these petitions martial law had been declared, call for a different conclusion. There is of course imparted to the matter a higher degree of complexity. For it cannot be gainsaid that the reasonable assumption is that the President exercised such an awesome power one granted admittedly to cope with an emergency or crisis situation, because in his judgment the situation as thus revealed to him left him with no choice. What the President did attested to an executive determination of the existence of the conditions that called for such a move. There was, in his opinion, an insurrection or rebellion of such magnitude that public safety did require placing the country under martial law. That decision was his to make; it is not for the judiciary. The assessment thus made, for all the sympathetic consideration it is entitled to, is not, however, impressed with finality. This Court has a limited sphere of authority. That, for me, is the teaching of *Lansang*.¹⁰ The judicial role is difficult, but it is unavoidable. The writ of liberty has been invoked

by petitioners. They must be heard, and we must rule on their petitions.

3. This Court has to act then. The liberty enshrined in the Constitution, for the protection of which habeas corpus is the appropriate remedy, imposes that obligation. Its task is clear. It must be performed. That is a trust to which it cannot be recreant. Whenever the grievance complained of is deprivation of liberty, it is its responsibility to inquire into the matter and to render the decision appropriate under the circumstances. Precisely, a habeas corpus petition calls for that response. For the significance of liberty in a constitutional regime cannot be sufficiently stressed. Witness these words from the then Justice, later Chief Justice, Concepcion: "Furthermore, individual freedom is too basic, too transcendental and vital in a republican state, like ours, to be denied upon mere general principles and abstract consideration of public safety. Indeed, the preservation of liberty is such a major preoccupation of our political system that, not satisfied with guaranteeing its enjoyment in the very first paragraph of section (1) of the Bill of Rights, the framers of our Constitution devoted [twelve other] paragraphs [thereof] to the protection of several aspects of freedom."¹¹ A similar sentiment was given expression by the then Justice, later Chief Justice, Bengzon: "Let the rebels have no reason to apprehend that their comrades now under custody are being railroaded into Muntinlupa without benefit of those fundamental privileges which the experience of the ages has deemed essential for the protection of all persons accused of crime before the tribunals of justice. Give them the assurance that the judiciary, ever mindful of its sacred mission will not, thru faulty cogitation or misplaced devotion, uphold any doubtful claims of Governmental power in diminution of individual rights, but will always cling to the principle uttered long ago by Chief Justice Marshall that when in doubt as to the construction of the Constitution, 'the Courts will favor personal liberty' . . ."¹² The pertinence of the above excerpt becomes quite manifest when it is recalled that its utterance was in connection with a certiorari proceeding where the precise point at issue was whether or not the right to bail could be availed of when the privilege of the writ of habeas corpus was suspended. There was no decisive outcome, although there were five votes in favor of an affirmative answer to only four against.¹³ Such pronouncements in cases arising under the 1935 Constitution should occasion no surprise. They merely underscore what was so vigorously emphasized by the then Delegate, Jose P. Laurel, Chairman of the Committee on the Bill of Rights, in his sponsorship address of the draft provisions. Thus: "The history of the world is the history of man and his arduous struggle for liberty. ... It is the history of those brave and able souls who, in the ages that are past, have labored, fought and bled that the government of the lash — that symbol of slavery and despotism — might endure no more. It is the history of those great self-sacrificing men who lived and suffered in an age of cruelty, pain and desolation so that every man might stand, under the protection of great rights and privileges, the equal of every other man."¹⁴ So should it be under the present Constitution. No less a person than President Marcos during the early months of the 1971 Constitutional Convention categorically affirmed in his *Today's Revolution: Democracy*: "Without freedom, the whole concept of democracy falls apart."¹⁵ Such a View has support in history. A statement from Dr. Rizal has a contemporary ring: "Give liberties, so that no one may have a right to conspire."¹⁶ Mabini listed as an accomplishment of the ill-fated revolution against the Americans the manifestation of "our love of freedom guaranteeing to each citizen the exercise of certain rights which make our communal life less constricted . . ."¹⁷

4. Equally so, the decisive issue is one of liberty not only because of the nature of the petitions, but also because that is the mandate of the Constitution. That is its philosophy. It is a regime of liberty to which our people are so deeply and firmly committed.¹⁸ The fate of the individual petitioners hangs in the balance. That is of great concern. What is at stake, however, is more than that — much more. There is a paramount public interest involved. The momentous question is how far in times of stress fidelity can be manifested to the claims of liberty. So it is ordained by the Constitution, and it is the highest law. It must be obeyed. Nor does it make a crucial difference, to my mind, that martial law exists. It may call for a more cautious approach. The simplicity of constitutional fundamentalism may not suffice for the complex problems of the day. Still, the duty remains to assure that the supremacy of the Constitution is upheld. Whether in good times or bad, it must be accorded the utmost respect and deference. That is what constitutionalism connotes. It is, its distinctive characteristic. Greater restraints may, of course, be imposed. Detention, to cite the obvious example, is not ruled out under

martial law, but even the very proclamation thereof is dependent on public safety' making it imperative. The powers, rather expansive, perhaps at times even latitudinarian, allowable the administration under its aegis, with the consequent diminution of the sphere of liberty, are justified only under the assumption that thereby the beleaguered state is in a better position to protect, defend and preserve itself. They are hardly impressed with the element of permanence. They cannot endure longer than the emergency that called for the executive having to make use of this extraordinary prerogative. When it is a thing of the past, martial law must be at an end. It has no more reason for being. If its proclamation is open to objection or its continuance no longer warranted, there is all the more reason, to follow Laski, to respect the traditional limitation of legal authority that freedom demands.¹⁹ With these habeas corpus petitions precisely rendering peremptory action by this Court, there is the opportunity for the assessment of liberty considered in a concrete social context. With full appreciation then of the complexities of this era of turmoil and disquiet, it can hopefully contribute to the delineation of constitutional boundaries. It may even be able to demonstrate that law can be timeless and yet timely.

5. There are relevant questions that still remain to be answered. Does not the proclamation of martial law carry with it the suspension of the privilege of the writ of habeas corpus? If so, should not the principle above enunciated be subjected to further refinement? I am not too certain that the first query necessarily calls for an affirmative answer. Preventive detention is of course allowable. Individuals who are linked with invasion or rebellion may pose a danger to the public safety. There is nothing inherently unreasonable in their being confined. Moreover, where it is the President himself, as in the case of these petitioners, who personally 'directed that they be taken in, it is not easy to impute arbitrariness. It may happen though that officers 'of lesser stature not impressed with the high sense of responsibility would utilize the situation to cause the apprehension of persons without sufficient justification. Certainly it would be, to my mind, to sanction oppressive acts if the validity of such detention cannot be inquired into through habeas corpus petitions. It is more than just desirable therefore that if such be the intent, there be a specific decree concerning the suspension of the privilege of the writ of habeas corpus. Even then, however, such proclamation could be challenged. If vitiated by constitutional infirmity, the release may be ordered. Even if it were otherwise, the applicant may not be among those as to whom the privilege of the writ has been suspended. It is pertinent to note in this connection that Proclamation No. 1081 specifically states "that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes against the fundamental laws of the State, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in Orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative."²⁰ The implication appears to be that unless the individual detained is included among those to whom any of the above crimes or offenses may be imputed, he is entitled to judicial protection. Lastly, the question of whether or not there is warrant for the view that martial law is at an end may be deemed proper not only in the light of radically altered conditions but also because of certain executive acts clearly incompatible with its continued existence. Under such circumstances, an element of a justiciable controversy may be discerned.

6. That brings me to the political question doctrine. Its accepted signification is that where the matter involved is left to a decision by the people acting in their sovereign capacity or to the sole determination by either or both the legislative or executive branches of the government, it is beyond judicial cognizance.²¹ Thus it was that in suits where the party proceeded against was either the President or Congress, or any of its branches for that matter, the courts refused to act.²² Unless such be the case, the action taken by any or both the political branches whether in the form of a legislative act or an executive order could be tested in court. Where private rights are affected, the judiciary has the duty to look into its validity. There is this further implication of the doctrine A showing that plenary power is granted either department of government may not be an obstacle to

judicial inquiry. Its improvident exercise or the abuse thereof may give rise to a justiciable controversy.²³ What is more, a constitutional grant of authority is not usually unrestricted.²⁴ Limitations are provided for as to what may be done and how it is to be accomplished. Necessarily then, it becomes the responsibility of the courts to ascertain whether the two coordinate branches have adhered to the mandate of the fundamental law. The question thus posed is judicial rather than political.

7. Reference at this point to the epochal opinion in the aforecited *Lansang vs. Garcia* decision, where the validity of the suspension of the privilege of the writ of habeas corpus was sustained by this Court, is not amiss. For in both the 1935 and the present Constitutions, the power to declare martial law is embraced in the same provision with the grant of authority to suspend the privilege of the writ of habeas corpus, with the same limits to be observed in the exercise thereof.²⁵ It would follow, therefore, that a similar approach commends itself on the question of whether or not the finding made by the President in Proclamation No. 1081 as to the existence of "rebellion and armed action undertaken by these lawless elements of the communist and other armed aggruppations organized to overthrow the Republic of the Philippines by armed violence and force [impressed with the] magnitude of an actual state of war against [the] people and the Republic."²⁶ is open to judicial inquiry. Reference to the opinion of Chief Justice Concepcion would prove illuminating: "Indeed, the grant of power to suspend the privilege is neither absolute nor unqualified. The authority conferred by the Constitution, both under the Bill of Rights and under the Executive Department, is limited and conditional. The precept in the Bill of Rights establishes a general rule, as well as an exception thereto. What is more, it postulates the former in the negative, evidently to stress its importance, by providing that '(t)he privilege of the writ of habeas corpus shall not be suspended....' It is only by way of exception that it permits the suspension of the privilege 'in cases of invasion, insurrection, or rebellion' -- or, under Art. VII of the Constitution, 'imminent danger thereof' — 'when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist.' Far from being full and plenary, the authority to suspend the privilege of the writ is thus circumscribed, confined and restricted not only by the prescribed setting or the conditions essential to its existence, but also as regards the time when and the place where it may be exercised. These factors and the aforementioned setting or conditions mark, establish and define the extent, the confines and the limits of said power, beyond which it does not exist. And, like the limitations and restrictions imposed by the Fundamental Law upon the legislative department, adherence thereto and compliance therewith may, within proper bounds, be inquired into by courts of justice. Otherwise, the explicit constitutional provisions thereon would be meaningless. Surely, the framers of our Constitution could not have intended to engage in such a wasteful exercise in futility."²⁷ Such a view was fortified by the high estate accorded individual freedom as made clear in the succeeding paragraph of his opinion: "Much less may the assumption be indulged in when we bear in mind that our political system is essentially democratic and republican in character and that the suspension of the privilege affects the most fundamental element of that system, namely, individual freedom. Indeed, such freedom includes and connotes, as well as demands, the right of every single member of our citizenry to freely discuss and dissent from, as well as criticize and denounce, the views, the policies and the practices of the government and the party in power that he deems unwise, improper or inimical to the commonwealth, regardless of whether his own opinion is objectively correct or not. The untrammelled enjoyment and exercise of such right — which; under certain conditions, may be a civic duty of the highest order — is vital to the democratic system and essential to its successful operation and wholesome growth and development."²⁸

The writer wrote a concurring and dissenting opinion. He was fully in agreement with the rest of his brethren as to the lack of conclusiveness attached to the presidential determination. Thus: "The doctrine announced in *Montenegro vs. Castaneda* that such a question is political has thus been laid to rest. It is about time too. It owed its existence to the compulsion exerted by *Barcelon vs. Baker*, a 1905 decision. This Court was partly misled by an undue reliance in the latter case on what it considered to be authoritative pronouncements from such illustrious American jurists as Marshall, Story, and Taney. That is to misread what was said by them. This is most evident in the case of Chief Justice Marshall, whose epochal *Marbury vs. Madison* was cited. Why that was so is difficult to

understand. For it speaks to the contrary. It was by virtue of this decision that the function of judicial review owes its origin notwithstanding the absence of any explicit provision in the American Constitution empowering the courts to do so. Thus: 'It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding, the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then; the courts are to regard the constitution, and the constitution is superior to any ordinary act of legislature, the constitution, and not such ordinary act, must govern the case to which they, both apply.'²⁹

8. To refer to *Lansang* anew, this Court sustained the presidential proclamation suspending the privilege of the writ of habeas corpus as there was no showing of arbitrariness in the exercise of a prerogative belonging to the executive, the judiciary merely acting as a check on the exercise of such authority. So Chief Justice Concepcion made clear in this portion of his opinion: "Article VII of the Constitution vests in the Executive power to suspend the privilege of the writ of habeas corpus under specified conditions. Pursuant to the principle of separation of powers underlying our system of government, the Executive is supreme within his own sphere. However, the separation of powers, under the Constitution, is not absolute. What is more, it goes hand in hand with the system of checks and balances, under which the Executive is supreme, as regards the suspension of the privilege, but only if and when he acts within the sphere allotted to him by the Basic Law, and the authority to determine whether or not he has so acted is vested in the Judicial Department, which, in this respect, is, in turn, constitutionally supreme. In the exercise of such authority, the function of the Court is merely to check not to supplant — the Executive, or to ascertain merely whether he has gone beyond the constitutional limits of his jurisdiction, not to exercise the power vested in him or to determine the wisdom of his act. To be sure, the power of the Court to determine the validity of the contested proclamation is far from being identical to, or even comparable with, its power over ordinary civil or criminal cases elevated thereto by ordinary appeal from inferior courts, in which cases the appellate court has all of the powers of the court of origin."³⁰ The test then to determine whether the presidential action should be nullified according to the Supreme Court is that of arbitrariness. Absent such a showing, there is no justification for annulling the presidential proclamation.

On this point, the writer, in a separate opinion, had this to say: "With such presidential determination of the existence of the conditions required by the Constitution to justify a suspension of the privilege of the writ no longer conclusive on the other branches, this Court may thus legitimately inquire into its validity. The question before us, it bears repeating, is whether or not Proclamation No. 889 as it now stands, not as it was originally issued, is valid. The starting point must be a recognition that the power to suspend the privilege of the writ belongs to the Executive, subject to limitations. So the Constitution provides, and it is to be respected. The range of permissible inquiry to be conducted by this Tribunal is necessarily limited then to the ascertainment of whether or not such a suspension, in the light of the credible information furnished the President, was arbitrary. Such a test met with the approval of the chief counsel for petitioners, Senator Jose W. Diokno. To paraphrase Frankfurter, the question before the judiciary is not the correctness but the reasonableness of the action taken. One who is not the Executive but equally knowledgeable may entertain a different view, but the decision rests with the occupant of the office. As would be immediately apparent even from a cursory perusal of the data furnished the President, so impressively summarized in the opinion of the Chief Justice, the imputation of arbitrariness would be difficult to sustain. Moreover, the steps taken by him to limit the area where the suspension operates as well as his instructions attested to a firm resolve on his part to keep strictly within the bounds of his authority. Under the circumstances, the decision reached by the Court that no finding of unconstitutionality is warranted commends itself for approval. The most that can be said is that there was a manifestation of presidential power well-nigh

touching the extreme borders of his conceded competence, beyond which a forbidden domain lies. The requisite showing of either improvidence or abuse has not been made."³¹

9. The Lansang doctrine for me is decisive on the various issues raised in this case, my discussion being confined to petitioner Rodrigo, as well as others similarly situated, for under my view that the petition in Aquino should be dismissed because charges had been filed, and the petition in Diokno should be considered withdrawn, there need be no further inquiry as to the merits of their respective contentions.

Now, first as to the validity of the proclamation itself. It would seem that it is beyond question in the light of this particular transitory provision in the present Constitution: "All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after lifting of martial law or the ratification of this Constitution, unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly."³² Independently of such provision, such presidential proclamation could not be characterized as arbitrary under the standard set forth in the Lansang decision. He did act "on the basis of carefully evaluated and verified information, [which] definitely established that lawless elements who are moved by a common or similar ideological conviction, design strategy and goal and enjoying the active moral and material support of a foreign power and being guided and directed by intensely devoted, well-trained, determined and ruthless groups of men and seeking refuge under the protection of our constitutional liberties to promote and attain their ends, have entered into a conspiracy and have in fact joined and banded their resources and forces together for the prime purpose of, and in fact they have been and are actually staging, undertaking and waging an armed insurrection and rebellion against the Government of the Republic of the Philippines in order to forcibly seize political and state power in the country, overthrow the duly constituted government and supplant our existing political, social, economic and legal order with an entirely new one whose form of government, whose system of laws, whose conception of God and religion, whose notion of individual rights and family relations, and whose political, social, economic legal and moral precepts are based on the Marxist-Leninist-Maoist teachings and beliefs; . . ."³³

Subsequent events did confirm the validity of such appraisal. Even now, from the pleadings of the Solicitor General, the assumption that the situation has not in certain places radically changed for the better cannot be stigmatized as devoid of factual foundation. As of the present then, even on the view that the courts may declare that the crisis conditions have ended and public safety does not require the continuance of martial law, there is not enough evidence to warrant such a judicial declaration. This is not to deny that in an appropriate case with the proper parties, and, in the language of Justice Laurel, with such issue being the very *lis mota*, they may be compelled to assume such an awesome responsibility. A sense of realism as well as sound juristic theory would place such delicate task on the shoulders of this Tribunal, the only constitutional court. So I would read *Rutter vs. Esteban*.³⁴ There, while the Moratorium Act³⁵ was at first assumed to be valid, with this Court in such suit being persuaded that its "continued operation and enforcement" under circumstances that developed later, became "unreasonable and oppressive," and should not be prolonged a minute longer, ... [it was] "declared null and void and without effect."³⁶ It goes without saying that before it should take such a step, extreme care should be taken lest, the maintenance of public peace and order, the primary duty of the Executive, be attended with extreme difficulty. It is likewise essential that the evidence of public safety no longer requiring martial law be of the clearest and most satisfactory character. It cannot be too strongly stressed that while liberty is a prime objective and the judiciary is charged with the duty of safeguarding it, on a matter of such gravity during periods of emergency, the executive appraisal of the situation is deserving of the utmost credence. It suffices to recall the stress laid by Chief Justice Concepcion in *Lansang* that its function "is merely to check — not to supplant" the latter. The allocation of authority in the Constitution made by the people themselves to the three departments of

government must be respected. There is to be no intrusion by any one into the sphere that belongs to another. Precisely because of such fundamental postulate in those cases, and there may be such, but perhaps rather rare, it could amount to judicial abdication if no inquiry were deemed permissible and the question considered political.

The last point is, while the detention of petitioners could have been validly ordered, as dictated by the very proclamation itself, if it continued for an unreasonable length of time, then his release may be sought in a habeas corpus proceeding. This contention is not devoid of plausibility. Even in times of stress, it cannot just be assumed that the indefinite restraint of certain individuals as a preventive measure is unavoidable. It is not to be denied that where such a state of affairs could be traced to the wishes of the President himself it carries with it the presumption of validity. The test is again arbitrariness as defined in *Lansang*. It may happen that the continued confinement may be at the instance merely of a military official, in which case there is more leeway for judicial scrutiny.

10. A word more on the withdrawal of a habeas corpus petition. On the basic assumption that precisely the great writ of liberty is available to a person subjected to restraint so that he could challenge its validity, I find it difficult not to yield assent to a plea by the applicant himself that he is no longer desirous' of pursuing such remedy. He had a choice of whether or not to go to court. He was free to act either way. The fact that at first he did so, but that later he was of a different mind, does not, in my opinion, alter the situation. The matter for me, is still one left to his free and unfettered will. The conclusion then, for me at least, is that a court must accede to his wishes. It could likewise be based on his belief that the realities of the situation compel the conclusion that relief could come from the Executive. That decision was his to make. It must be respected. Moreover, if only because of humanitarian considerations, considering the ill-effects of confinement on his state of health, there is equally legal support for the view that his conditional release as in the case of the other detainees would not be inappropriate.

If his motion for withdrawal contained phraseology that is offensive to the dignity of the court, then perhaps the corresponding disciplinary action may be taken. For that purpose, and for that purpose alone, the petition may be considered as still within judicial cognizance. It is true in certain cases that the issues raised may be so transcendental that there is wisdom in continuing the proceeding. The withdrawal, even then, for me, is not fraught with pernicious consequences. If the matter were that significant or important, the probability is that the question will soon be ventilated in another petition. There is, to deal briefly with another point, the matter of the rather harsh and bitter language in which the motion for withdrawal was couched. That is a matter of taste. Even if it went beyond the bounds of the permissible, the withdrawal should be granted. This for me is the principle that should obtain. The rather uncharitable view expressed concerning the ability of certain members of the Court to act justly on the matter should not give rise, in my opinion, to undue concern. That is one's belief, and one is entitled to it. It does not follow that thereby the person thus unjustifiably maligned should suffer any loss of self-esteem. After all, it is a truism to say that a man on the bench accountable only to his conscience and, in the ultimate analysis, to his Maker. There is all the more reason then not to be unduly bothered by the remarks in question. Moreover, they emanated from a source suffering from the pangs of desperation born of his continued detention. It could very well be that the disappointment of expectations and frustration of hopes did lead to such an intemperate outburst. There is, for me at least, relevance to this excerpt from an opinion by Justice Frankfurter: "Since courts, although representing the law, ... are also sitting in judgment, as it were, on their own function in exercising their power to punish for contempt, it should be used only in flagrant cases and with the utmost forbearance. It is always better to err on the side of tolerance and even of disdainful indifference."³⁷

11. There is novelty in the question raised by petitioner Rodrigo. Nor is that the only reason why it matters. It is fraught with significance not only for him but also for quite a number of others in a like predicament. They belong to a group released from confinement. They are no longer detained. Ordinarily that should suffice to preclude resort to the remedy of habeas corpus. Offhand, it may be plausibly asserted that the need no longer

exists. The prison wall, to paraphrase Chafee, is no longer there; it has fallen down. What is there to penetrate? That is just the point, petitioner Rodrigo complains. That is not really true or only true partially. There are physical as well as intellectual restraints on his freedom. His release is conditional. There are things he cannot say, places he cannot go. That is not liberty in a meaningful sense. This great writ then has not lost its significance for him, as well as for others similarly situated. The way he developed his argument calls to mind Cardozo's warning that in a world of reality, a juridical concept may not always be pressed to the limit of its logic. There are countervailing considerations. The fact that he was among those whose detention was ordered by the President is one of them. There was then an executive determination on the highest level that the state of affairs marked by rebellious activities did call for certain individuals being confined as a preventive measure. Unless there is a showing of the arbitrariness of such a move, the judiciary has to respect the actuation. It must be assumed that what was to be done with them thereafter must have been given some attention. At one extreme, their preventive detention could be terminated and their full freedom restored. At the other, it could be continued if circumstances did so warrant. Here, there was a middle way chosen. Petitioner Rodrigo as well as several others were released subject to conditions. It cannot be dogmatically maintained that such a solution was an affront to reason. Not only for the person locked up, but perhaps even more so for his family, the end of the incarceration was an eagerly awaited and highly welcome event. That is quite understandable. It did justify petitioner's assertion that in so agreeing to the conditions imposed, he was not acting of his own free will. Realistically, he had no choice, or one minimal at most. Nonetheless, it cannot be denied that he was a recipient of what at the very least was a clear manifestation of the Philippine brand of martial law being impressed with a mild character.

This being a habeas corpus petition, the appropriate question for judicial inquiry is the validity of the limits set to the conditional release of petitioner Rodrigo. The guiding principle, is supplied by this ringing affirmation of Justice Malcolm: "Any restraint which will preclude freedom of action is sufficient."³⁸ The implication for me is that there may be instances of the propriety of the invocation of the writ even without actual incarceration. This is one of them. It is heartening that the Court so views it. It is, to my mind, regrettable though that there appears to be full acceptance of the power of the military to impose restrictions on petitioner Rodrigo's physical liberty. There is need, it would seem to me, for a more discriminating appraisal, especially where it could be shown that the order to that effect proceeds from a source lower than the President. The extremely high respect justifiably accorded to the action taken by the highest official of the land, who by himself is a separate and independent department, not to mention the one constitutional official authorized to proclaim martial law, is not indicated. There should be, of course, no casual or unreasoned disregard for what the military may deem to be the appropriate measure under the circumstances. This reflection, though, gives me pause. Petitioner Rodrigo and others similarly situated were released. That step would not have been taken if circumstances did not justify it. It seems then reasonable to assume that full, rather than restricted, freedom was warranted. The matter may be put forth more categorically, but I refrain from doing so. The reason is practical. To insist that it should be thus may curb what appears to be the commendable tendency to put an end to the preventive detention of those in actual confinement. As for restraints on intellectual liberty embraced in freedom of speech and of press, of assembly, and of association, deference to controlling authorities compels me to say that the writ of habeas corpus is not the proper case for assailing them. It does not mean that judicial inquiry is foreclosed. Far from it. All that is intended to be conveyed is that this remedy does not lend itself to that purpose. In so advocating this approach, I am not unmindful that it might be looked upon as lack of awareness for the mischief that may be caused by irresponsible elements, not to say the rebels themselves. The words of Willoughby, whose view on martial law is the most sympathetic to the primacy of liberty, furnish the antidote: "As long as the emergency lasts then, they must upon pain of arrest and subsequent punishment refrain from committing acts that will render more difficult the restoration of a state of normalcy and the enforcement of law."³⁹

12. Reliance, as is quite evident from the foregoing, is well-nigh solely placed on Philippine authorities. While

the persuasive character of American Constitutional law doctrines is not entirely a thing of the past, still, the novelty of the question before us, compels in my view deference to the trend indicated by our past decisions, read in the light not only of specific holdings but also of the broader principles on which they are based. Even if they do not precisely control, they do furnish a guide. Moreover, there seems to be a dearth of United States Supreme Court pronouncements on the subject of martial law, due no doubt to absence in the American Constitution of any provision concerning it.

It is understandable why no reference was made to such subject in the earliest classic on American constitutional law written by Justice Story.⁴⁰ When the landmark 1866 Milligan case⁴¹ made its appearance, and much more so after Sterling⁴² followed in 1932 and Duncan⁴³ in 1946, a discussion thereof became unavoidable. So it is evident from subsequent commentaries and case books.⁴⁴ Cooley though, in his equally famous work that was first published in 1868 contented himself with footnote references to Milligan.⁴⁵ Watson viewed it in connection with the suspension of the privilege of the writ of habeas corpus.⁴⁶ In the nineteen twenties, there was a fuller treatment of the question of martial law. Burdick anticipated Willoughby with this appraisal: "So-called martial law, except in occupied territory of an enemy; is merely the calling in of the aid of military forces by the executive, who is charged with the enforcement of the law, with or without special authorization by the legislature. Such declaration of martial law does not suspend the civil law, though it may interfere with the exercise of one's ordinary rights. The right to call out the military forces to maintain order and enforce the law is simply part of the police power. It is only justified when it reasonably appears necessary, and only justifies such acts as reasonably appear necessary to meet the exigency, including the arrest, or in extreme cases the killing of those who create the disorder or oppose the authorities. When the exigency is over the members of the military forces are criminally and civilly liable for acts done beyond the scope of reasonable necessity. When honestly and reasonably coping with a situation of insurrection or riot a member of the military forces cannot be made liable for his acts, and persons reasonably arrested under such circumstances will not, during the insurrection or riot, be free by writ of habeas corpus."⁴⁷

Willoughby, as already noted, was partial to the claims of liberty. This is quite evident in this excerpt in his opus: "There is, then, strictly speaking, no such thing in American law as a declaration of martial law whereby military law is substituted for civil law. So-called declarations of martial law are, indeed, often made, but their legal effect goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law. Some of the authorities stating substantially this doctrine are quoted in the footnote below."⁴⁸ Willis spoke similarly: "Martial law proper, that is, military law in case of insurrection, riots, and invasions, is not a substitute for the civil law, but is rather an aid to the execution of civil law. Declarations of martial law go no further than to warn citizens that the executive has called upon the military power to assist him in the maintenance of law and order. While martial law is in force, no new powers are given to the executive and no civil rights of the individual, other than the writ of habeas corpus, are suspended. The relations between the citizen and his state are unchanged."⁴⁹

It is readily evident that even when Milligan supplied the only authoritative doctrine, Burdick and Willoughby did not ignore the primacy of civil liberties. Willis wrote after Sterling. It would indeed be surprising if his opinion were otherwise. After Duncan, such an approach becomes even more, strongly fortified, Schwartz, whose treatise is the latest to be published, has this summary of what he considers the present, state of American law: "The Milligan and Duncan cases show plainly that martial law is the public law of necessity. Necessity alone, calls it forth; necessity justifies its exercise; and necessity measures the extent and degree to which it may be employed. It is, the high Court has affirmed, an unbending rule of law that the exercise of military power, where the rights of

the citizen are concerned, may never be pushed beyond what the exigency requires. If martial rule survives the necessity on which alone it rests, for even a single minute, it becomes a mere exercise of lawless violence."⁵⁰ Further: "Sterling vs. Constantin is of basic importance. Before it, a number of decisions, including one by the highest Court, went on the theory that the executive had a free hand in taking martial-law measures. Under them, it had been widely supposed that a martial-law proclamation was so far conclusive that any action taken under it was immune from judicial scrutiny. Sterling vs. Constantin definitely discredits these earlier decisions and the doctrine of conclusiveness derived from them. Under Sterling vs. Constantin, where martial law measures impinge upon personal or property rights — normally beyond the scope of military power, whose intervention is lawful only because an abnormal situation has made it necessary — the executive's ipse dixit is not of itself conclusive of the necessity."⁵¹

It is not to be lost sight of that the basis for the declaration of martial law in the Philippines is not mere necessity but an explicit constitutional provision. On the other hand, Milligan, which furnished the foundation for Sterling⁵² and Duncan⁵³ had its roots in the English common law. There is pertinence therefore in ascertaining its significance under that system. According to the noted English author, Dicey: " 'Martial law,' in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to what is called in France the 'Declaration of the State of Siege,' under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army (autorite militaire). This is an unmistakable proof of the permanent supremacy of the law under our constitution."⁵⁴ There was this qualification: "Martial law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognized in the most ample manner by the law of England. It is a power which has in itself no special connection with the existence of an armed force. The Crown has the right to put down breaches of the peace. Every subject, whether a civilian or a soldier, whether what is called a 'servant of the government,' such for example as a policeman, or a person in no way connected with the administration, not only has the right, but is, as a matter of legal duty, bound to assist in putting down breaches of the peace. No doubt policemen or soldiers are the persons, who, as being specially employed in the maintenance of order, are most generally called upon to suppress a riot, but it is clear that all loyal subjects are bound to take their part in the suppression of riots."⁵⁵

The picture would be incomplete, of course, if no reference were made to Rossiter. In his work on Constitutional Dictatorship, where he discussed crisis governments in the French Republic, in Great Britain and in the United States, he spoke of martial rule. For him, it "is an emergency device designed for use in the crises of invasion or rebellion. It may be most precisely defined as an extension of military government to the civilian population, the substitution of the will of a military commander for the will of the people's elected government. In the event of an actual or imminent invasion by a hostile power, a constitutional government may declare martial rule in the menaced area. The result is the transfer of all effective powers of government from the civil authorities to the military, or often merely the assumption of such powers by the latter when the regular government has ceased to function. In the event of a rebellion its initiation amounts to a governmental declaration of war on those citizens in insurrection against the state. In either case it means military dictatorship — government by the army, courts-martial, suspension of civil liberties, and the whole range of dictatorial action of an executive nature. In the modern democracies the military exercises such dictatorship while remaining subordinate and responsible to the executive head of the civil government. Martial rule has a variety of forms and pseudonyms, the most important of which are martial law, as it is known in the common law countries of the British Empire and the United States, and the state of seige, as it is known in the civil law countries of continental Europe and Latin America. The state

of siege and martial law are two edges to the same sword, and in action they can hardly be distinguished. The institution of martial rule is a recognition that there are times in the lives of all communities when crisis has so completely disrupted the normal workings of government that the military is the only power remaining that can restore public order and secure the execution of the laws."⁵⁶

Happily for the Philippines, the declaration of martial law lends itself to the interpretation that the Burdick, Willoughby, Willis, Schwartz formulations paying due regard to the primacy of liberty possess relevance. It cannot be said that the martial rule concept of Rossiter, latitudinarian in scope, has been adopted, even on the assumption that it can be reconciled with our Constitution. What is undeniable is that President Marcos has repeatedly maintained that Proclamation No. 1081 was precisely based on the Constitution and that the validity of acts taken thereunder could be passed upon by the Supreme Court. For me, that is quite reassuring, persuaded as I am likewise that the view of Rossiter is opposed to the fundamental concept of our polity, which puts a premium on freedom. No undue concern need then be felt as to the continuing reliance on *Moyer vs. Peabody*,⁵⁷ where Justice Holmes speaking for the Court, stated that the test of the validity of executive arrest is that they be made "in good faith and in the honest belief that they are 'needed in order to head the insurrection off . . .'"⁵⁸ He did state likewise: "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See *Keely vs. Sanders*, 99 US 441, 446, 25 L ed. 327, 328. This was admitted with regard to killing men in the actual clash of arms and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm."⁵⁹ Nor was this to manifest less than full regard for civil liberties. His other opinions indicated the contrary. More specifically, it was from his pen, in *Chastleton Corporation vs. Sinclair*,⁶⁰ where the doctrine that the judiciary may inquire into whether the emergency was at an end, was given expression. Thus: "We repeat what was stated in *Block vs. Hirsh*,....., as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But, even as to them, a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . And still more obviously, so far as this declaration looks to the future, is can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed."⁶¹

13. It may safely be concluded therefore that the role of American courts concerning the legality of acts taken during a period of martial law is far from minimal. Why it must be so was explained by Dean Rostow in this wise: "Unless the courts require a showing, in cases like these, of an intelligible relationship between means and ends, society has lost its basic protection against the abuse of military power. The general's good intention must be irrelevant. There should be evidence in court that his military judgment had a suitable basis in fact. As Colonel Fairman, a strong proponent of widened military discretion, points out: 'When the executive fail or is unable to satisfy the court of the evident necessity for the extraordinary measures it has taken, it can hardly expect the court to assume it on faith.'"⁶² This is the way Lasswell would summarize the matter: "On the whole, we can conclude that the courts of this country have a body of ancient principles and recent precedents that can be used to keep at a minimum unnecessary encroachments upon private rights by the executive, civil or military. The vigor and sensitiveness with which the due process clause has been affirmed in the last two decades is, in particular, an important development."⁶³

14. It may be that the approach followed may for some be indicative of lack of full awareness of today's stern realities. It is my submission that to so view the transcendental issues before us is to adhere as closely as possible to the ideal envisioned in *Ex parte Milligan*: "The Constitution is a law for rulers and for people equally in war and in peace and covers with the shield of its protection all classes of men at all times and under all circumstances."⁶⁴ It is ever timely to reiterate that at the core of constitutionalism is a robust concern for

individual rights. This is not to deny that the judicial process does not take place in a social void. The questions that call for decision are to be examined in the total social context with full appreciation of the environmental facts, whether viewed in its temporal or other relevant aspects. They have to reconcile time-tested principles to contemporary problems. Legal norms cannot always stand up against the pressure of events. The great unquestioned verities may thus prove to be less than adequate. So much is conceded. Nonetheless, even with the additional difficulty that the Court today is compelled to enter terrain with boundaries not so clearly defined, carrying with it the risk of exceeding the normal limits of judicial imprecision, I find myself unable to resist the compulsion of constitutional history and traditional doctrines. The facts and issues of the petitions before us and the mandates of the fundamental law, as I view them in the light of accepted concepts, blunt the edge of what otherwise could be considerations of decisive impact. I find myself troubled by the thought that, were it otherwise, it would amount to freezing the flux of the turbulent present with its grave and critical problems in the icy permanence of juristic doctrines. As of now, such an uncomfortable thought intrudes. Hence this brief concurring and dissenting opinion.

* The other petitioners are Joaquin P. Roces, Teodoro M. Locsin, Rolando Fadul, Rosalind Galang, Go Eng Guan, Maximo V. Soliven, Renato Constantino, Luis R. Mauricio, Napoleon G. Rama, Jose Mari Velez, Ramon V. Mitra, Juan L. Mercado, Roberto Ordenez, Manuel Almario, and Ernesto Rondon.

[1] *Chin Yow vs. United States*, 208 US 8, 13 (1908)

[2] *Secretary of State of Home Affairs vs. O'Brien*, A.C. 603, 609 (1923). As the writ originated in England, it may be of some interest to note that as early as 1220 the words *habeas corpus* appeared in an order directing an English sheriff to produce parties to a trespass action before the Court of Common Pleas. In succeeding centuries, the writ was made use of by way of procedural orders to ensure that parties be present at court proceedings.

[3] Cf. *Finnick vs. Peterson*, 6 Phil. 172 (1908); *Jones vs. Harding*, 9 Phil. 279 (1907). *Villaflores vs. Summers*, 41 Phil. 62 (1920); *Carag vs. Warden*, 53 Phil. 85 (1929); *Lopez vs. De los Reyes*, 55 Phil. 170 (1930); *Estacio vs. Provincial Warden*, 69 Phil. 150 (1939); *Arnault vs. Nazareno*, 87 Phil. 29 (1950); *Arnault vs. Balagtas*, 97 Phil. 358 (1955).

[4] Cf. *Rubi vs. Provincial Board*, 39 Phil. 660 (1919).

[5] Cf. *Lorenzo vs. Director of Health*, 50 Phil. 595 (1927).

[6] Cf. *In re Carr*, 1 Phil. 513 (1902); *Mekin vs. Wolfe*, 2 Phil. 74 (1903); *Cabantag vs. Wolfe*, 6 Phil. 273 (1906); *In re Smith*, 14 Phil. 112 (1909); *Cabiling vs. Prison Officer*, 75 Phil. 1 (1945); *Raquiza vs. Bradford*, 75 Phil. 50 (1945); *Reyes vs. Crisologo*, 75 Phil. 225 (1945); *Yamashita vs. Styer*, 75 Phil. 583 (1945); *Cantos vs. Styer*, 76 Phil. 748 (1946); *Tubb and Tedrow vs. Griess*, 78 Phil. 249 (1947); *Miquiabas vs. Phil. Ryukyus Command*, 80 Phil. 262 (1948); *Dizon vs. Phil.-Ryukyus Command*, 81 Phil. 286 (1948).

[7] Cf. *Lo Po vs. McCoy*, 8 Phil. 343 (1907); *Lorenzo vs. McCoy*, 15 Phil. 559 (1910); *Edwards vs. McCoy*, 22 Phil. 598 (1912); *Que Quay vs. Collector of Customs*, 33 Phil. 128 (1916); *Tan Me Nio vs. Collector of Customs*, 34 Phil. 944 (1916); *Bayani vs. Collector of Customs*, 37 Phil. 468 (1918); *In re McCulloch Dick*, 38 Phil. 41 (1918); *Mateo vs. Collector of Customs*, 63 Phil. 470 (1936); *Chua vs. Secretary of Labor*, 68 Phil. 649 (1939); *Villahermosa vs. Commissioner of Immigration*, 80 Phil. 541 (1948); *Mejoff vs. Director of Prisons*, 90 Phil. 70 (1951); *Borovsky vs. Commissioner of Immigration*, 90 Phil. 107 (1951).

[8] Cf. *Reyes vs. Alvarez*, 8 Phil. 723 (1907); *Lozano vs. Martinez*, 36 Phil. 976 (1917); *Pelayo vs. Lavin Aedo*, 40 Phil. 501 (1919); *Bancosta vs. Doe*, 46 Phil. 843 (1923); *Sanchez de Strong vs. Beishir*, 53 Phil. 331 (1929); *Makapagal vs. Santamaria*, 55 Phil. 418 (1930); *Salvana vs. Gaella*, 55 Phil. 680 (1931); *Ortiz vs. Del Villar*, 57

Phil. 19 (1932); Flores vs. Cruz, 99 Phil. 720 (1956); Murdock vs. Chuidian, 99 Phil. 821 (1956).

9 As was so aptly put in an article written by the then Professor, now Solicitor General, Estelito Mendoza: "It is a well-known fact that the privilege of the writ of the habeas corpus is an indispensable remedy for the effective protection of individual liberty. This is more so when the infringement arises from government action. When liberty is threatened or curtailed by private individuals, only a loud cry (in fact, it need not even be loud) need be made, and the government steps in to prevent the threatened infringement or to vindicate the consummated curtailment. The action is often swift and effective; the results generally satisfactory and gratifying. But when the government itself is the 'culprit' the cry need be louder, for the action is invariably made under color of law or cloaked with the mantle of authority. The privilege of the writ, however; because it may be made to bear upon governmental officers, assures that the individual's cry shall not, at least, be futile and vain." Mendoza, The Suspension of the Writ of Habeas Corpus: Suggested Amendments, 33 Philippine Law Journal, 630, 635 (1958).

10 Lansang vs. Garica, L-33964, December 11, 1971, 42 SCRA 448.

11 People vs. Hernandez, 99 Phil. 515, 551-552 (1956). The reference was to the 1935 Constitution. It applies as well to the present Constitution.

12 Nava vs. Gatmaitan, 90 Phil. 172, 194-195 (1951).

13 The five affirmative votes came from the then Chief Justice Paras and Justices Bengzon, Tuason, Reyes and Jugo. The negative votes were cast by Justices Feria, Pablo, Padilla, and Bautista Angelo.

14 Laurel, S., ed., III Proceedings of the Philippine Constitutional Convention 334 (1966).

15 Marcos, Today's Revolution: Democracy 29 (1971).

16 Alzona, ed., Quotations from Rizal's Writings, 72 (1962).

17 Mabini, The Philippine Revolution 10 (1969).

18 Cf. Preamble of the present Constitution as well as that of the 1935 Constitution.

19 Cf. Laski, Liberty in the Modern State 34 (1949).

20 Proclamation No. 1081, September 21, 1972.

21 Cf. Tanada vs. Cuenco, 103 Phil. 1051 (1957).

22 Cf. Alejandrino vs. Quezon, 46 Phil. 83 (1924); Vera vs. Avelino, 77 Phil. 192 (1946); Avelino vs. Cuenco, 83 Phil. 17 Resolution of March 4, 1940.

23 Cf. Morrero vs. Bocar, 66 Phil. 429 (1938); Aytona vs. Castillo, L-19313, January 19, 1962, 4 SCRA 1; Rodriguez vs. Quirino, L-19800, October 28, 1963, 9 SCRA 284.

24 Cf. Lansang vs. Garcia, L-33964, December 11, 1971 42 SCRA 448.

25 Cf. According to Article VII, Section 10, par. (2) of the 1935 Constitution:

"The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law." The relevant provision of the present Constitution is found in Article IX, Section 12. It reads thus: "The Prime Minister shall be commander-in-chief of all armed forces of the Philippines and, whenever it

becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law."

26 Proclamation No. 1081, September 21, 1972.

27 Lansang vs. Garcia, L-33964, December 11, 1971, 42 SCRA 448, 473-474.

28 Ibid, 474-475.

29 Ibid, 505-506.

30 Ibid, 479-480.

31 Ibid, 507-508.

32 Article XVII, Section 3, par. (2) of the Constitution.

33 Ibid.

34 93 Phil. 68 (1953).

35 Republic Act No. 342 (1948).

36 93 Phil. 68, 82.

37 Bridges vs. California, 314, US 252, 304.

38 Villavicencio vs. Lukban, 39 Phil. 778, 790 (1919).

39 3 Willoughby on the Constitution of the United States, 1591(1929)

40 Story, Commentaries on the Constitution of the United States 3rd ed. (1858).

41 Ex parte Milligan, 4 Wall. 2.

42 Sterling vs. Constantin, 287 US 378

43 Duncan vs. Kahanamoku, 327 US 304.

44 Cf. Dodd, Cases on Constitutional 520-528 (1949) Dowling, Cases on Constitutional Laws, 446-456 (1950); Sholley, Cases on Constitutional Law, 285-295 (1951); Frank, Cases on Constitutional Law, 257-261, 270 (1952); Freund, Sutherland, Howe, Brown, Constitutional Law, 1646-1651, 1679-1693 (1954); Barrett, Bruton, Honnold, Constitutional Law, 1302-1308 (1963); Kauper, Constitutional Law, 276-284 (1966); Lockhart, Kamisar Choper, Constitutional Law, 1411-1418 (1970).

45 1 Cooley, Constitutional Limitations, 8th ed., 637, 758 (1926).

46 Watson on the Constitution of the United States (1910)

47 Burdick, The Law of the American Constitution, 261 (1922).

48 Willoughby on the Constitution of the United States, 2nd ed., 1591 (1929)

49 Willis on Constitutional Law, 449 (1936).

50 Schwartz, II The Powers of Government, 244 (1963).

51 Ibid, 246.

52 287 US 378, 402-403 (1932).

53 327 US 304, 322 (1946). The concurring opinion of Justice Murphy was similarly generous in its reference to Milligan. It is not to be lost sight of that the statutory provision in question was Section 87 of the Organic Act of Hawaii when it was still a territory. Nonetheless, since according to Justice Black, its language as well as its legislative history failed to indicate the scope of martial law, its interpretation was in accordance with the American constitutional tradition as embodied in Milligan.

54 Dicey, The Law of the Constitution, 287-288 (1962)

55 Ibid. 288.

56 Rossiter, Constitutional Dictatorship, 9 (1948).

57 212 US 78 (1909).

58 Ibid., 85.

59 Ibid.

60 264 US 543 (1924).

61 Ibid. 547-548

62 Rostow, The Sovereign Prerogative, 235 (1983). The work of Fairman quoted is the Law of Martial Rule, 217-218 (1943).

63 Laiswel National Security and Individual Freedom 151 (1950).

64 4 Wall 123 (1866).

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SEPARATE OPINION

TEEHANKEE, J.:

Prefatory statement: This separate opinion was prepared and scheduled to be promulgated with the judgment of the Court (penned by the Chief Justice) on September 12, 1974. Such promulgation was however overtaken by the welcome news of the release from detention on September 11, 1974 of petitioner Jose W. Diokno upon the order of President Ferdinand E. Marcos; and the Court then resolved to defer promulgation until the following week. Hence, Part I of this opinion dealing with the Diokno petition should be read in such time context.

The two other parts thereof of dealing with the Aquino and Rodrigo cases are to be read as of the actual date of promulgation, since they reiterate a main theme of the opinion that the Court should adhere to file well-grounded principle of not ruling on constitutional issues except when necessary in an appropriate case. In the writer's view,

the gratifying development in the Diokno case which rendered his petition moot by virtue of his release once more demonstrates the validity of this principle.

I. On the Diokno petition: I vote for the granting of petitioner Jose W. Diokno's motion of December 29, 1973 to withdraw the petition for habeas corpus filed on September 23, 1972 on his behalf and the supplemental petition and motions for immediate release and for oral argument of June 29, 1973 and August 14, 1973 filed in support thereof, as prayed for.

1. The present action is one of habeas corpus and the detainee's own withdrawal of his petition is decisive. If the detainee himself withdraws his petition and no longer wishes this Court to pass upon the legality of his detention and cites the other pending habeas corpus cases which have not been withdrawn and wherein Court can rule on the constitutional issues if so minded,[1] such withdrawal of a habeas corpus petition should be granted practically as a matter of absolute right (whatever be the motivations therefor) in the same manner that the withdrawal motions of the petitioners in the other cases were previously granted by the Court.[2]

Since there were seven (7) members of the Court who voted for granting the withdrawal motion as against five (5) members who voted for denying the same and rendering a decision,[3] I submit that this majority of seven (7) out of the Court's membership of twelve (12) is a sufficient majority for granting the withdrawal prayed for. A simple majority of seven is legally sufficient for the granting of a withdrawal of a petition, since it does not involve the rendition of a decision on the merits. It is only where a decision is to be rendered on the merits by the Court en banc that the 1973 Constitution requires the concurrence of at least eight (8) members.[4]

I therefore dissent from the majority's adhering to the five-member minority view that the majority of members seven is not legally sufficient for granting withdrawal and that a decision on the merits be rendered notwithstanding the withdrawal of the petition.

2. The granting of the withdrawal of the petition is but in consonance with the fundamental principle on the exercise of judicial power which, in the words of the Solicitor-General, "as Justice Laurel emphasized, is justifiable only as a necessity for the resolution of an actual case and controversy and therefore should be confined to the very *lis mota* presented." [5]

Such withdrawal is furthermore in accord with the respondents' stand from the beginning urging the Court not to take cognizance (for want of jurisdiction or as a matter of judicial restraint citing Brandeis' injunction that "The most important thing we decide is what not to decide"[6]) or that "at the very least, this Court should postpone consideration of this case until the present emergency is over." [7]

Many of the other petitioners in the habeas corpus cases at bar were granted leave to withdraw their petitions. Petitioner Diokno's withdrawal motion should likewise be granted in line with the well-established doctrine that the Court will not rule on constitutional issues except when necessary in an appropriate case.

3. But the Solicitor-General now objects to the withdrawal on the ground of public interest and that "this Tribunal . . . has been used as the open forum for underground propaganda by those who have political axes to grind" with the circulation of the withdrawal motion and that this Court would be "putting the seal of approval" and in effect admit the "unfair, untrue and contemptuous" statements made in the withdrawal motion should this Court grant the withdrawal.[8] I see no point in the position taken by the Solicitor-General of urging the Court to deny the withdrawal motion only to render a decision that would after all dismiss the petition and sustain respondents' defense of political question and have the Court declare itself without jurisdiction to adjudicate the constitutional issues presented[9] and asking the Court to embrace the "pragmatic method" of William James which "rejects ... the a priori assumption that there are immutable principles of justice. It tests a proposition by its practical consequences." [10]

The objections are untenable.

The public interest objection is met by the fact that there are still pending other cases (principally the prohibition case of petitioner Benigno S. Aquino, Jr. in another case, L-37364 questioning the filing of grave charges under the Anti-Subversion Act, etc. against him with a military commission^[11] and which is not yet submitted for decision) where the same constitutional issues may be resolved.

The other objections are tenuous: The Solicitor-General refutes his own objections in his closing statement in his comment that "for their part, respondents are confident that in the end they would be upheld in their defense, as indeed petitioner and counsel have practically confessed judgment in this case."^[12]

The propaganda objection is not a valid ground for denying the withdrawal of the petition and should not be held against petitioner who had nothing whatsoever to do with it.

The objection that granting the withdrawal motion would amount to an admission of the "unfair, untrue and contemptuous statements" made therein is untenable since it is patent that granting the withdrawal motion per se (regardless of petitioner's reasons) does not amount to an admission of the truth or validity of such reasons and as conceded by the Solicitor-General, neither will denying the withdrawal motion per se disprove the reasons.^[13] The untruth, unfairness or contumacy of such reasons may best be dealt with, clarified or expounded by the Court and its members in the Court's resolution granting withdrawal or in the separate opinions of the individual justices (as has actually been done and which the writer will now proceed to do).

4. Petitioner's first reason for withdrawal is subjective. After mentioning various factors, particularly, the fact that five of the six justices (including the writer) who held in the Ratification cases^[14] that the 1973 Constitution had not been validly ratified had taken on October 29, 1973 an oath to support and defend the new Constitution, he expresses his feeling that "(I) cannot reasonably expect either right or reason law or justice, to prevail in my case," that "the unusual length of the struggle also indicates that its conscience is losing the battle" and that "since I do not wish to be a party to an adverse decision, I must renounce every possibility of favorable judgment."^[15] A party's subjective evaluation of the Court's action is actually of no moment, for it has always been recognized that this Court, possessed of neither the sword nor the purse, must ultimately and objectively rest its authority on sustained public confidence in the truth, justice, integrity and moral force of its judgments.^[16]

Petitioner's second reason for withdrawal reads: "(S)econd, in view of the new oath that its members have taken, the present Supreme Court is a new Court functioning under a new 'Constitution,' different from the Court and the Constitution under which I applied for my release. I was willing to be judged by the old Court under the old Constitution, but not by the new Court under the new Constitution.

Petitioner is in error in his assumption that this Court is a "new Court functioning under a new Constitution different from the Court and the Constitution under which [he] applied for [his] release." The same Supreme Court has continued save that it now operates under Article X of the 1973 Constitution which inter alia increased its component membership from eleven to fifteen and transferred to it administrative supervision over all courts and personnel thereof with the power of discipline and dismissal over judges of inferior courts in the same manner that the same Republic of the Philippines of which the Supreme Court is but a part has continued in existence but now operates under the 1973 Constitution.'¹⁸

During the period of ninety days that the Ratification cases were pending before the Court until its dismissal of the cases per its resolution of March 31, 1973 became final on April 17, 1973, the Executive Department was operating under the 1973 Constitution in accordance with President Ferdinand E. Marcos' Proclamation No. 1102 on January 17, 1973 announcing the ratification and coming into effect of the 1973 Constitution while this Court as the only other governmental department continued to operate under the 1935 Constitution pending its final resolution on the said cases challenging the validity of Proclamation No. 1102 and enforcement of the new

Constitution. (As per the Court's resolution of January 23, 1973, it declined to take over from the Department of Justice the administrative supervision over all inferior courts expressing its sense that "it is best that the status quo be maintained until the case aforementioned (Javellana vs. Exec. Secretary) shall have been finally resolved . . .")

Such a situation could not long endure wherein the only two great departments of government, the Executive and the Judicial,¹⁹ for a period of three months were operating under two different Constitutions (presidential and parliamentary). When this Court's resolution of dismissal of the Ratification cases by a majority of six to four Justices became final and was entered on April 18, 1973 "with the result that there (were) not enough votes to declare that the new Constitution is not in force,²⁰ the Court and particularly the remaining three dissenting Justices (notwithstanding their vote with three others that the new Constitution had not been validly ratified²¹ had to abide under the Rule of Law by the decision of the majority dismissing the cases brought to enjoin the enforcement by the Executive of the new Constitution and had to operate under it as the fundamental charter of the government, unless they were to turn from legitimate dissent to internecine dissidence for which they have neither the inclination nor the capability.

The Court as the head of the Judicial Department thenceforth assumed the power of administrative supervision over all courts and all other functions and liabilities imposed on it under the new Constitution. Accordingly, this Court and all other existing inferior courts continue to discharge their judicial function and to hear and determine all pending cases filed or submitted under the old (1935) Constitution²² as well as new cases under the new (1973) Constitution with the full support of the members of the Integrated Bar of the Philippines (none of whom has made petitioner's claim that this is a "new Court" different from the "old Court").

A major liability imposed upon all members of the Court and all other officials and employees was that under Article XVII, section 9 of the Transitory Provisions²³ which was destructive of their tenure and called upon them "to vacate their respective offices upon the appointment and qualification of their successors." Their taking the oath on October 29, 1973 "to preserve and defend the new Constitution" by virtue of their "having been continued in office"²⁴ on the occasion of the oath-taking of three new members of the Court²⁵ pursuant to Article XV, section 426 was meant to assure their "continuity of tenure" by way of the President having exercised the power of replacement under the cited provision and in effect replaced them with themselves as members of the Court with the same order of seniority.²⁷

5. The withdrawal in effect gives cause for judicial abstention and further opportunity (pending submittal for decision of the Aquino prohibition case in L-37364) to ponder and deliberate upon the host of grave and fundamental constitutional questions involved which have thereby been rendered unnecessary to resolve here and now.

In the benchmark case of *Lansang vs. Garcia*²⁸ when the Court declared that the President did not act arbitrarily in issuing in August, 1971 Proclamation No. 889, as amended, suspending the privilege of the writ of habeas corpus for persons detained for the crimes of insurrection or rebellion and other overt acts committed by them in furtherance thereof, the Court held through then Chief Justice Concepcion that "our next step would have been the following: The Court, or a commissioner designated by it, would have received evidence on whether — as stated in respondents' 'Answer and Return' — said petitioners had been apprehended and detained 'on reasonable belief' that they had participated in the crime of insurrection or rebellion.' "

(However, since in the interval of two months during the pendency of the case, criminal complaints had been filed in court against the petitioners-detainees (Luzvimindo David, Gary Olivar, et al.), the Court found that "it is best to let said preliminary examination and/or investigation be completed, so that petitioners' release could be ordered by the court of first instance, should it find that there is no probable cause against them, or a warrant for their arrest could be issued should a probable cause be established against them."²⁹ The Court accordingly ordered the

trial court "to act with utmost dispatch" in conducting the preliminary investigation for violation of the Anti-Subversion Act and "to issue the corresponding warrants of arrest, if probable cause is found to exist against them, or otherwise, to order their release.")

Can such a procedure for reception of evidence on the controverted allegations concerning the detention as indicated in *Lansang* be likewise applied to petitioner's case considering his prolonged detention for almost two years now without charges?³⁰ It should also be considered that it is conceded that even though the privilege of the writ of habeas corpus has been suspended, it is suspended only as to certain specific crimes and the "answer and return" of the respondents who hold the petitioner under detention is not conclusive upon the courts which may receive evidence and determine as held in *Lansang* (and as also provided in the Anti-Subversion Act [Republic Act 1700]) whether a petitioner has been in fact apprehended and detained arbitrarily or "on reasonable belief" that he has "participated in the crime of insurrection or rebellion" or other related offenses as may be enumerated in the proclamation suspending the privilege of the writ.

Pertinent to this question is the Court's adoption in *Lansang* of the doctrine of *Sterling vs. Constantin*³¹ enunciated through U.S. Chief Justice Hughes that even when the state has been placed under martial law "... (W)hen there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. 3. sec. 2) and, so extending, the court has all the authority appropriate to its exercise. . ."

Equally pertinent is the Court's statement therein announcing the members' unanimous conviction that it has the authority to inquire into the existence of said factual bases [stated in the proclamation suspending the privilege of the writ of habeas corpus or placing the country under martial law as the case may be, since the requirements for the exercise of these powers are the same and are provided in the very same clause] in order to determine the constitutional sufficiency thereof."³² The Court stressed therein that "indeed, the grant of power to suspend the privilege is neither absolute nor unqualified. The authority conferred upon by the Constitution, both under the Bill of Rights and under the Executive Department, is limited and conditional. The precept in the Bill of Rights establishes a general rule, as well as an exception thereto. What is more, it postulates the former in the negative evidently to stress its importance, by providing that '(t)he privilege of the writ of habeas corpus shall not be suspended ...' It is only by way of exception that it permits the suspension of the privilege 'in cases of invasion, insurrection, or rebellion' — or under Art. VII of the Constitution imminent danger thereof — 'when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist.' Far from being full and plenary, the authority to suspend the privilege of the writ is thus circumscribed, confined and restricted, not only by the prescribed setting or the conditions essential to its existence, but, also, as regards the time when and the place where it may be exercised. These factors and the aforementioned setting or conditions mark, establish and define the extent, the confines and the limits of said power, beyond which it does not exist. And like the limitations and restrictions imposed, by the Fundamental Law upon the legislative department, adherence thereto and compliance therewith may, within proper bounds, be inquired into by the courts of justice. Otherwise, the explicit constitutional provisions thereon would be meaningless. Surely, the framers of our Constitution could not have intended to engage in such a wasteful exercise in futility."³³

While a state of martial law may bar such judicial inquiries under the writ of habeas corpus in the actual theater of war, would the proscription apply when martial law is maintained as an instrument of social reform and the civil courts (as well as military commissions) are open and freely functioning?

What is the extent and scope of the validating provision of Article XVII, section 3(2) of the Transitory Provisions

of the 1973 Constitution?³⁴

Granting the validation of the initial preventive detention would the validating provision cover indefinite detention thereafter or may Inquiry be made as to its reasonable relation to meeting the emergency situation?

What rights under the Bill of Rights, e.g. the rights to due process and to "speedy, impartial and public trial"³⁵ may be invoked under the present state of martial law?

Is the exercise of martial law powers for the institutionalization of reforms incompatible with recognizing the fundamental liberties granted in the Bill of Rights?

The President is well aware of the layman's view of the "central problem of constitutionalism in our contemporary society . . . whether or not the Constitution remains an efficient instrument for the moderation of conflict within society. There are two aspects of this problem. One is the regulation of freedom in order to prevent anarchy. The other is the limitation of power in order to prevent tyranny."³⁶

Hence, he has declared that "The New Society looks to individual rights as a matter of paramount concern, removed from the vicissitudes of political controversy and beyond the reach of majorities. We are pledged to uphold the Bill of Rights and as the exigencies may so allow, we are determined that each provision shall be executed to the fullest,"³⁷ and has acknowledged that "martial law necessarily creates a command society [and] is a temporary constitutional expedient of safeguarding the republic . . ."³⁸

He has thus described the proclamation of martial law and "the setting up of a corresponding crisis government" as "constitutional authoritarianism," which is a recognition that while his government is authoritarian it is essentially constitutional and recognizes the supremacy of the new Constitution.

He has further declared that "martial law should have legally terminated on January 17, 1973 when the new Constitution was ratified", but that "the popular clamor manifested in the referendum (was) that the National Assembly be temporarily suspended" and the reaction in the July, 1973 referendum "was violently against stopping the use of martial law powers," adding that "I intend to submit this matter at least once a year to the people, and when they say we should shift to the normal functions of government, then we will do so."³⁹

The realization of the prospects for restoration of normalcy and full implementation of each and every provision of the Bill of Rights as pledged by the President would then hopefully come sooner rather than later and provides an additional weighty reason for the exercise of judicial abstention under the environmental circumstances and for the granting of the withdrawal motion.

II. In the Aquino case: I maintain my original vote as first unanimously agreed by the Court for dismissal of the habeas corpus petition of Benigno S. Aquino, Jr. on the ground that grave, charges against him for violation of the Anti-Subversion Act (Republic Act 1700), etc. were filed in August 1973 and hence the present petition has been superseded by the prohibition case then filed by him questioning the filing of the charges against him with a military commission rather than with the civil courts (which case is not yet submitted for decision).

The said prohibition case involves the same constitutional issues raised in the Diokno case and more, concerning the constitutionality of having him tried by a military commission for offenses allegedly committed by him long before the declaration of martial law. This is evident from the special and affirmative defenses raised in respondents' answer therein filed just last August 21, 1974 by the Solicitor General which reiterate the same defenses in his answer to the petition at bar. Hence, the same constitutional issues may well be resolved if necessary in the decision yet to be rendered by the Court in said prohibition case.

I therefore dissent from the subsequent vote of the majority to instead pass upon and resolve in advance the said

constitutional issues unnecessarily in the present case.

III. In the Rodrigo case: I submit that the habeas corpus petition of Francisco "Soc" Rodrigo as well as the petitions of those others similarly released should be dismissed for having been rendered moot and academic by virtue of their release from physical confinement and detention. That their release has been made subject to certain conditions (e.g. not being allowed to leave the Greater Manila area without specific authorization of the military authorities) does not mean that their action would survive, since "(T)he restraint of liberty which would justify the issuance of the writ must be more than a mere moral restraint; it must be actual or physical."⁴⁰ They may have some other judicial recourse for the removal of such restraints but their action for habeas corpus cannot survive since they are no longer deprived of their physical liberty. For these reasons and those already expounded hereinabove, I dissent from the majority vote to pass upon and resolve in advance the constitutional issues unnecessarily in the present case.

[1] Petitioner's Reply to Solicitor General Comment dated March 7, 1974. pp. 40-41

[2] Idem, pp. 39-40: see L-35556, L-35567 and L-35571 where petitions were withdrawn with leave of the Court

[3] Makalintal, C.J. and Zaldivar, Fernando, Teehankee, Barredo, Muñoz Palma and Aquino, JJ voted for granting the withdrawal motion Castro, Makasiar, Antonio, Esguerra and Fernandez, JJ voted for denial of the motion

[4] Article X, section 2, which further requires the concurrence of at least ten (10) members to declare unconstitutional a treaty, executive agreement of law

[5] Respondents' comment of Jan. 17, 1974 on motion to withdraw petition, p. 6.

[6] Idem, p. 5.

[7] Respondents' memorandum of Nov. 17, 1972, pp. 41-47.

[8] Respondents' comment of Jan. 17, 1974, pp. 3, 5 and 16. The Solicitor-General's line of argument: "(T)he charge in the case at bar goes to the very foundations of our system of justice and the respect that is due to it. It is subversive of public confidence in the impartiality and independence of courts and tends to embarrass the administration of justice. As has been aptly said, 'The Court's authority -- possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.' (Baker vs. Carr. 369 U.S. 186, 266, 267, Frankfurter. J. dissenting [1962].)"

"Unless, therefore, the charge is rectified anything this Court will do in the case at bar is likely to be misconstrued in the public mind. If this Court decides this case and renders judgment against petitioner its decision is likely to be misinterpreted either as a vindictive action taken against the petitioner or as proving his charge. If it grants the Motion to Withdraw it will be confessing the very judgment expressed by the Petitioner — that this Court cannot do justice in this case. Perhaps the only way open for it would be to render judgment for the petitioner, although then others will likely think that the Court is reacting to the charge. 'It is this harmful obstruction and hindrance that the judiciary strives to avoid, under penalty of contempt,' as this Court explained in another case. (Herras Teehankee vs. Director of Prisons, re Antonio Quirino, 76 Phil. 630 (1946))"

[9] Solicitor-General's Reply to petitioner's comment (re Manifestation) dated June 10, 1974, pp. 2-4.

[10] Respondents' Reply to Petitioner's Sur-Rejoinder (re motion to withdraw) dated June 10, 1974, pp. 5-6, citing James, What Pragmatism Means in Human Experience and its Problems Introductory Readings in Philosophy. 23.

25 (A. Tsambassis. ed. 1967.)

[11] Filed on August 23, 1973

[12] Respondents' comment of Jan. 17, 1974, p. 17; emphasis supplied.

[13] Solicitor-General's Reply to petitioner's comment, dated June 10, 1974, p. 13

[14] Javellana vs. Exec. Secretary L-36142, et al., Mar. 31, 1973.

[15] Petitioner's withdrawal motion of Dec. 29, 1973. pp. 3, 4 and 7.

[16] Thus, on April 7, 1973, after its decision of March 31, 1973 dismissing the Ratification cases, acting upon the urgent petition of the wives of petitioners Diokno and Aquino that their visitation privileges had been suspended and that they had lost all contact for over a month with the detainees whose personal effects were returned to their homes, the Court in Case L-36315 "upon humanitarian considerations resolved unanimously to grant pending further action by this Court, that portion of the prayer in petitioner's "Supplement and/or amendment to petition filed on April 6, 1973 that the wives and minor children of petitioners Diokno and Aquino be allowed to visit them, subject to such precautions as respondents may deem necessary."

17 Petitioner's withdrawal motion. pp. 6-7

18 Subject to the transitory provisions of Article XVII.

19 Congress no longer convened on January 22, 1973 as ordained by the 1935 Constitution; see Roxas vs. Executive Secretary, L-36165, March 31, 1973, with a majority of its members opting to serve in the abortive Interim National Assembly under Art. XVII, sec. 2 of the 1973 Constitution.

20 Javellana vs. Exec. Secretary, 30 SCRA 30, 141

21 Justices Zaldivar, Fernando and the writer, with Chief Justice Concepcion, retired and now Chief Justice Makalintal and Justice Castro

22 Article XVII, sec. 8, 1973 Constitution.

23 "SEC. 9. All officials and employees in the existing Government of the Republic of the Philippines shall continue in office until otherwise provided by law or decreed by the incumbent President of the Philippines, but all officials whose appointments are by this Consitution vested in the Prime Minister shall vacate their respective offices upon the appointment and qualification of their successors."

24 "na pinapagpatuloy sa panunungkulan" as stated in the original oath in Pilipino.

Fernandez, Munoz Palma and Aquino, JJ.

25 "SEC. 4. All public officers and employees and members of the armed forces shall take an oath to support and defend the Constitution."

27 See Phil. Express, Times Journal and Bulletin Today issues of Oct. 30. 1973. The Court and the Integrated Bar have since then petitioned the President to extend likewise the same security of tenure to all other judges of inferior courts from the Court of Appeals down by setting a time limit to the exercise of his power of summary replacement.

28 42 SCRA 448, 462, 492.

29 Except Justice Fernando who opined that "(B)y the same token, if and when formal complaint is presented, the court steps in and the executive steps out. The detention ceases to be an executive and becomes a judicial concern. Thereupon the corresponding court assumes its role and the judicial process takes its course to the exclusion of the executive or the legislative departments. Henceforward, the accused is entitled to demand all the constitutional safeguards and privileges essential to due process." citing Justice Tuazon's opinion in *Nava vs. Gatmaitan*, 90 Phil. 172 (1951).

30 Since September 23, 1972.

31 287 U.S. 375, 385; emphasis copied from *Lansang*, 42 SCRA at p. 473.

32 Referring to the requirements of Art. III, sec. 1, par. 14 and Art. VII, sec. 11, par. 2 of the 1935 Constitution, now Art. IV, sec. 15 and Art. IX, sec. 12 of the 1973 Constitution, respectively. The commander-in-chief clause in both Constitutions is identical and reads.

"SEC. 12. The Prime Minister (President) shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place, the Philippines or any part thereof under martial law." (Art. IX, sec. 12 1973 Constitution and Art. VII, sec. 11(2) 1935 Constitution).

33 42 SCRA at pp. 473-474; emphasis copied.

34 "SEC. 3. (2) All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after lifting of martial law or the ratification of this Constitution, unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly."

35 Art. IV, sec. 1 and 19, Bill of Rights, 1973 Constitution.

36 Salvador P. Lopez, U.P. president's keynote address. Dec. 3, 1973 at the U.P. Law Center Series on the 1973 Constitution.

37 President Marcos: "Democracy: a living ideology" delivered May 25, 1973 before the U.P. Law Alumni Association; *Times* journal issue of May 28, 1973.

38 President Marcos: Foreword, *Notes on the New Society*, p. VI

39 U.S. News and World Report, interview with President Marcos, reported in *Phil. Sunday Express* issue of August 18, 1974.

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