

BENIGNO S. AQUINO, JR., PETITIONER VS. MILITARY COMMISSION NO. 2, CHIEF OF STAFF, ARMED FORCES OF THE PHILIPPINES, AND SECRETARY OF NATIONAL DEFENSE, THE CHIEF JUSTICE OF THE SU...*G.R. No. L-37364. May 09, 1975*

Ponente: ANTONIO, J.

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Following the proclamation of martial law in the Philippines, petitioner was arrested on September 23, 1972, pursuant to General Order No. 2-A of the President for complicity in a conspiracy to seize political and state power in the country and to take over the Government. He was detained at Fort Bonifacio in Rizal province. On September 25, 1972, he sued for a writ of habeas corpus[1] in which he questioned the legality of the proclamation of martial law and his arrest and detention. This Court issued a writ of habeas corpus, returnable to it, and required respondents to file their respective answers, after which the case was heard. Thereafter, the parties submitted their memoranda. Petitioner's last Reply memorandum was dated November 30, 1972. On September 17, 1974, this Court dismissed the petition and upheld the validity of martial law and the arrest and detention of petitioner.[2]

In the present case, petitioner challenges the jurisdiction of military commissions to try him, alone or together with others, for illegal possession of firearms, ammunition and explosives, for violation of the Anti-Subversion Act and for murder. The charges are contained in six (6) amended charge sheets[3] filed on August 14, 1973 with Military Commission No. 2.

The original petition in this case was filed on August 23, 1973. It sought to restrain the respondent Military Commission from proceeding with the hearing and trial of petitioner on August 27, 1973. Because of the urgency of the petition, this Court called a hearing on Sunday, August 26, on the question of whether with its membership of only nine (9) Justices, it had a quorum to take cognizance of the petition in view of the constitutional questions involved. At that hearing, this Court asked the parties to agree to seek from the Military Commission a postponement of petitioner's trial the following day. The purpose was to relieve the Court of the pressure of having to decide the question of quorum without adequate time to do so.

When the proceedings before the Military Commission opened the following day, however, petitioner questioned the fairness of the trial and announced that he did not wish to participate in the proceedings even as he discharged both his defense counsel of choice and his military defense counsel.

The proceedings were thereupon adjourned to another day. In the meantime, for the petitioner's assurance, a Special Committee, composed of a retired Justice of the Supreme Court, to be designated by the Chief Justice, as Chairman, and four (4) members to be designated respectively by petitioner, the President of the Integrated Bar of the Philippines, the Secretary of Justice and the Secretary of National Defense, was created to reinvestigate the charges against petitioner. The Secretaries of Justice and National Defense designated their representatives but the

petitioner refused to name his. The Chief Justice asked former Justice J.B.L. Reyes but the latter declined, as he also declined in his capacity as President of the IBP to designate a representative to the Committee. As a result, with only two of its members designated, the Special Committee has not been able to function.

On September 4, 1973, a supplemental petition alleging the creation of the Special Committee and questioning the legality of its creation was filed. The Chief Justice of the Supreme Court and the Secretary of Justice were included as respondents. Subsequently, the Court resolved to require the respondents to file their answer and on August 21, 1974, within the extended period granted by the Court, respondents, with the exception of the Chief Justice, filed their answer to the supplemental petition.

Thereafter, petitioner was required to file a reply and was granted additional time after the lapse of the original period, but instead of doing so, petitioner asked for the admission of a second supplemental petition challenging the continued enforcement of martial law in the Philippines, in the light of Presidential statements to the effect that with the coming into force of the new Constitution on January 17, 1973, martial law was "technically and legally" lifted. To this petition respondents answered. Thereafter, the parties submitted their respective memoranda in lieu of oral argument as per Resolution of this Court on January 14, 1975.[4]

On March 24, 1975, petitioner filed an "Urgent Motion for Issuance of Temporary Restraining Order Against Military Commission No. 2", praying that said Commission be prohibited from proceeding with the perpetuation of testimony under its Order dated March 10, 1975, the same being illegal, until further orders from the Supreme Court.

On March 31, 1975, respondents filed their Comment to petitioner's aforementioned urgent motion, which motion and other related incidents were set for hearing on April 14, 1975 at 10:00 a.m., as per Resolution of this Court on April 8, 1975.

Meanwhile, or on April 1, 1975, this Court issued a Resolution, stating that "for lack of a necessary quorum", it could not act on petitioner's Urgent Motion for Issuance of Temporary Restraining Order Against Military Commission No. 2, inasmuch as this case involved a constitutional question.

On April 7, 1975, petitioner filed a "Manifestation" stating, among others, that the "Urgent Motion did not and does not involve a constitutional question", for reasons stated therein.

On April 12, 1975, respondents filed their "Reply to Petitioner's Manifestation", followed by Respondents' Manifestation filed on April 14, 1975, attaching thereto fourteen (14) sworn statements of witnesses whose testimonies are sought to be perpetuated.

On April 14, 1975, this Court also issued a restraining order against respondent Military Commission No. 2, restraining it from further proceeding with the perpetuation of testimony under its Order dated March 10, 1975 until the matter is heard and further orders are issued.

When this case was called for hearing, petitioner's counsel presented to this Court a motion to withdraw the petition, as well as all other pending matters and/or incidents in connection therewith. Respondents' counsel interposed objections to the granting of the aforesaid motion to withdraw.

After the hearing, this Court Resolved: "(a) to require the Solicitor General to furnish the Court as well as the petitioner and the latter's counsel, with copies of the transcript of all the stenographic notes taken at the hearing before the Military Commission No. 2 for the perpetuation of the testimony of the witnesses for the prosecution in various criminal cases filed against herein petitioner, within five (5) days from today; (b) to request the Solicitor General and the AFP Judge Advocate General to make the necessary arrangements for the petitioner to confer

with his counsel on matters connected with the aforementioned motion to withdraw; (c) to allow counsel for the petitioner, if they so desire, to file a manifestation in amplification of the aforesaid motion to withdraw, within ten (10) days from the date they confer with the petitioner, and thereafter to allow the Solicitor General to file a counter-manifestation within ten (10) days from receipt of a copy thereof; and (d) to consider the case submitted for decision after submission by both parties of their respective pleadings on the motion to withdraw."

Subsequently, the parties manifested their compliance.

I

Acting on petitioner's motion to withdraw the petitions and motions in this case, and there being only three (3) Justices (Justices Fernando, Teehankee and Munoz Palma) who voted in favor of granting such withdrawal, whereas seven (7) Justices (Justices Castro, Barredo, Antonio, Esguerra, Aquino, Concepcion and Martin) voted for its denial, the said motion to withdraw is deemed denied (Section 11, Rule 56 of the Revised Rules of Court). The Chief Justice has inhibited himself, having been made respondent by petitioner his Supplemental Petitions.[5]

The Justices who voted to deny the withdrawal are of the opinion that since all matters in issue in this case have already been submitted for resolution, and they are of paramount public interest, it is imperative that the questions raised by petitioner on the constitutionality and legality of proceedings against civilians in the military commissions, pursuant to pertinent General Orders, Presidential Decrees and Letters of Instruction, should be definitely resolved.

In regard to the merits, We Resolve by a vote of eight (8) Justices to dismiss the main as well as the supplemental petitions.^{5-A}

II

MILITARY COMMISSIONS

We hold that the respondent Military Commission No. 2 has been lawfully constituted and validly vested with jurisdiction to hear the cases against civilians, including the petitioner.

1. The Court has previously declared that the proclamation of Martial Law (Proclamation No. 1081) on September 21, 1972, by the President of the Philippines is valid and constitutional and that its continuance is justified by the danger posed to the public safety.⁶

2. To preserve the safety of the nation in times of national peril, the President of the Philippines necessarily possesses broad authority compatible with the imperative requirements of the emergency. On the basis of this, he has authorized in General Order No. 8 (September 27, 1972) the Chief of Staff, Armed Forces of the Philippines, to create military tribunals to try and decide cases "of military personnel and such other cases as may be referred to them." In General Order No. 12 (September 30, 1972), the military tribunals were vested with jurisdiction "exclusive of the civil courts", among others, over crimes against public order, violations of the Anti-Subversion Act, violations of the laws on firearms, and other crimes which, in the face of the emergency, are directly related to the quelling of the rebellion and preservation of the safety and security of the Republic. In order to ensure a more orderly administration of justice in the cases triable by the said military tribunals, Presidential Decree No. 39 was promulgated on November 7, 1972, providing for the "Rules Governing the Creation, Composition, Jurisdiction, Procedure and Other Matters Relevant to Military Tribunals". These measures he had the authority to promulgate, since this Court recognized that the incumbent President, under paragraphs 1 and 2 of Section 3 of Article XVII of the new Constitution, had the authority to "promulgate proclamations, orders and decrees during

the period of martial law essential to the security and preservation of the Republic, to the defense of the political and social liberties of the people and to the institution of reforms to prevent the resurgence of the rebellion or insurrection or secession or the threat thereof . . . "7 Pursuant to the aforesaid Section 3[1] and [2] of Article XVII of the Constitution, General Orders No. 8, dated September 27, 1972 (authorizing the creation of military tribunals), No. 12, dated September 30, 1972 (defining the jurisdiction of military tribunals and providing for the transfer from the civil courts to military tribunals of cases involving subversion, sedition, insurrection or rebellion, etc.), and No. 39, dated November 7, 1972, as amended (prescribing the procedures before military tribunals), are now "part of the law of the land."8

3. Petitioner nevertheless insists that he being a civilian, his trial by a military commission deprives him of his right to due process, since in his view the due process guaranteed by the Constitution to persons accused of "ordinary" crimes means judicial process. This argument ignores the reality of the rebellion and the existence of martial law. It is, of course, essential that in a martial law situation, the martial law administrator must have ample and sufficient means to quell the rebellion and restore civil order. Prompt and effective trial and punishment of offenders have been considered as necessary in a state of martial law, as a mere power of detention may be wholly inadequate for the exigency,⁹ "It need hardly be remarked that martial law lawfully declared," observed Winthrop, "creates an exception to the general rule of exclusive subjection to the civil jurisdiction, and renders offences against the laws of war, as well as those of a civil character, triable, at the discretion of the commander, (as governed by a consideration for the public interests and the due administration of justice) by military tribunals."¹⁰

Indeed, it has been said that in time of overpowering necessity, "Public danger warrants the substitution of executive process for judicial process."¹¹ According to Schwartz, "The immunity of civilians from military jurisdiction must, however, give way in areas governed by martial law. When it is absolutely imperative for public safety, legal processes can be superseded and military tribunals authorized to exercise the jurisdiction normally vested in courts."¹²

In any case, We cannot close Our eyes to the fact that the continued existence of these military tribunals and the exercise by them of jurisdiction over civilians during the period of martial law are within the contemplation and intendment of Section 3, paragraph 2 of Article XVII of the Constitution. These are tribunals of special and restricted jurisdiction created under the stress of an emergency and national security. This is the only logical way to construe said Section 3, paragraph 2 of Article XVII of the Constitution, in relation to General Order Nos. 8, 12 and 39, in the context of contemporary history and the circumstances attendant to the framing of the new charter.

4. When it has been established that martial law is in force, the responsibility for all acts done thereunder must be taken by the authorities administering it.¹³ It is a serious responsibility which merits the cooperation of all in the collective desire for the restoration of civil order. In the case at bar, petitioner is charged with having conspired with certain military leaders of the communist rebellion to overthrow the government, furnishing them arms and other instruments to further the uprising. There is no question that the continuing communist rebellion was one of the grave threats to the Republic that brought about the martial law situation. Under General Order No. 12, jurisdiction over this offense has been vested exclusively upon military tribunals. It cannot be said that petitioner has been singled out for trial for this offense before the military commission. Pursuant to General Order No. 12, all "criminal cases involving subversion, sedition, insurrection or rebellion or those committed in furtherance of, on the occasion of, incident to or in connection with the commission of said crimes" which were pending in civil courts were ordered transferred to the military tribunals. This jurisdiction of the tribunal, therefore, operates equally on all persons in like circumstances.

5. Neither are We impressed with petitioner's argument that only thru a judicial proceeding before the regular

courts can his right to due process be preserved. The guarantee of due process is not a guarantee of any particular form of tribunal in criminal cases. A military tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend and trial before an impartial tribunal, adequately meet the due process requirement. Due process of law does not necessarily mean a judicial proceeding in the regular courts.¹⁴ The guarantee of due process, viewed in its procedural aspect, requires no particular form of procedure. It implies due notice to the individual of the proceedings, an opportunity to defend himself and "the problem of the propriety of the deprivations, under the circumstances presented, must be resolved in a manner consistent with essential fairness."¹⁵ It means essentially a fair and impartial trial and reasonable opportunity for the preparation of defense.¹⁶

Here, the procedure before the Military Commission, as prescribed in Presidential Decree No. 39, assures observance of the fundamental requisites of procedural due process, due notice, an essentially fair and impartial trial and reasonable opportunity for the preparation of the defense.¹⁷

6. It is, however, asserted that petitioner's trial before the military commission will not be fair and impartial, as the President had already prejudged petitioner's cases and the military tribunal is a mere creation of the President, and "subject to his control and direction." We cannot, however, indulge in unjustified assumptions. Prejudice cannot be presumed, especially if weighed against the great confidence and trust reposed by the people upon the President and the latter's legal obligation under his oath to "do justice to every man". Nor is it justifiable to conceive, much less presume that the members of the military commission, the Chief of Staff of the Armed Forces of the Philippines, the Board of Review and the Secretary of National Defense, with their corresponding staff judge advocates, as reviewing authorities, through whom petitioner's hypothetical conviction would be reviewed before reaching the President, would all be insensitive to the great principles of justice and violate their respective obligations to act fairly and impartially in the premises.

This assumption must be made because innocence, not wrongdoing, is to be presumed. The presumption of innocence includes that of good faith, fair dealing and honesty. This presumption is accorded to every official of the land in the performance of his public duty. There is no reason why such presumption cannot be accorded to the President of the Philippines upon whom the people during this period has confided powers and responsibilities which are of a very high and delicate nature. The preservation of the rights guaranteed by the Constitution rests at bottom exactly where the defense of the nation rests: in the good sense and good will of the officials upon whom the Constitution has placed the responsibility of ensuring the safety of the nation in times of national peril.

III

ADMINISTRATIVE ORDER NO. 355

We also find that petitioner's claim that Administrative Order No. 355 actually "strips him of his right to due process" is negated by the basic purpose and the clear provisions of said Administrative Order. It was precisely because of petitioner's complaint that he was denied the opportunity to be heard in the preliminary investigation of his charges that the President created a Special Committee to reinvestigate the charges filed against him in the military commission. The Committee is to be composed of a retired Justice of the Supreme Court, to be designated by the Chief Justice, as Chairman, and four (4) members to be designated respectively by the accused, the President of the Integrated Bar, the Secretary of Justice and the Secretary of National Defense, all of whom, according to Administrative Order No. 355 "must be learned in the law, reputed for probity, integrity, impartiality, incorruptibility and fairness . . ." It is intended that the Committee should conduct the investigation with "utmost fairness, impartiality and objectivity" ensuring to the accused his constitutional right to due process, to determine whether "there is reasonable ground to believe that the offenses charged were in fact committed and the accused is

probably guilty thereof."

Petitioner, however, objected by challenging in his supplemental petition before this Court the validity of Administrative Order No. 355, on the pretense that by submitting to the jurisdiction of the Special Committee he would be waiving his right of cross-examination because Presidential Decree No. 77, which applies to the proceedings of the Special Committee, has done away with cross-examination in preliminary investigation.

The infirmity of this contention is apparent from the fact that the Committee "shall have all the powers vested by law in officials authorized to conduct preliminary investigations." We have held as implicit in the power of the investigating Fiscal or Judge in the discharge of his grave responsibility of ascertaining the existence of probable cause, is his right to cross-examine the witnesses since "cross-examination whether by the judge or by the prosecution supplies the gap by permitting an instant contrast of falsehoods and opposing half-truths, mixed with elements of truth, from which the examining judge or officer is better able to form a correct synthesis of the real facts."¹⁸

In the case at bar, petitioner's representative in the Committee, having been conferred with "all the powers" of officials authorized to conduct preliminary investigations, is, therefore, expressly authorized by Section 1[c] of Presidential Decree No. 77 to subpoena the complainant and his witnesses and "propound clarificatory questions". Viewed in the context of Our ruling in *Abrera vs. Munoz*,¹⁹ this implies the authority of his representative in the Committee to cross-examine the witnesses of the prosecution, in order to reach an intelligent and correct conclusion on the existence of probable cause.

IV

PRELIMINARY INVESTIGATION

Equally untenable is petitioner's contention that his constitutional right to due process has been impaired when the anti-subversion charges filed against him with the military commission were not investigated preliminarily in accordance with Section 5 of the Anti-Subversion Act, but in the manner prescribed by Presidential Decree No. 39, as amended by Presidential Decree No. 77. It is asserted that under the aforesaid Presidential Decrees, he is precluded from cross-examining the prosecution witnesses and from being assisted by counsel. Contrary to petitioner's contention, Section 1[b] of Presidential Decree No. 77 specifically grants him the right to counsel, and Presidential Decree No. 328 amended Presidential Decree No. 39, precisely to secure the substantial rights of the accused by granting him the right to counsel during preliminary investigation. Under Section 5 of Republic Act No. 1700, the accused shall have the right "to cross-examine witnesses against him" and in case the offense is penalized by prison mayor to death, the preliminary investigation shall be conducted by the proper Court of First Instance. As to whether or not the denial to an accused of an opportunity to cross-examine the witnesses against him in the preliminary investigation constitutes an infringement of his right to due process, We have to advert to certain basic principles. The Constitution "does not require the holding of preliminary investigations. The right exists only, if and when created by statute."²⁰ It is "not an essential part of due process of law."²¹ The absence thereof does not impair the validity of a criminal information or affect the jurisdiction of the court over the case.²² As a creation of the statute it can, therefore, be modified or amended by law.

It is also evident that there is no curtailment of the constitutional right of an accused person when he is not given the opportunity to "cross-examine the witnesses presented against him in the preliminary investigation before his arrest, this being a matter that depends on the sound discretion of the Judge or investigating officer concerned."²³

Speaking for the Court, Justice Tuason, in *Bustos vs. Lucero*,²⁴ discussed the matter extensively, thus:

"As applied to criminal law, substantive law is that which declares what acts are crimes and prescribes the punishment for committing them, as distinguished from the procedural law which provides or regulates the steps by which one who commits a crime is to be punished. (22 C.J.S., 49.) Preliminary investigation is eminently and essentially remedial; it is the first step taken in a criminal prosecution.

"As a rule of evidence, section 11 of Rule 108 is also procedural. Evidence — which is 'the mode and manner of proving the competent facts and circumstances on which a party relies to establish the fact in dispute in judicial proceedings' — is identified with and forms part of the method by which, in private law, rights are enforced and redress obtained, and, in criminal law, a law transgressor is punished. Criminal procedure refers to pleading, evidence and practice. (State vs. Capaci, 154 So., 419; 179 La., 462.) The entire rules of evidence have been incorporated into the Rules of Court. We can not tear down section 11 of Rule 108 on constitutional grounds without throwing out the whole code of evidence embodied in these Rules.

"In *Beazell vs. Ohio*, 269 U.S., 167, 70 Law. ed., 216, the United States Supreme Court said:

'Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. See *Calder vs. Bull*, 3 Dall. 386, 390, 1 L. ed., 648, 650; *Cummings vs. Missouri*, 4 Wall. 277, 326, 18 L. ed., 356, 364; *Kring vs. Missouri*, 107 U.S. 221, 228, 232, 27 L. ed., 507, 508, 510, 2 Sup. Ct. Rep., 443. And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. *Kring vs. Missouri*, 107 U.S., 221, 27 L. ed., 507, 2 Sup. Ct. Rep., 443; *Thompson vs. Utah*, 170 U.S., 343; 42 L. ed., 1061, 18 Sup. Ct. Rep., 620. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an ex post facto law. *Hopt vs. Utah*, 110 U.S., 575, 28 L. ed., 263, 4 Sup. Ct. Rep., 202, 4 Am. Crim. Rep. 417. Nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible, *Thompson vs. Missouri*, 171 U.S., 380, 43 L. ed., 204, 18 Sup. Ct. Rep., 922; or which changes the place of trial, *Gut vs. Minnesota*, 9 Wall. 35, 19 L. ed., 573; or which abolishes a court for hearing criminal appeals, creating a new one in its stead. See *Duncan vs. Missouri*, 152 U.S., 377, 382, 38 L. ed., 485, 487, 14 Sup. Ct. Rep., 570.'

"Tested by this standard, we do not believe that the curtailment of the right of an accused in a preliminary investigation to cross-examine the witnesses who had given evidence for his arrest is of such importance as to offend against the constitutional inhibition. As we have said in the beginning, preliminary investigation is not an essential part of due process of law. It may be suppressed entirely, and if this may be done, mere restriction of the privilege formerly enjoyed thereunder can not be held to fall within the constitutional prohibition."

In rejecting the contention of the political offenders accused in the People's Court that their constitutional right to equal protection of the laws was impaired because they were denied preliminary examination and investigation, whereas the others who may be accused of the same crimes in the Court of First Instance shall be entitled thereto, this Court held:

"(2) Section 22 in denying preliminary investigation to persons accused before the People's Court is justified by the conditions prevailing when the law was enacted. In view of the great number of prisoners then under detention and length of time and amount of labor that would be consumed if so many prisoners were allowed the right to have preliminary investigation, considered with the necessity of disposing of these cases at the earliest possible dates in the interest of the public and of the accused themselves, it was not an unwise measure which dispensed with such investigation in such cases. Preliminary investigation, it must be remembered, is

not fundamental right guaranteed by the Constitution. For the rest, the constitutional prohibition against discrimination among defendants placed in the same situation and condition is not infringed."²⁵

It was realized that the procedure prescribed in Republic Act No. 5180 granting the complainant and respondent in a preliminary investigation the right to cross-examine each other and their witnesses was "time consuming and not conducive to the expeditious administration of justice". Hence, it was found necessary in Presidential Decree No. 77 to simplify the procedure of preliminary investigation to conform to its summary character, by eliminating the cross-examination by the contending parties of their respective witnesses which in the past had made the proceeding the occasion for the full and exhaustive display of parties' evidence. The procedure prescribed in the aforesaid decrees appears justified by the necessity of disposing cases during the martial law, especially those affecting national security, at the earliest date. On the basis of the aforesaid settled principles, the curtailment of the right of an accused to cross-examine the witnesses against him in the preliminary investigation does not impair any constitutional right. It may be relevant to note that recently in *Litton, et al. vs. Castillo, et al.*,²⁶ this Court denied for lack of merit a petition challenging the validity of Presidential Decree No. 77 issued on December 6, 1972, on the ground that aforesaid decree now "forms part of the law of the land."

V

PERPETUATION OF TESTIMONY

Petitioner claims that the order of the Military Commission for the perpetuation of the testimony of prosecution witnesses is void because no copy of the petition was previously served on him. He asserts that, as a consequence, he was not given the opportunity to contest the propriety of the taking of the deposition of the witnesses. It must be noted that petitioner does not dispute respondents' claim that on March 14, 1975, he knew of the order allowing the taking of the deposition of prosecution witnesses on March 31, to continue through April 1 to 4, 1975.

The provisions of Presidential Decree No. 328, dated October 31, 1973, for the conditional examination of prosecution witnesses before trial, is similar to the provisions of Section 7 of Rule 119 of the Revised Rules of Court. Presidential Decree No. 328 provides:

"Where, upon proper application, it shall satisfactorily appear to the military tribunal before which a case is pending, that a witness for the prosecution or the defense is too sick or infirm to appear at the trial, or has to leave the Philippines with no definite date of returning thereto, or where delay in the taking of his testimony may result in the failure of justice or adversely affect national security, the witness may forthwith be examined and his deposition immediately taken, such examination to be by question and answer, in the presence of the other party, or even in the latter's absence provided that reasonable notice to attend the examination or the taking of the deposition has been served on him, and will be conducted in the same manner as an examination, at the trial, in which latter event the failure or refusal to attend the examination or the taking of the deposition shall be considered a waiver." (*Italics supplied.*)

Section 7 of Rule 119 of the Revised Rules provides:

"Deposition of witness for the prosecution. — Where, however, it shall satisfactorily appear that the witness cannot procure bail, or is too sick or infirm to appear at the trial, as directed by the order of the court, or has to leave the Philippines with no definite date of returning thereto, he may forthwith be conditionally examined or his deposition immediately taken. Such examination or deposition must be by question and answer, in the presence of the defendant or after reasonable notice to attend the examination or the taking of the deposition has been served on him, and will be conducted in the same manner as an examination at the trial. Failure or refusal on the part of the defendant to attend the examination or the taking of the deposition after the notice hereinbefore provided, shall be considered a waiver. The statement or deposition of the witness thus taken may

be admitted in behalf of or against the defendant. His testimony taken, the witness must thereupon be discharged, if he has been detained."

The foregoing was taken substantially from Section 7 of Rule 115 of the old Rules of Court, with the difference, among others, that the phrase "or after one hour notice" in the old Rules of Court has been changed to "or after reasonable notice" in the Revised Rules of Court.

In *Elago vs. People*,²⁷ this Court, in rejecting the contention that no written motion was filed by the prosecuting attorney for the taking of the depositions and that less than one hour notice has been given the defendant, held that "the one-hour notice mentioned in Section 7, Rule 115, of the Rules of Court, was intended by law mainly to give the defendant time to attend the taking of a deposition and not to prepare for the taking thereof because in reality there is no need for preparation. It is not a trial where the defendant has to introduce his evidence. It is only taking down the statements of the witnesses for the prosecution with opportunity on the part of the defendant to cross-examine them."

The thrust of *Elago* is that the order of the court authorizing the taking of the deposition of the witnesses of the prosecution and fixing the date and time thereof is the one that must be served on the accused within a reasonable time prior to that fixed for the examination of the witnesses so that the accused may be present and cross-examine the witness.

On this point of the time given the defendant to attend the taking of the deposition, Professor Wigmore has the following to say:

"The opportunity of cross-examination involves two elements:

"(1) Notice to the opponent that the deposition is to be taken at the time and place specified, and

"(2) A sufficient interval of time to prepare for examination and to reach the place.

* * * * *

"(2) The requirements as to the interval of time are now everywhere regulated by statute . . . ; the rulings in regard to the sufficiency of time are thus so dependent on the interpretation of the detailed prescriptions of the local statutes that it would be impracticable to examine them here. But whether or not the time allowed was supposedly insufficient or was precisely the time required by statute, the actual attendance of the party obviate any objection upon the ground of insufficiency, because then the party has actually had that opportunity of cross-examination . . . for the sole sake of which the notice was required."²⁸

We, therefore, hold that the taking of the testimony or deposition was proper and valid.

VI

WAIVER OF PETITIONER'S PRESENCE

There is conflict among the authorities as to whether an accused can waive his right to be present at his trial. Some courts have regarded the presence of the accused at his trial for felony as a jurisdictional requirement, which cannot be waived.²⁹ Many others do not accept this view.³⁰ In defense of the first view, it has been stated that the public has an interest in the life and liberty of an accused and that which the law considers essential in a trial cannot be waived by the accused.³¹ In support of the latter view, it has been argued that the right is essentially for the benefit of the accused,³² and that "since the accused, by pleading guilty, can waive any trial at all, he should be able to waive any mere privilege on the trial that is designed only to aid him in shielding himself from such result."³³

In this jurisdiction, this Court, in *People vs. Avancena*,³⁴ traced the history of the constitutional right of the accused to be present at his trial from *U.S. vs. Karelsen*³⁵ and *U.S. vs. Bello*³⁶ to *Diaz vs. United States*³⁷ and *People vs. Francisco*.³⁸ In the first two cases, it was ruled that one whose life or liberty is involved in the prosecution for felony must be personally present at every stage of the trial when his substantive rights may be affected by the proceedings and that it is not within his power to waive the right to be personally present. In *Diaz vs. United States* and *People vs. Francisco*, this rule was modified. Upon the authority of the *Diaz* and *Francisco* cases, the Court laid down as the law in this jurisdiction that: (1) in cases of felony, the accused has the right to be present at every stage of the trial, inclusive of the arraignment and pronouncement of the judgment; (2) - where the offense is capital the right of the accused to be present at every stage of the trial is indispensable and cannot be waived; (3) even in felonies not capital, if the accused is in custody, his right to be present at every stage of the trial is likewise indispensable and cannot be waived; (4) where the offense is not capital and the accused is not in custody, his presence is indispensable only: (a) at the arraignment; (b) at the time the plea is taken, if it be one of guilt; and (c) at the pronouncement of judgment. The Court quoted the rationale of *Diaz vs. United States* as basis of its ruling, thus:

"... the court was called upon to pass on the question whether the provision in section 5 of the Philippine Civil Government Act, securing to the accused in all criminal prosecutions 'the right to be heard by himself and counsel,' makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert, but which he also may waive by his voluntary act. After observing that an identical or similar provision is found in the constitutions of the several states of the American Union, and that its substantial equivalent is embodied in the 6th Amendment to the Constitution of the United States; that it is the right which these constitutional provisions secure to persons accused of crime in that country that was carried here by the congressional enactment; and that, therefore, according to a familiar rule, the prevailing course of decision there may and should be accepted as determinative of the nature and measure of the right here. Justice Van Devanter, speaking for the court, said: 'As the offense in this instance was a felony, we may put out of view the decisions dealing with this right in cases of misdemeanor. In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control; and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the lawful penalty that would follow conviction. But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.'"³⁹

In *Avanceña*, the issue was whether the defendant charged with an offense which is not capital had impliedly waived his right to be present at his trial, because of his failure to appear in court at the trial of his case.

Under the present Constitution, however, trial even of a capital offense may proceed notwithstanding the absence of the accused. It is now provided that "after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustified."⁴⁰

On the basis of the aforecited provision of the Constitution which allows trial of an accused in absentia, the issue has been raised whether or not petitioner could waive his right to present at the perpetuation of testimony proceedings before respondent Commission.

As a general rule, subject to certain exceptions, any constitutional or statutory right may be waived if such waiver is not against public policy. The personal presence of the accused from the beginning to the end of a trial for

felony, involving his life and liberty, has been considered necessary and vital to the proper conduct of his defense. The "trend of modern authority is in favor of the doctrine that a party in a criminal case may waive irregularities and rights, whether constitutional or statutory, very much the same as in a civil case."⁴¹

There are, for instance, certain rights secured to the individual by the fundamental charter which may be the subject of waiver. The rights of an accused to defend himself in person and by attorney, to be informed of the nature and cause of the accusation, to a speedy and public trial, and to meet the witnesses face to face, as well as the right against unreasonable searches and seizures, are rights guaranteed by the Constitution. They are rights necessary either because of the requirements of due process to ensure a fair and impartial trial, or of the need of protecting the individual from the exercise of arbitrary power. And yet, there is no question that all of these rights may be waived.⁴² Considering the aforementioned provisions of the Constitution and the absence of any law specifically requiring his presence at all stages of his trial, there appears, therefore, no logical reason why petitioner, although he is charged with a capital offense, should be precluded from waiving his right to be present in the proceedings for the perpetuation of testimony, since this right, like the others aforesaid, was conferred upon him for his protection and benefit.

It is also important to note that under Section 7 of Rule 119 of the Revised Rules of Court (Deposition of witness for the prosecution) the "Failure or refusal on the part of the defendant to attend the examination or the taking of the deposition after notice hereinbefore provided, shall be considered a waiver . . ." (Italics supplied.) Similarly, Presidential Decree No. 328 expressly provides that "... the failure or refusal to attend the examination or the taking of the deposition shall be considered a waiver." (Italics supplied.)

It is for the foregoing reasons that the writer of this opinion voted with the six (6) Justices who ruled on the full right of petitioner to waive his presence at said proceedings.

Since only six (6) Justices (Fernando, Teehankee, Barredo, Antonio, Muñoz Palma and Aquino) are of the view that petitioner may waive his right to be present at all stages of the proceedings while five (5) Justices (Castro, Makasiar, Esguerra, Concepcion Jr. and Martin) are in agreement that he may so waive such right, except when he is to be identified, the result is that the respondent Commission's Order requiring his presence at all times during the proceedings before it should be modified, in the sense that petitioner's presence shall be required only in the instance just indicated. The ruling in *People vs. Avanceña*⁴³ is thus pro tanto modified.

Finally, it is insisted that even if said orders and decrees were valid as martial law measures, they have ceased to be so upon the termination of the emergency. In *Aquino, et.al. vs. Enrile, et al.*, supra, We adverted to the fact that the communist rebellion which impelled the proclamation of martial law has not abated. In the absence of any official proclamation by the President of the cessation of the public emergency, We have no basis to conclude that the rebellion and communist subversion which compelled the declaration of martial law, no longer pose a danger to public safety.

It is important to note here that an accused being tried before a military tribunal enjoys the specific constitutional safeguards pertaining to criminal trials. Thus, he is entitled to be heard by himself and counsel,⁴⁴ to be informed of the nature and cause of the accusation,⁴⁵ to meet the witnesses face to face, to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf,⁴⁶ and to be exempt from being a witness against himself. As in trial before civil courts, the presumption of innocence can only be overcome by evidence beyond reasonable doubt of the guilt of the accused.⁴⁷ These tribunals, in general, are "bound to observe the fundamental rules of law and principles of justice observed and expounded by the civil judicature."⁴⁸ Section 11 of the Manual for Courts-Martial specifically provides that the "rules of evidence generally recognized in the trial of criminal cases in the courts of the Philippines shall be applied by courts-martial."⁴⁹ This is applicable to

trials in the military commission.⁵⁰ There is, therefore, no justification for petitioner's contention that such military tribunals are concerned primarily with the conviction of an accused and that proceedings therein involve the complete destruction and abolition of petitioner's constitutional rights. This is not, however, to preclude the President from considering the advisability of the transfer of these cases to the civil courts, as he has previously announced.

In view of all the foregoing, judgment is hereby rendered dismissing the petitions for prohibition with preliminary injunction and setting aside the temporary restraining order issued on April 8, 1975, with costs against petitioner.

Esguerra, Aquino, Concepcion Jr., and Martin, JJ., concur.

* Per Supplemental Petitions.

[1] G.R. No. L-35546, entitled "In the Matter of the Petition for Habeas Corpus of Benigno S. Aquino, Jr., et al., Petitioners, vs. Hon. Juan Ponce Enrile, et al., Respondents."

[2] Martial Law Cases (Aquino vs. Enrile)), Nos. L-35546, L-35538, L-35540, L-35567, and L-35573, September 17, 1974, 59 SCRA 183-651.

[3] Sheet No. 1 — In Criminal Case No. MC-2-19 the charge sheet alleged violation of General Order Nos. 6 and 7 in relation to Presidential Decree No. 9,

In that the above-named accused, person subject to trial by the Military Tribunals, in or about the period comprising the year 1971 to October 20, 1972, at 25 Times St., and 14 Ledesma Court, Project 6, Quezon City and Parañaque, Rizal, did then and there wilfully, unlawfully and feloniously have in his possession, custody and control the following firearms, ammunition, explosives and accessories, to wit . . .

Sheet No. 2 – In Criminal Case No. MC-2-20 the charge sheet alleged violation of the Anti-Subversion Act,

In that above-named accused, persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivision under the control and domination of an alien power, in order to achieve the same, the accused, BENIGNO S. AQUINO, JR., in or about the month of May, 1969, or prior and/or subsequent thereto, in Barrio Alto, Hacienda Luisita, San Miguel, Tarlac, Tarlac, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of their said organization, give to one of them, the other accused BENJAMIN BIE, JR. alias COMDR MELODY of the HMB and/or the NPA six (6) armalite rifles to deliver the said firearms to BERNABE BUSCAYNO alias COMDR DANTE of the HMB/NPA for the purpose of using the said firearms against the duly constituted government of the Philippines.

Sheet No. 3 — In Criminal Case No. MC-2-21 the charge sheet also alleged violation of the Anti-Subversion Act,

In that the above-named accused, persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivision under the control and domination of an alien power, in order to achieve the same, the accused, BENIGNO S. AQUINO, JR.,

in about the month of January 1971 or prior and/or subsequent thereto, at 25 Times St., Quezon City, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of said organizations, give to one of them, the other accused BENJAMIN SANGUYO alias COMDR PUSA of the HMB and/or NPA one (1) AK-47 rifle plus two (2) magazines with several rounds of ammunition and two (2) automatic M-2 carbines (folding type) plus two (2) banana type magazines with ammunition for the purpose of using said firearms against the duly constituted government of the Philippines.

Sheet No. 4 — In Criminal Case No. MC-2-22 the charge sheet alleged the commission of murder in relation to General Order No. 12-B,

In that above-named accused, persons subject to and triable by the Military Tribunals, conspiring together and confederating with one COMDR CRUZ, who is already deceased, during the period comprising the last days of November and 2 December 1967, in Bo. San Miguel, Tarlac, Tarlac, with intent to kill and all armed with firearms and in band, did, then and there, wilfully, and unlawfully and feloniously take one CECILIO SUMAT, Barrio Captain of Motrico, La Paz, Tarlac, from his house at said place and thereafter did then and there shoot him inflicting a gunshot wound on his head, thus causing his death as a consequence.

That the qualifying and generic aggravating circumstances of treachery, evident premeditation, use of superior strength, with the aid of armed men, disguise, craft and motor vehicle were present in the commission of the crime.

Sheet No. 5 — In Criminal Case No. MC-2-23 the charge sheet alleged violation of the Anti-Subversion Act,

SPECIFICATION I:

In that the above-named accused, persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivision under the control and domination of an alien power in order to achieve the same, the accused, BENIGNO S. AQUINO, JR., in or about the month of April, 1969 or prior and/or subsequent thereto, at 25 Times St., Quezon City, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of said organization, give to said organization or organizations through its leaders or officers the sum of P15,000.00 for the purpose of using said money to stage an NPA-sponsored demonstration in Manila which was in fact carried out in Congress, Malacanang, and in the US Embassy on 18 April 1969 for the purposes above-mentioned.

SPECIFICATION II:

In that the above-named accused, persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivision under the control and domination of an alien power, in order to achieve the same, the accused, BENIGNO S. AQUINO, JR., in or about the period comprising the early part of 1967 or prior and/or subsequent thereto, in Concepcion, Tarlac, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of said organization, give to one of them, the other accused BERNABE

BUSCAYNO alias COMDR DANTE of the HMB and/or NPA, one (1) caliber .45 pistol with magazine and ammunition for the purpose of using the same against the duly constituted government of the Philippines.

SPECIFICATION III:

In that the above-named accused, persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivision under the control and domination of an alien power, in order to achieve the same, the accused, BENIGNO S. AQUINO, Jr., in or about the month of August, 1967 or prior and/or subsequent thereto, in Barrio San Francisco, Tarlac, Tarlac, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of said organization, give to one of them, the other accused BERNABE BUSCAYNO alias COMDR DANTE, two (2) caliber .45 pistols in the house of Leonida Arceo for the purpose of using the said firearms against the duly constituted government of the Philippines.

SPECIFICATION IV:

In that the above-named accused, persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivision under the control and domination of an alien power, in order to achieve the same the accused BENIGNO S. AQUINO, JR., in or about the month of October, 1969, or prior and/or subsequent thereto in Barrio Alto, Hacienda Luisita, San Miguel, Tarlac, Tarlac, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of said organization, give to COMDR ARTHUR GARCIA and JOSE BUSCAYNO alias COMDR JOE two (2) armored vests and a pair of walkie-talkie for the purpose of using them against the duly constituted government of the Philippines.

SPECIFICATION V:

In that the above-named accused persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivisions under the control and domination of an alien power, in order to achieve the same the accused BENIGNO S. AQUINO, JR. on or about 1-2 November 1965, or prior and/or subsequent thereto, in San Miguel, Tarlac, Tarlac, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of said organization, give to one of them COMDR ALIBASBAS through COMDR DANILO several firearms and ammunition which were robbed and taken from the house of Manuel Rodriguez of Hacienda Rodriguez, using the said firearms and ammunition against the duly constituted government of the Philippines and in fact said firearms including ALIBASBAS and his group when they were killed at Barrio Almendras, Concepcion, Tarlac.

SPECIFICATION VI:

In that the above-named accused, persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB)) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivision under the control and domination of an alien power, in order to achieve the same, the accused, BENIGNO S. AQUINO, JR., in or about the period comprising the year 1970 to 1971, or prior and/or subsequent thereto, at 25 Times St., Quezon City, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of said organization, give and provide shelter and/or medical treatment to wounded/sick officers/ leaders/members of the HMB/NPA, to wit:

1. ROBERTO SANTOS alias COMDR FELMAN
2. BENJAMIN SANGUYO alias COMDR PUSA
3. COMDR JUANING RIVERA alias COMDR JUANING
4. FERNANDO BORJA alias COMDR FER
5. SIMEON SANGKAP alias COMDR FRED

6. COMDR TUC

7. PEPITO LOPEZ alias BOY BATOC
8. RODOLFO RAMOS alias COMDR RAMIR alias COMDR RUDY
9. BOY BULDONG alias BOY PITCHO
10. OSCAR PACHECO alias ROY

Sheet No. 6 — And in Criminal Case No. MC-2-24 the charge sheet alleged violation of the Anti-Subversion Act,

In that the above-named accused, persons subject to trial by the Military Tribunals, as ranking leaders of the Communist Party of the Philippines and/or its military arms such as the Hukbong Mapagpalaya ng Bayan (HMB) and/or the New People's Army (NPA) constituting an organized conspiracy to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion and other illegal means for the purpose of placing such government or political subdivision under the control and domination of an alien power, in order to achieve the same, the accused BENIGNO S. AQUINO, JR., in or about the month of December, 1970, or prior and/or subsequent thereto, at 25 Times St., Quezon City, did then and there knowingly, wilfully, unlawfully and feloniously by overt acts, conspiring, confederating with other leaders and/or members of said organization, give to BENJAMIN SANGUYO alias COMDR PUSA and his NPA companions including PC LT VICTOR CORPUS, cash money in the amount of P500.00 for the purpose of renting a car to be used in raiding the Philippine Military Academy Armory, Baguio City, of firearms and ammunition, which was in fact carried out on 29 December 1970.

[4] Respondents' Memorandum dated March 10, 1975, pp. 2 to 12.

[5] See Rollo, Supplemental Petition, pp. 77, 130, and Second Supplemental Petition, pp. 185-244.

5-A Justices Castro, Barredo, Makasiar, Antonio, Esguerra, Aquino, Concepcion, Jr. and Martin.

6 Benigno S. Aquino, Jr., et al. vs. Juan Ponce Enrile et al., G.R. No. L-35546; Roces, et al. vs. Secretary of National Defense, L-35538; Diokno, et al. vs. Secretary of National Defense, L-35520, Soliven, et al. vs. Secretary of National Defense, L-35540; Doronila, et al. vs. Secretary of National Defense, L-35567; and Rondon et al. vs. Secretary of National Defense, L-35573, all promulgated on September 17, 1974, 59 SCRA 183-651.

7 Benigno S. Aquino, Jr., et al. vs. Commission on Elections, et al., G.R. No. L-40004, January 31, 1975.

8 See also De Chavez vs. Zobel, L-28609 and Dimaala, et al. vs. Zobel, L-28610, both promulgated January 17, 1974. These two cases consider Presidential Decree No. 27 as "part and parcel of the law of the land according to the revised Constitution itself."

9 Military commissions in American practice are the traditional courts "during the periods of martial rule or military government." (Fairman, *The Law of Martial Rule*, 1943 Ed., p. 262). Its proceedings "derives their sole authority from the existence of actual, rebellion, and the duty of doing whatever may be necessary to quell it, and to restore peace and order." (*The King vs. Allen*, [1912] 2 Irish Rep. 241.)

According to Fairman, "a military commission is a tribunal established to try persons not subject to our military law, charged with violations of war or, in places subject to military government or martial rule, with offenses either of civil nature or against the regulations of the military authorities." (Fairman, *supra*, p. 272.) One of the justifications given for the trial of civilians by military commissions during an insurrection "had been to try the accused more quickly with a view to stopping more effectively the progress of the insurrection." (*Ibid*, citing Finlason's Rep. 83 ff., p. 267.)

10 Winthrop, *Military Law and Precedents*, Vols. 1 and 2, p. 830.

11 Moyer vs. Peabody, 212 U.S. 78, 53 L., ed. 411. 417.

12 Schwartz, *Constitutional Law*, p. 160.

13 Stanton vs. Godfrey, (1851)) 1 Searle, *Supreme Court of Cape of Good Hope* cited in Fairman, *Law of Martial Rule*, pp. 132-133.

14 "Due process of law does not necessarily mean a judicial proceeding the proceeding may be adapted to the nature of case but it does necessitate an opportunity for a hearing and a defense. *Ballard vs. Hunter*, 1907, 204 U.S. 241, 255, 27 S. Ct. 261, 51 L., ed. 461; *Simon vs. Craft*, 1901, 182 U.S. 427, 437, 21 S. Ct. 836, 45 L. ed. 1165; *In re Bryant*, 1885, 3 Mackey 489. See *Logue vs. Fenning*, 1907, 29 App. D.C. 519, 525; cf. *Matter of Lambert*, 1901, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am. St. Rep. 296; *In re Wellman*, 1896, 3 Kan. App. 100, 45 P. 726; *State vs. Billings*, 1894, 55 Minn. 467, 57 N.W. 206, 794, 43 Am. St. Rep. 525; *Allgor vs. New Jersey State Hospital*, 1912, 80 N.J. Eq. 386, 84 A. 711; *In re Allen*, 1909, 82 Vt. 365, 73 A. 1078, 26 L.R.A., N.S. 232." (*Barry vs. Hall*, 98 F. 2d 222.)

"Due process is not necessarily judicial ..." (*Mendoza Espuelas vs. Provincial Warden of Bohol*, G.R. No. L-13223, May 30, 1960, 108 Phil. 353; *Insular Govt. vs. Ling Su Fan*, 15 Phil. 58; *Forbes vs. Tiaco*, 16 Phil. 534; *Tan Te vs. Bell*, 27 Phil. 354; *De Leon vs. Director of Prisons*, 31 Phil. 60; *U.S. vs. Gomez Jesus*, 31 Phil. 218; *U.S. vs. Ignacio*, 33 Phil. 202; *Cornejo vs. Gabriel*, 41 Phil. 188; and *People vs. Ponce de Leon*, 56 Phil. 386.)

"Under ordinary circumstances the constitutional guaranty as to due process of law implies a formal judicial proceeding. In fact, most of the definitions refer to judicial proceedings as an element of due process of law. Nevertheless, it is settled that such proceedings are not an indispensable requisite in all cases. It is accordingly said that the term 'proceeding' means such an exercise of the powers of government as the settled maxims of the law permit and sanction, under such safeguards for the protection of individual rights as these maxims prescribe

for the class of cases to which the one in question belongs. Questions may arise which may be best determined otherwise than by ordinary process of judicial investigation without violating the constitutional provision as to due process of law. In many matters the tribunal requirement of due process may be met by a board or commission, or an executive or administrative officer or tribunal, or notary public, or even a private body. (16 Am. Jur. 2d Sec. 581.)

15 Ibid, Sec. 548.

16 Arnault vs. Pecson, 87 Phil. 418, 422.

17 Thus, among its provisions are:

"b. During Trial.

* * * * *

(5) Rights of Accused. — The accused shall be entitled:

(a) To challenge for cause any member of the commission based on any of the grounds provided in the Manual for Courts-Martial.

(b) To receive a copy of the charges at least five (5) days in advance of the date of initial hearing.

(c) To be present at the arraignment, when he enters a plea of guilty and at the pronouncement of judgment of conviction. Where the accused is in custody or charged with a capital offense, he shall be entitled to be present at all stages of the trial. In cases where there is allegation of conspiracy and one or more accused are available for trial and others are not, trial may proceed against all, provided, that the indictment shall have been published at least once a week for two consecutive weeks in any newspapers of general circulation and a copy of a notice of trial shall have been served on the accused or on his next of kin or at his last known residence or business address with a person of sufficient discretion to receive the same.

(d) To be represented during the trial by defense counsel appointed by the convening authority, or counsel of his own choice if practicable or to conduct his own defense. In the event that he is allowed a counsel of his own choice, he may elect to retain or excuse the appointed defense counsel.

(e) To testify on his own behalf and present evidence in his defense, and cross-examine any witness who personally appears before the commission.

(f) To have the substance of the charges and specifications, the proceedings and any documentary evidence translated when he is unable to understand them.

(g) To have a copy of the record of trial within a reasonable time after trial.

(6) Law Member — The ruling of the law member on the admissibility of evidence and on all interlocutory questions (i.e., all questions other than the findings of guilt or innocence and sentence) other than challenges, motion for finding of not guilty or sanity of the accused shall be final.

(7) Evidence. — (a) The rule set forth in the Manual for Courts-Martial shall normally be applied. Where the strict application of said rules is not feasible, the Commission may modify the same consistent with the requirements of justice. In such event, the commission should accord the accused or his counsel and the trial counsel reasonable notice before applying the modified rules. Nothing under this rule should, however, allow the commission to admit hearsay evidence nor to convict the accused without proof beyond reasonable doubt.

(8) Trial Proper Procedure. — After the period for challenges and the commission having been empanelled, the

trial shall be conducted substantially as follows unless modified by the commission pursuant to (7) (a) above:

- (a) Each charge and specification shall be read, or its substance stated, in open court.
- (b) The presiding member shall ask accused whether he pleads "Guilty" or "Not Guilty". At this stage the accused may move to quash the charge under the same grounds, procedure, and conditions prescribed in the Revised Rules of Court of the Philippines, except that the motion shall only be oral.
- (c) The prosecution shall make its opening statement.
- (d) The witnesses and other evidence for the prosecution shall be heard or presented. At the close of the case for the prosecution, the commission, may on motion of the defense for a finding of not guilty, consider and rule whether the evidence before the commission supports the charges against the accused. The commission may grant, deny or defer action on such motion.
- (e) The defense may make an opening statement prior to presenting its case.
- (f) The witness and other evidence for the defense shall be heard or presented. Thereafter the prosecution and defense shall introduce evidence in rebuttal.
- (g) The prosecutor and thereafter the defense shall deliver their respective summations.
- (h) The commission shall thereafter close and deliberate on the findings and sentence and shall not adjourn until it was arrived at and announced the findings and sentence.
- (i) Manner of Voting and Number of Votes Required. — Voting on the findings and sentence shall be by secret written ballot. The minimum number of votes required for a conviction or sentence shall be as follows:
 - 1. To convict:
 - a. For an offense carrying a mandatory death penalty — five (5) members.
 - b. For other offenses — Two-thirds of the members present at the time the vote is taken.
 - 2. To sentence:
 - a. Death — Five (5) members.
 - b. Other penalty — Two-thirds of the members present at the time the vote is taken.
- (9) Sentence. — The sentence shall be commensurate with the offense committed. A military commission shall apply the penalties prescribed in martial law orders or decrees and in their absence, the penalties prescribed by applicable laws. In the absence of both, the penalties prescribed by the Articles of War and Manual for Courts-Martial shall be the guide. Conviction automatically carries with it dismissal from the service if the accused is a commissioned officer, government official or employee, and dishonorable discharge if an enlisted person of the Armed Forces of the Philippines, unless otherwise decreed in the judgment.
- (10) Record. — A military commission is a court record. A verbatim record of its proceedings shall be made. It shall be prepared by the trial counsel under the direction of the commission. Such record, certified by the presiding member of the commission or his successor shall be delivered or transmitted to the convening authority as soon as possible after trial.
- (11) Contempt. A military commission may punish direct contempt with confinement for not more than one (1) month and indirect contempt with confinement for as long as the person fails to comply or obey a lawful order of the commission.

c. After Trial. ?

1) Action by Convening Authority. Every record of trial by military commission shall be forwarded to the Chief of Staff, Armed Forces of the Philippines for action. If the sentence imposed by the military commission is death or imprisonment for twenty (20) years and one (1) day or more, the Chief of Staff, Armed Forces of the Philippines shall refer the record of trial to a Board of Review for review. For this purpose, he shall constitute such Boards of Review as may be necessary. The Board of Review shall transmit its opinion together with the record of trial to the Chief of Staff, Armed Forces of the Philippines for action.

(2) Execution of Sentence. — Except as otherwise herein provided no sentence of a military commission shall be executed unless the same is approved and ordered executed by the Chief of Staff, Armed Forces of the Philippines. Where the sentence imposed by a military commission is death or if the Chief of Staff recommends that a penalty of death should be imposed, in a case where the sentence imposed by a military commission is less than death, the record of trial shall be forwarded to the President through the Secretary of National Defense, for confirmation or approval. No sentence of death shall be executed unless ordered executed by the President. In any case, the President shall have the power to reverse, confirm, increase the penalty imposed, or otherwise modify any decision of the military commission." (Pres. Decree No. 39, Rules Governing the Creation, Composition, Jurisdiction, Procedure, and other matters Relevant to Military Tribunals.)

18 Abrera vs. Judge Muñoz, et al., 108 Phil. 1124, 1128.

19 Supra.

20 San Diego vs. Hernandez, 24 SCRA 109, 114.

21 Luna vs. Plana, 26 SCRA 310, 321, citing People vs. Olandag, 92 Phil. 286, 289.

22 Zacarias vs. Cruz, 30 SCRA 728.

23 Bustos vs. Lucero, 81 Phil. 640; Dequito vs. Arellano, 81 Phil. 128; Abrera vs. Muñoz, 108 Phil. 1124.

24 Supra, pp. 650-651.

25 People vs. Carlos, 78 Phil. 535, 542-543.

26 L-35992, February 25, 1975.

27 84 Phil. 643.

28 Wigmore on Evidence, 3rd Ed., Vol. V, pp. 60-61, cited in Elago vs. People, supra.

29 State vs. Reed, 65 Mont. 51, 210 P. 756; Maurer vs. People, 43 N.Y. 1; Noel vs. Commonwealth, 115 S.E. 679, NE 2d 779.

30 Miles vs. State, 222 Ind. 312, 53 NE 2d 779; Davidson vs. State, 108 Ark. 191, 158 S.W. 1103; Thomas vs. State, 117 Miss. 532, 78 So. 147. See: 23 A.L.R. 2d 473, Sec. 6; 26 A.L.R. 2d 786, Sec. 19.

31 State vs. Mannion, 19 Utah 505, 57 P. 542.

32 Glouser vs. United States, 296 F 2d 853 Cert. den. 7 L. ed. 2d 789.

33 Frank vs. State, 142 Ga. 741, 83 SE. 645; Thomas vs. State, supra; State vs. Kelly, 97 N.C. 404, 2 SE. 185; Hill vs. State, 17 Wisc. 675.

34 32 O.G. 713, L-37005.

35 3 Phil. 223, 231.

36 11 Phil. 526.

37 223 U.S. 442; 56 L. ed. 500.

38 46 Phil. 403.

39 People vs. Avanceña, supra, p. 715.

40 Last sentence of Article IV, Section 19, 1973 Constitution.

41 21 Am Jur. 2d, Sec. 219, p. 259.

42 U.S. vs. Go Leng, 21 Phil. 426; U.S. vs. Sarabia, 4 Phil. 566, Medina vs. Orozco, 18 SCRA 1168; U.S. vs. Anastacio, 6 Phil. 413; U.S. vs. Laranja, 21 Phil. 500; People vs. Kagui Malasugi, 63 Phil. 221.

43 32 O.G., 713.

44 P.D. No. 39, sub. par. b [5] [d]; Article 17, A.W.

45 Ibid., sub. par. b [5] [b] and [c].

46 Ibid., sub. par. b [5] [e]; Article 33, A.W.

47 Ibid., sub. par. b [7]; Article 30, A.W.

48 Winthrop's Military Law, Vols. 1 and 2, 313.

49 Executive Order No. 178, Series of 1938.

50 P.D. No. 39, sub. par. b [7] [a]; Article 37, A.W.

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CONCURRING OPINION**BARREDO, J.:**

I concur in the main opinion so very ably penned for the Court by our distinguished colleague, Mr. Justice Antonio. I am writing this separate opinion not with intent to unnecessarily lend force to the cogent and compelling considerations expounded therein but only to articulate a few thoughts I entertain relative to certain aspects of this case which have additionally impelled me to overrule the contentions of petitioner other than his invocation of his right to waive his presence at the proceedings being held against him.

At the outset, I would like to underscore the fact that this is the first decision of this Court regarding major martial law issues wherein the main opinion carries the unqualified concurrence of the required number of justices for doctrinal purposes. Since I have heretofore regretted Our failure to agree on a common opinion that would not be

subject to varying constructions, including distorted and self-motivated ones which could be peddled around for propaganda purposes by those who for reasons of their own cannot see anything right in the present order, it is to me a cause of genuine satisfaction that at long last the Court has been able to render the instant opinion and judgment, touching on important and basic constitutional and legal features of the prevailing martial law administration, in a manner that leaves no room for doubt as to the meaning and scope of Our pronouncements.

To be more specific, the main opinion in this case and the rulings therein contained own the full support of at least eight members of the Court, without counting what I consider to be the close-enough-to-concurrence posture of Mr. Justice Fernando, which betrays no little effort to reconcile long cherished traditional views with the innovative and progressive juridical concepts emerging from the imperatives of the legal character of the presently established government. In the light of the constitutional requirement of ten (10) votes for a declaration of invalidity of any order of the President, eight negatives votes is more than impressive. And certainly, all the rulings in the main opinion, having as they do have the support of those eight votes, constitute authoritative doctrines, against which, the contrary views of any member of the bar should have no more than academic value. At these times when it is best that the legal foundations of the existing government should be securely solidified to better and faster achieve the ends for which martial law has been proclaimed, the pronouncements of the Court in this case should put an end to any effort to discredit the actions of this Government as being founded only on might rather. Indeed, my faith is that the rule of law obtains to day as it than right. Indeed, my faith is that the rule of law obtains today as it has always obtained before, and due consideration and corresponding accommodation accorded to the requirements of the emergency confronting the nation do not detract in any way from the effective supremacy of the law.

1. Petitioner's motion to withdraw denied

It is a settled rule consistent with the fitting dignity of judicial proceedings that after a case has been submitted for decision, withdrawal of the same from the jurisdiction of the court is a matter addressed to its sound discretion and is far from being a matter of right on the part of any of the parties. For obvious reasons, a party should not be allowed to provoke issues of far reaching interest and importance and hurl accusations against the actuations of the adverse party, thereby creating doubts in the public mind as to the validity of said actuations, and thereafter, upon being confronted with the defenses of his opponent and sensing perhaps probable defeat, to just take a retreat, without expressly admitting the infirmity of his position, thereby making sure that he can with relative impunity continue with his critical attitude in the manner suitable to his convenience and purposes. Observance of the laudable policy of terminating litigations at the earliest opportunity may not be invoked when the evident result is detriment to the more paramount objective of having a definite ruling by the Supreme Court as to what the law is in regard to the matters of vital public interest actually and properly brought to it for adjudication.

But the imperative need to settle the important issues raised in this case is not the only reason I have for voting to deny petitioner's motion. When petitioner was required by the Court to amplify his initial unreasoned request to be allowed to withdraw all his petitions, motions and other incidents herein, his counsel submitted a letter purportedly coming from petitioner, wherein he vehemently cast aspersions against this Court, alleging that he does "not want anything from the Supreme Court, and that the whole thing had been designed, composed and orchestrated in Malacañang" and that his "legal battles in the Supreme Court are now over. Mr. Marcos is the single genius, composing and directing all the proceedings, whether in the military tribunal or in the civil courts," and even going as far as referring to the "Supreme Court as an obstacle."

I do not believe it is under any circumstance proper for a Supreme Court to leave such accusations unchallenged. Most likely, they could be mere uncontrollable outburst of a desperate soul which are without judicial significance, but since it is as likely that petitioner's letter would be used as propaganda material not only here but

abroad to discredit the Philippine Government in the eyes of the world, I consider it inevitable for the Court to proceed to dispose of the merits of petitioner's case and thus let all and sundry judge for themselves on the basis of the Court's expressed considerations rather than on that of petitioner's self-serving opinion, whether or not our judiciary is what petitioner claims it to be. It is my considered view that if a party who comes to court has indeed any right to withdraw his case therefrom, such withdrawal should not receive the sanction of the court when the party tells the court that his reason for withdrawing is because he has no confidence in its impartiality and capacity to render justice. In such a situation, the only recourse of the court is to prove by actually deciding the case how just and impartial it is.

I would like to state here emphatically that petitioner's apprehensions about the dangers to the independence of the judiciary of the Philippines at present, particularly the Supreme Court, is nothing more than an a priori opinion and is not and cannot be supported by facts. After all, the Court does not have to necessarily agree with everyone who feels that certain acts of the Government are illegal or unconstitutional. Surely, a propensity to overrule the other departments of the Government is not the true mark of the independence of the judicial branch. If so far, the Supreme Court has not yet declared any impugned acts of the President or the martial law government unconstitutional, it is not because the Court is subservient to the President in any way, but simply because, in the honest conviction of its members, the proper case for such a declaration has not come. That the Court can and will strike down acts of the President in the appropriate instances, there should be no doubt whatsoever. The people can rest assured that when the proper occasions arise, the justices, individually and collectively, will not be found wanting in wisdom and courage to act accordingly, regardless of what might be the views and wishes of the Executive and/or any other department of the government.

At this point, it may not be amiss to say a few words respecting petitioner's decision to resort to what is being referred to as a "hunger strike."

According to his letter aforementioned, the initial reason for such a step was, to quote his own words, to "protest against a procedure intended to humiliate and dehumanize me, considering that all they wanted was for me to be identified as a common criminal and not as a political rival. I also said that my hunger strike was not only for myself but on behalf of many other victims of today's oppression and injustices." Later, however, the causes thereof were broadened by him thus:

"Despite my hunger strike, or probably because of it, I see with unmistakable clarity that my legal battles in the Supreme Court are now over. Mr. Marcos is the single genius, composing and directing all the proceedings, whether in the military tribunal or in the civil courts. This is the evil of one-man rule at its very worst. He has destroyed the independence of the civil courts, abolished the legislature, controlled the mass media, curtailed our cherished liberties — with the backing of the military, which, ironically, exists 'for the good of the people.'

Without the Supreme Court as an obstacle, I have decided to go on my hunger strike and place my fate and my life squarely in the hands of my accuser, prosecutor, and judge — Mr. Marcos. Thus the plain, naked truth will be made clear to our people and to the rest of the world.

As I said, my hunger strike is not for myself alone, but for the many thousands of Filipinos who are helpless victims of the oppression and injustices of the so-called New Society. The meaning and thrust of my struggle and sacrifice transcend the limited question of absence or presence in the proceedings before the military tribunal.

I have therefore solemnly vowed to continue my hunger strike as a symbol of our people's firm protest against:

1. the trial of civilians before military tribunals, particularly for offenses allegedly committed by them before martial law;

2. the lack of judicial independence. Trials by civil courts would still be a travesty of justice, especially in cases where those in power, their relatives or associates, are interested ? for as long as our judges remain 'casuals'. They should be given permanent tenure, for their own good and for the benefit of our people who have a vital stake in a sound administration of justice.

3. the absence of a genuine free press. Since martial law was proclaimed, I have been unfairly condemned and vilified by the controlled newspapers and tv-radio stations. I know there are many people who have been similarly pilloried. But a genuine free press is even more important for those who are in power. It may free them from their arrogance, their prejudices, and their pretensions, and help them see the injustices they have committed against their own people.

4. the further continuation of martial law and its evils and repressions. After all, Mr. Marcos has already announced to the world that he had actually removed martial law since April, 1974." (Petitioner Aquino's letter, pp. 4-5.)

In so far as petitioner's "hunger strike" may be understood as an attempt to stampede the Court to render a verdict favorable to his views, I must state categorically that it is subversive and contumacious, specially because it is being admittedly done with "unmistakable clarity" of mind and purpose. Frankly, I am at a loss as to what kind of procedure would suit him. In the same breadth that he professes to advocate that every man is entitled to equal protection of the laws, he claims that he should be treated not as an ordinary accused but "as a political rival", evidently meaning, of the President. How indeed is "a political rival" of the Administrator of martial law supposed to be prosecuted for an offense committed against the laws of the land?

Be that as it may, anyone can easily imagine the unmanageable situation and judicial chaos that would result should We create a precedent wherein the Court should yield to the demands of a person under formal charge of committing an offense, as otherwise he would resort to a hunger strike. Nonetheless, We were somehow disposed to lean backwards and rule interlocutorily as early as We could on the issue as to whether or not the respondent Military Commission was right in compelling petitioner to attend the perpetuation proceedings and thereby place his initial cause for the "hunger strike" in its true perspective. But Our efforts to this end were met by petitioner's Churchill-like reaction that what We could possibly give was "too late and too little", manifested by his once more disauthorizing his lawyers from henceforth speaking for him and finally seeking the withdrawal of this case from our hands. Is the Court supposed to extend to a "political rival" of the President more than what the existing laws provide for others?

As a Filipino myself, I am ready to concede that petitioner is being actuated by what he honestly believes to be his duty to our country and people. His abiding loyalty to his cause and his firm conviction to attain his objectives are to me admirable. But I reject any suggestion that for the Court to uphold the legality and constitutionality of the existing government is inimical to the national interests and ideals. I can see that the concept of martial law presently being evolved here as well as some features of its implementation do not conform with certain views of the American Supreme Court and some alien writers on the subject, but is it imperative that the Supreme Court of the Philippines should adhere to the doctrines laid down by alien authorities in order to be right?

Incidentally, it is becoming increasingly evident that some religious quarters as such would want their influence felt in the resolution of the legal issues before Us. One does not have to dig deep into the pages of history to learn that nations and peoples have also suffered where and when there was no separation of the church and state as when they were under despots and autocrats. In any event, while one can commiserate and sympathize with petitioner for the personal sufferings he has elected to undergo, I cannot convince myself that they are in anyway comparable with the agonies of Christ at Calvary, as seemingly, I am informed, has been somehow or seemingly suggested at a religious gathering sometime ago of those who share convictions with petitioner. Withal, I am

afraid that even the mere attempt to draw such a comparison could be a sin of sacrilege and of having strange gods before our only Holy Redeemer.

2. Military tribunals and trials for persons who have committed offenses against the objectives of martial law is a natural and logical concomitant of martial rule.

The legalistic and scholarly discussion in the main opinion of the issue of jurisdiction of herein respondent Military Commission No. 2 needs no amplification. I only wish to punctualize a broader foundation for my concurrence. I have always maintained it is elementary, historically and legally, that in any regime of martial law, offenders against its objectives are and ought to be tried by military tribunals in accordance with the procedure prescribed for them. To feel apprehensive then that unless the Court upholds petitioner's contention that as a civilian he cannot be tried by respondent commission for the crimes allegedly committed prior to the proclamation of martial law, thousands of Filipinos run the risk of being similarly haled before military courts and deprived of their constitutional rights to due process, is to ignore that throughout the life of all nations, when rebellions and revolutions were mounted, no distinction has ever been drawn, among those igniting the uprising which naturally was done before any declaration of martial law, as to whether they are civilians or military men, for purposes of trying them before the military courts of the legitimate or victorious government, at least, whenever prosecution had to be undertaken before the hostilities were over. And in this connection, it may be said of more recent military tribunals trying rebels that more safeguards are being adopted in order that the elementary requirements of due process may be surely observed by them. Moreover, it would be a misconception of the true import of this decision to suppose that it may be taken advantage of by any future government, for, as I have explained in my concurring opinion in the Habeas Corpus cases,[1] any self-restraint the Court has opted to exercise in its decisions so far rendered, from asserting its judicial authority to interfere with the actuations of the Executive, considering it has not found any evidence of manifest abuse of discretion or gross arbitrariness in them, does not mean the Supreme Court has lost the power to act accordingly in appropriate cases that may come later. And there being no question that Proclamation 1081 which established martial law in the Philippines is valid,[2] it necessarily follows that respondent military tribunal which has been created under it are vested with jurisdiction to try and decide petitioner's cases, it appearing that the charges and specifications against him are related to the causes that gave occasion to the Proclamation, no matter that the offenses charged therein were committed long before the issuance of said proclamation. Otherwise, the alternative would be to await the termination of martial law when all passions shall have subsided and the courts could calmly and without regard to the personal feelings of the judge as to the merits of the rebellion make an impartial decision, but that would mean the continued detention of the petitioner in the meantime.

It is insisted, however, that since the civil courts are open, it is derogative of their constitutional authority to sanction petitioner's trial in a military commission. Such contention ignores the fundamental mission of military courts during martial law. In any martial law situation wherein civil courts are continued, their co-existence with military tribunals ought not to create any conflict of jurisdiction. The trial and punishment of offenders against the established order should as a matter of necessity be left in the hands of the military whereas the civil courts are supposed to aid and in the preservation of normal society among the non-offenders by continuing the exercise of their jurisdiction over all civil matters which have no direct relation to the imperatives of the Proclamation. And as very well explained in the main opinion, the constitutional requirements of due process are being complied with even in the military tribunals.

In legal contemplation, there is here no diminution much less a derogation of the judicial power vested by the Constitution upon the Supreme Court and other inferior courts established by law. As I made clear in my separate opinion in the Habeas Corpus cases,[3] once the Supreme Court refrains, during a national emergency, by virtue

of the discretion implicitly granted to it by the people in the Constitution, from invalidating the proclamation of martial law, because it is convinced that there has been no patent arbitrariness in its issuance, which We have actually done already in said cases, there can be no legal objection to the existence of military courts for the purposes I have just indicated. And it must be so, for it is entirely rational that military tribunals are peculiarly fit, in view of the more summary and expeditious procedure designed for their functioning, to temporarily administer justice in the prompt and unencumbered manner required by the exigencies of the situation. In other words, the theater-of-war test is not truly determinative of the constitutionality of military trials during martial law, even when martial law is proclaimed for the express purposes of simultaneously reforming society with the suppression of the rebellion by force, to the end that the causes therefor may not recur. Whether or not the authority of the civil courts may give way to military jurisdiction should rather depend on the nature of the offenses committed and its relation to the elimination of the unnecessary hindrances or obstacles to the complete restoration of order and the attainment of the social and political objectives of the Proclamation.

3. Petitioner's allegation of pre-judgment, albeit lacking in sufficient juridical persuasiveness is nevertheless worthy of serious consideration by the authorities who can provide relief.

That I am somehow impressed by petitioner's contention of supposed pre-judgment of his case by the President who has ordered the creation of the military courts and by whom their decisions are to be reviewed for final approval is no secret. At the open hearing of this case before this Court on April 14 last, I had occasion to ask the Solicitor General what possible impediments are there to the transfer of petitioner's case to the civil courts, which can rightly be done under the law. But that was, of course, far from indicating that I believe that indeed there could be such prejudgment. I have faith that in the discharge of his solemn constitutionally prescribed oath to "do justice to every man", President Marcos would not be capable of wantonly discarding the inherent responsibilities of his high office, knowing as he does that he would not be where he is were it not for the trust and confidence reposed in him by the people when they elected him as the man who by the exercise of the immense powers given him by the Constitution would precisely protect and defend them against injustice and oppression.

Truth to tell, the thought or suspicion of prejudgment in military justice during martial law is inevitable, for the obvious reason that the concentration of powers in such a situation carries with it inherently the spectacle of the army being the accuser and judge at the same time. When it is considered, however, that military courts are generally collegiate, with each member thereof being obliged to vote secretly not only on the issue of the guilt of the accused as to each charge and specification but separately, also on the penalty to be imposed, and that in important cases, particularly capital ones like some of those of petitioner, their decisions are automatically subject to review and recommendation by a number of levels of authority, such as the Chief of Staff, the Board of Review, the Secretary of National Defense etc., each with their corresponding staff judge advocates, before reaching the President for the final verdict, one cannot escape the conviction that more exacting safeguards against any possibility of partiality and pre-judgment may not be found in the civil courts. It is entirely wrong, unjust and unwarranted to think of all army men as having only one mind. After all, they are also Filipinos like petitioner and counsel, and they cannot have less interest in and devotion to the sacred ideals for which our common country and people exist.

Moreover, in the case at bar, the statements attributed to the President and which petitioner quotes and maintains are reflective of the President's supposed pre-judgment of his cases, viewed objectively, would indicate at most only an off-hand evaluation of the evidence then on hand, without regard to the other evidence now in possession of the prosecution, and without counting those which petitioner will present on his behalf, and does not necessarily amount to a pronouncement of guilt. As such, therefore, they do not sufficiently prove what the judgment of the President would be after the whole evidence of petitioner's cases shall have been examined and

evaluated by him. In other words, from the strictly legal point of view, petitioner's pose about denial of due process to him by reason of prejudgment lacks persuasiveness.

Legal standards aside, however, it is immensely reassuring that the President has announced that as soon as the present perpetuation proceedings are terminated, he will consider the advisability of transferring the cases in question to the civil courts. Should that be done, and I have no reason for believing that it will not be so done, it will not only be that petitioner will be relieved of a great degree of mental torture, but, as importantly if not more so, the President shall have given the nation eloquent proof not so much of his nobility as of his determination not to allow the decision in the cases of petitioner to be in any manner tainted by the slightest suspicion of any personal feeling or opinion on his part. And I have no fears at all that others who are also similarly charged before military commissions will demand the same treatment, thereby subverting the whole system of crime prosecution under martial law I have earlier adverted to, for in the particular case of petitioner, there is the singular circumstances that the President has made statements which have some relevance to his cases, which it does not appear has been done in those of the others. Besides, under General Order No. 49, the President has already transferred the mass of the cases against civilians to the civil courts. Briefly then, while I hold that there is nothing constitutionally wrong with having petitioner tried by a military tribunal, it is my conviction that it is preferable from all other points of view that his cases be transferred to the civil courts, and not because in fact he will not get justice from the former, but because he will have more peace of mind in the latter and the people will be spared every doubt as to whether or not the slightest element of partiality or bias has crept into one of the most important trials in the current history of our country. But, of course, it is not within the ambit of the authority of even the Court itself, much less this writer, to direct the President's exercise of the powers vested in him by the Constitution; so, all that I can do is to voice the faith and hope that the President may not encounter any further obstacle to his actually ordering the transfer of petitioner's cases to the civil courts in accordance with his aforementioned public announcement, the sooner the better.

4. Petitioner has the right to waive his presence at the perpetuation proceedings before the respondent Commission.

As I have stated earlier, what really seems to have initially provoked petitioner's decision to go on some kind of a hunger strike was the respondent Commission's turnabout in regard to the issue of whether or not he can waive his presence during the perpetuation proceedings before it. After ruling at first that he had such right, subsequently, upon motion for reconsideration of the prosecution, the Commission reversed itself and ruled that his presence is indispensable and can thus be secured compulsorily. But if such action of the respondent commission is the cause of petitioner's hunger strike, as he had stated at the beginning, he may now desist from continuing with his rather perilous posture. All the members of the Court participating in this case are agreed that the ruling in *People vs. Avanceña* relied upon by the prosecution should be at least modified, if not completely overturned. Six of us, namely, Justices Fernando, Teehankee, Antonio, Muñoz Palma, Aquino and this writer are of the view that petitioner, although under detention and charged with a capital offense, has the right to absent himself at any stage of the trial, while the other five Justices, namely Justices Castro, Makasiar, Esguerra, Concepcion Jr. and Martin, believe also that that right exists subject however to the qualification that it cannot be invoked whenever his presence is needed for identification purposes. Accordingly, it is entirely up to the petitioner whether or not to attend the perpetuation proceedings now going on except when he is to be identified by the witnesses on the stand and only for just the time needed for that exclusive purpose.

Speaking for myself, I find eminent merit in the contention of petitioner that even for identification purposes he cannot be made to be present at the trial against his will. Since under the Constitution, trial of criminal cases in the absence of the accused is allowed, when after the arraignment and in spite of due notice he fails to appear without

justification, pursuant to Section 19 of the Bill of Rights or Article IV, I cannot see why an accused who does not want to undergo the experience of being repeatedly pointed to and of being the target of the curious eye of the public, cannot elect to leave the defense of his case and of his rights to his counsel in his absence or even put himself completely at the mercy of the court, secure in the thought that it is anyway the inescapable duty of the judge not to allow anything illegal or inhuman to be done to him.

I can understand why an accused has to be present at the arraignment and at the reading of the sentence. In the former, it has to be known to the court that he is indeed the person charged and that he personally understands the accusation against him. More importantly, the plea must be entered by him personally to avoid any misconstruction and misrepresentation, innocent or otherwise. In the latter, it is essential that the accused himself should be aware from personal knowledge what is the verdict of the court, and if it be conviction, what is the penalty to be served by him. These are matters too personal to permit delegation. At the same time, his presence makes it simpler in the public interest for the authorities to enforce execution of any adverse judgment. But I cannot see why an accused should be compelled to be present at the trial when he prefers perhaps the solitude of his cell to pray either for forgiveness, if he knows he is guilty, or, if he is innocent, for God to illumine the court so there would be unerring justice in his case.

My understanding is that the problem of identification of an accused may be adequately solved without violating the justified wishes of the accused to be left alone. To start with, if he is referred to by the witnesses of the prosecution by name, the court may presume that the accused who has acknowledged his true name at the arraignment is the one indicated. This Court ruled unequivocally more than sixty-five years ago in *U.S. vs. Adolfo*, 12 Phil. 296, and reiterated it in *People vs. Santos*, 53 Phil. 863, twenty years later, and there had been no contrary opinion since then, that the rebuttable presumption of identity of person is applicable not only in civil cases but also to the identification of the accused in criminal cases. To my mind, there is absolutely no need that the accused be personally identified by the court while the inculpatory witness is testifying, where the accused voluntarily waives his presence and even suggests to the court, as petitioner has done, to avail of the legal presumption just mentioned. (See Sec. 5(w), Rule 131.)

Of course, it is to be underscored that the presumption is *juris tantum*. Thus, the waiver of the presence of the accused at the trial does not preclude him from presenting evidence to overcome the presumption. I admit that the ensuing situation may pose problems for the prosecution, but where in the democratic world is the accused supposed to lend his hand in order to make it that much easier for the court to convict him. Our fundamental law, no less than the rudimentary rules of fair play, expressly enjoins that the accused may not be compelled to incriminate himself. I take such injunction to be consistent with man's inalienable right to be treated with the dignity of a human being and it therefore extends to any and all forms of making the accused aid the prosecution in proving its case.

It is claimed that the state has the unquestionable right and duty to see to it that the accused is not convicted unless he is duly identified. To the wisdom and nobility of such proposition, I must say amen. But I maintain that it is an incongruity in principle to predicate on such a just premise the conclusion that the state may compel the accused to assist it by exhibiting himself for purposes of identification. I am aware of precedents to the effect that the compulsion against self-incrimination prohibited by the Bill of Rights does not contemplate acts required of the accused which do not involve the employment of his intellect. In other words, he cannot be made to produce evidence against himself, but he can be compelled to perform mechanical acts conducive to that end. But I do not see any analogy between the facts in those precedents and the case at bar, and, in any event, I do not see the justice and fairness of those precedents. As far as I am concerned, the prosecution must prove its case by its own effort and with its own resources and should not be permitted to depend on the accused for anything that will help

it secure his conviction. I know that the Constitution has placed emphasis on the duties and obligations of persons in the Philippines equally with the Bill of Rights, but nowhere in those pertinent provisions in Article V do I discern any duty or obligation on the part of an accused to help the prosecution in having himself identified by the witnesses of the state.

After having been in continuous practice at the bar for more than three decades before joining the Court, I should know that the almost invariable procedure practiced in the identification of accused persons at the trial is in a sense impractical, if not farcical. As the cases are called from the calendar, the accused are made to stand and evidence their presence within the view of everybody in the courtroom including the witnesses of the prosecution. Rare is the occasion when necessary precautions are taken at the initiative of meticulous defense lawyers to prevent the witnesses from seeing the accused as they answer the calling of the calendar. My point is that any quibbling about the proper identification of the accused by compelling his presence at the trial may not be worth the irreparable injury to human dignity that can be caused by bodily and forcibly taking the accused from his place of confinement to the place of trial in the event he insists on his pose that he is agreeable anyway that the presumption on identities I have referred to be applied to his case.

In the precedents relied on by the prosecution, it is held that inasmuch as the accused is under detention, his person is subject to the disposition of the court before whom he is charged. I disagree. My position on this point is that his detention is only for the purpose of securing the execution of the judgment in the eventuality of conviction and for no other purpose derogative of his freedom to waive his personal rights related to the procedure of his trial. His constitutional rights "to be heard by himself or counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face and to have compulsory process to secure the attendance of witnesses and the production of witnesses on his behalf" (Section 19, Art. IV) including those not to be "compelled to be a witness against himself . . . to remain silent" and not to be subjected to "force, violence, threat, intimidation, or any other means which vitiates (his) free will" (Sec. 20, id.) and even that of not being "twice put in jeopardy of punishment for the same offense" (Sec. 22, id.) may be waived by him provided the waiver is made properly. As I see it, the right to be present at the trial is more or less the composite of these rights I have enumerated. Since all of them separately are waivable, why may not the waiver of all of them be done wholesale, so to speak, as long as the waiver is clearly and voluntarily manifested to the court. Above all, I consider the right of an accused to human dignity to be more precious than all his other rights, hence I cannot see the point in compelling the accused to sacrifice his human dignity for the sake of enabling the prosecution to identify him in person when the same end can as well be legally attained without exacting from him such sacrifice.

Sustaining as I do sustain the right of petitioner to absent himself at the trial proper, it is unnecessary for me to discuss whether or not the perpetuation proceedings constitute part of the trial. I must make it clear, however, that even if We were to hold that they are part of the trial proper, I insist that if the witnesses who have testified or will testify at the perpetuation proceedings should be available when the trial actually takes place, it is the right of the accused to have them recalled and to be examined further and even anew in the sound discretion of the trial court. Presidential Decree 328, paragraph 2, amending subparagraph 4 b(7) of Presidential Decree No. 39 is to be so construed, in the interest of fairness and justice.

As I close this concurrence, two thoughts continuously recurring in my mind during its preparation keep urging articulation. The first is that to commit suicide is prohibited by the laws of God and man. No one has the right to take his life for any reason. Withal, leadership in any field of human endeavor creates a responsibility that knows no surcease for any kind of convenience. Perseverance of purpose to be of real significance and worth requires one's survival. The future is inscrutable — the hand of fate guides only those who bide their time and do not

despair before the designed moment comes. Thus, could it yet be a crime also against the interests of our country and people to indulge in self-destruction when one knows that he has talents and attributes that can be offered for the attainment of the national destiny.

The second concerns the Supreme Court whose independence of conviction it is the bounden duty of every Filipino to keep unsullied. The unkindest thing of all is for those to whom you concede the loftiest of motives to impugn recklessly your own. The unceasing quest for the achievement of the national goal naturally divides men in all democracies into groups each composed of those sharing common views and feelings as to how to make the country succeed earlier in realizing its ideals. Such disparity, however, cannot produce disunity, as long as everyone involved because of official duty or choice trusts the good faith of the other.

For the members of the Court to happen to coincide in legal views with the Executive is not servility. Neither should it be considered evidence of any measure of orchestration or common planning. As a matter of fact, there has never been any such thing. The best proof is that, as I have emphasized at the outset, this is the first martial law case in which the required majority for doctrinal purposes has been attained. Where then is the alleged orchestration? And how could the charge have basis in the face of the undeniable happenstance that no martial law or constitutional decision has yet come out from the Court without vigorous and extensive dissents of notable consistency. Indeed, occasions there have been when one or two more votes became imperative for a more effective and conclusive ruling, and no one can say that anybody concerned received dictation as to what to do. Of my own knowledge, I bear witness that not even a finger has been lifted in any manner against any of the dissenters.

As of now, the Court has not found enough cause to hold any of the President's actuations submitted for Our scrutiny to have overstepped constitutional bounds. It is evident that due care is being taken to avoid fault in this respect. I can imagine no reason why and no occasion when such effort will ever be relaxed at all. More so in the earnest vigil by the Supreme Court.

[1] *Infra*.

[2] *Aquino, et al. vs. Hon. Juan Ponce Enrile, et al.*, G.R. No. L-35546 and its sister cases, all promulgated on September 17, 1974.

[3] *Id.*

4 31 O.G. 713 (1935).

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CONCURRING AND DISSENTING OPINION

CASTRO, J.:

I am constrained to write this concurring and dissenting opinion because (a) although I substantially agree with Justice Felix Q. Antonio's forthright discussion and learned resolution of the inescapable issues posed by the petition and the supplemental petitions filed by the petitioner Benigno S. Aquino, Jr., I disagree with his approbation of the "right" of total waiver claimed by the petitioner, and (b) I desire to express my views on matters which, although in a sense peripheral and not squarely in issue, are nevertheless cogent and pertinent to the central issues at bar.

1. At the threshold, I must state that I voted to deny the petitioner Aquino's motion to withdraw his petitions and all related motions and incidents, for the self-same reasons that impelled my vote to deny Jose W. Diokno's motion to withdraw his petition in the Martial Law cases (Aquino, et al. vs. Enrile, et al., L-35546, and other allied cases.*) Like in the cases just adverted to, there are in the case at bar considerations and issues of transcendental and grave import, and I apprehend that great disservice may be caused to the national interest if these are not resolved on the merits.

2. I am hard put to understand how and why the petitioner's counsels conjured the argument that under the Bill of Rights the "due process" accorded to persons accused in criminal cases contemplates only judicial process. This argument runs squarely athwart the time-honored doctrine in the Philippines as well as in the United States — a doctrine that the petitioner's counsels must surely be aware of — that due process in criminal trials may comprehend not only judicial process, but also executive process (and even legislative process in the proper cases.)

3. Corollarily to this contention of the petitioner, the further thesis is advanced that his trial by a military commission denies him due process because he is deprived of the right of appeal. It seems rather elementary that the right of appeal, unless the Constitution expressly guarantees such right, is merely statutory and may be withdrawn, modified or altered at any time — a principle that his counsels know only too well. Even an appeal to an intermediate collegiate appellate court or to the Supreme Court is not a right under the Constitution unless an explicit guarantee can be found in the words thereof.

And as far as appeal is concerned, it is apparent that the petitioner's counsels are not aware of the number of the levels of review of a decision of conviction by a military commission in our jurisdiction. Four levels of review (equivalent to four levels of automatic appeal) are provided, namely: the first review by the Staff Judge Advocate of the Chief of Staff (who appoints the military commission); the second review by a Board of Review of not less than three senior officers of the Judge Advocate General's Service; the third review by a Board of Military Review acting for the Secretary of National Defense and consisting of not less than two lawyer-officers of at least field rank; and the fourth and final review by the Secretary of Justice for the President of the Philippines as Commander-in-Chief. These four reviews are compulsory; none of them may be bypassed or dispensed with. And even if the Staff Judge Advocate, the Board of Review, and the Board of Military Review all concur in the judgment of conviction and the sentence imposed by the military commission, the Secretary of Justice may yet, if in his opinion the evidence so warrants, recommend to the President the acquittal or exoneration of the accused. So that from arraignment by a military commission to final action by the President, a minimum of thirteen presumptively responsible individuals in different capacities are involved in the entire process: a military commission of not less than five members, a Staff Judge Advocate, a Board of Review of not less than three officers, a Board of Military Review of not less than two officers, the Secretary of Justice, and the President. I cannot accept the petitioner's inferential conclusion that all the twelve persons involved (before the President takes final action) can be dictated to, assuming that the President is minded to influence them. The petitioner may not be aware that the military commissions now existing have acquitted many who have been accused before

them, and that convictions have been reversed or modified upon the recommendation of the reviewing officers and boards of officers.

4. The petitioner makes the indictment that the military tribunals and the entire Judiciary are, to paraphrase him, well under the thumb of the President of the Philippines. I quote his exact words: "Mr. Marcos is the single genius, composing and directing all the proceedings, whether in the military tribunal or in the civil courts . . . [and] has destroyed the independence of the civil courts . . . Trials by civil courts would still be a travesty of justice . . ." This accusation is doubtless very serious, but I say that it is a gravely irresponsible one. To declare or imply that the entire Judiciary, from the Chief Justice and Associate Justices of the Supreme Court down to the last municipal judge, is under dictation by the President, is an indictment that can come only from a person who does not know whereof he speaks. If the petitioner has no faith in military justice and at the same time professes absolute lack of faith in the Judiciary, does this mean that the petitioner is so magically endowed that only he and he alone is capable of meting out justice in this country? The over-all workload of all the courts in the Philippines has increased immeasurably. If this does not indubitably indicate the faith of the people in the Judiciary then I do not know what does. If the petitioner does not share the faith of the people in the Judiciary, we must look to reasons other than the ostensible ones for his irresponsible and reprehensible statements. To my mind these reasons are obvious and need not be belabored.

5. On the matter of whether the petitioner has what he claims is a "right of total waiver" of his presence in the proceedings before the military commission, I confess that the basis for such view escapes me. The trouble with the advocacy of the so-called "right" of total waiver is that it places undue and inordinate stress on the "rights" of the individual and completely refuses to recognize that the State, too, has its own rights and duties. I do not believe that there can be any debate on the right and obligation of the State to administer justice properly. Part and parcel of this right and obligation is the right of a tribunal, whether judicial or executive, to satisfy itself that the person whom it may later convict upon the evidence is the accused pointed to by the eye-witnesses for the prosecution. Because if the witnesses point to X, and the accused actually happens to be Y, the court or tribunal has, in conscience, no recourse but to absolve Y. For, the proper identification of the accused is the very quintessence and sine qua non of any valid prosecution, is the very fundament of due process in any criminal trial. Surely, if the commission is to discharge its burden conscientiously, it cannot be denied the right to determine for itself the proper identity of the person who stands accused before it. This right has absolute primacy over what the petitioner calls his "right" of total waiver of his presence.

Of course, in this particular case of the petitioner, it could be argued that he is a national figure and therefore is known by everybody. But I challenge the correctness of this postulate. For can it not possibly happen that a member of the trying tribunal may have heard of Benigno S. Aquino, Jr., the former Governor of Tarlac and former Senator, but may have never actually seen him before? Identification is essentially one of perception of sight and not a process of inference or strained deductive reasoning. It may be correct to infer from the declarations in court of witnesses for the prosecution who refer to a Benigno S. Aquino, Jr., former Governor of Tarlac and former Senator, that the person referred to is the petitioner, but this cannot thereby foreclose the petitioner from later challenging the validity of his conviction (if he is convicted) upon the ground that not one of the prosecution witnesses pointed to him as the indicted Benigno S. Aquino, Jr.

My understanding of the provisions of the new Constitution on waiver of presence in criminal proceedings is that such waiver may be validly implied principally in cases where the accused has jumped bail or has escaped, but certainly may not be asserted as a matter of absolute right in cases where the accused is in custody and his identification is needed in the course of the proceedings.

And what of the reviews to be conducted by the Staff Judge Advocate of the Chief of Staff, the Board of Review,

the Board of Military Review, and the Secretary of Justice? Is it not the bounden duty of these individuals, singly and collectively, to satisfy themselves beyond cavil at the outset of review that the person convicted by the commission is the accused named in the charges and that he was identified properly by the eye-witnesses for the prosecution?

Thus, I voted for qualified waiver: the accused may waive his presence in the criminal proceedings except at the stages where identification of his person by the prosecution witnesses is necessary. I might agree to the proposition of "total" waiver in any case where the accused agrees explicitly and unequivocally in writing signed by him or personally manifests clearly and indubitably in open court and such manifestation is recorded, that whenever a prosecution witness mentions a name by which the accused is known, the witness is referring to him and to no one else.

What is disturbing is that because six Justices voted for "total" waiver and only five Justices voted for qualified waiver, the judges of all inferior courts would now be at a loss to determine, in any given situation, whether to take the "total" waiver position or follow the qualified waiver doctrine — unless it be conceded that because the Court is divided and the "total" waiver theory fails to command the assent of eight Justices, the qualified waiver theory must be regarded as doctrinal law. Otherwise, each judge should be left to determine, according to his conscience and the milieu of each case, what to do in order to administer justice properly.

Acquittal on a mistaken identity basis has occurred in numberless instances all over the world. While it is true that the Rules of Court provide that identity of name means identity of person, it is a well-known fact in this country that there are names so common that many persons carry the same name. Especially considering that our population has burgeoned considerably, no one can deny that there are many persons by the name Jose Cruz, many by the name Jose Santos, many by the name Jose Reyes, *ad infinitum*** (which is good enough reason why the President of the Integrated Bar, retired Supreme Court Justice Jose B.L. Reyes, has found it necessary to put the letters "B" and "L" between the names "Jose" and "Reyes", and why I have used the name "Ruiz" in my name in order that my identity will not be confused with those of two other persons who are known by the name Fred Castro).

6. During the deliberations on this case, there came to the attention of the Court rumors and amorphous bits of news to the effect that the petitioner was on the verge of death because of his "hunger strike." Curiously and oddly enough, none of those who purveyed the rumors ever thought of submitting to the Court a statement from the Secretary of National Defense as to the state of health of the petitioner. And because of this, there was a feeling on the part of some members of the Court that they were being "stampeded" into deciding this case on the basis of the petitioner's "hunger strike." As far as I am concerned, I did not think it advisable for the Court to request the Secretary of National Defense for such statement, because I assumed that if the petitioner were indeed in a state where his death was imminent, his counsels would have come forward with alacrity to inform the Court accordingly — and this, in spite of the petitioner's motion to withdraw which, at the time the rumors reached the Court, was still unresolved. To argue that because the petitioner had already filed his motion to withdraw there was no more need for his counsels to give the Court information regarding his supposedly deteriorating health, is to assume erroneously that the Court would grant his motion.

7. I here make of record my considered view that the petitioner has deliberately and calculatingly tried to utilize the Court as a forum for his propaganda. First he said he preferred trial by the civil courts to trial by any military tribunal, but in the next breath he denounced the civil courts as "lacking in independence." Then he filed a petition with the Court to stop the proceedings before the military tribunal; shortly thereafter he moved to withdraw it, saying that his remedies had come "to little and too late." Next he renounced the services of all his counsels, civilian and military, yet his lawyers continued to file pleadings in his behalf with the Court, visit him in his

quarters, and assist him in the perpetuation proceedings before the military commission. Then his lawyers filed a manifestation with the Court claiming that the military commission's decision to compel him to appear was for the purpose of "dehumanizing and humiliating" him; but when the Court, acting on his manifestation, restrained the military commission, he directed his lawyers to withdraw his petitions before the Court, including his prayer for a temporary restraining order. He informed the newspapers that his "hunger strike" was a protest against his compelled presence in the perpetuation proceedings, but when six Justices of the Court voted for his "right" to "total" waiver of his presence, he announced that he would attend the proceedings. All of these developments could indeed be read to mean one or both of two things: that his "hunger strike" was, after all, perhaps not quite what it purported to be and/or that he has been trifling and continues to trifle with the military commission and with the Court.

8. If I were the petitioner, and I know I am innocent, there would appear to be no reason for me not to face the proceedings frontally and establish my innocence. This is not to imply that the petitioner is guilty of the charges; it is merely to stress that his behavior is hardly what perceptive people would expect from a man who professes innocence. If it is propaganda that is in the back of the head of the petitioner, I would think that the highest-quality propaganda in his favor is to establish his innocence of the charges soonest possible

9. I would like to add my own emphasis to the opinion written by Justice Antonio, by stating in capsule my considered views: (1) the President of the Philippines, by virtue of his proclamation of martial law (in sensu strictiore), which the Court has already upheld as within the ambit of his powers under the 1935 and 1973 Constitutions, has likewise the power to organize military commissions in order to carry out the objectives and purposes of martial rule; (2) the military commissions created by authority of the pertinent presidential decrees are legal as well as constitutional, as the said presidential decrees have been expressly made part of the law of the land by the transitory provisions of the 1973 Constitution; (3) by tradition and history as well as by the explicit provisions of the said valid presidential decrees, the military commissions so created have jurisdiction to try civilians for offenses necessarily connected with the objectives of martial law, whether these offenses were committed prior to the institution of martial rule or subsequent thereto — and this inspite of the fact that the civil courts are open and functioning; (4) the claim of the petitioner that because the offenses with which he is charged were, in point of time, allegedly committed prior to the declaration of martial law they may not be taken cognizance of by a military commission, ignores one inescapable basic fact, and this is that the crimes imputed to him are among the crimes that gave cause for the institution of martial rule; (5) the argument of the petitioner that the Constitution, in providing for due process in criminal trials, can mean only trial by judicial courts, not only demonstrates the petitioner's misunderstanding or misreading of military traditions in civilized countries throughout the ages but as well foists an interpretation of the Constitution not warranted by its phraseology; (6) well-imbedded in our jurisprudence is the recognition that justice can be administered fairly by military tribunals; and (7) the power of the Supreme Court to review death sentences does not include the power to review death sentences imposed by military tribunals.

10. In view of all that I have above stated, and especially in the light of my considered opinion that the military commissions now in existence have jurisdiction to try civilians, judicial restraint effectively precludes me from expressing my views on whether the President should transfer the case of the petitioner to a civil court for trial. Finally, it is my abiding conviction that the President will do, within the intendment of his sacred oath of office, what he believes is just for the petitioner and, logically, also for everyone else similarly situated.

* Promulgated September 17, 1974; see 59 SCRA 244.

** The March 1974 issue of the PLDT Greater Manila Telephone Directory carries 44 listings of "Jose Cruz," 44

listings of "Jose Reyes," and 47 listings of "Jose Santos."

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CONCURRING AND DISSENTING OPINION

FERNANDO, J.:

As was made clear at the opening of the learned and comprehensive, ably-penned decision of the Court through Justice Antonio, I am for the granting of petitioner's motion for withdrawal. My brethren had thought otherwise and consequently did proceed to discuss the merits of the issues raised. While again I would vote for the transfer of the criminal charges against petitioner to civil courts, it does not mean that I am in total disagreement. Nonetheless, there may be a need for a brief expression of opinion on my part as a mere formal concurrence on some of the points discussed may for some imply an identity of thought lurking dormant and concealed. It is better to avoid any misunderstanding. Moreover, at least to my mind, it would make even more apparent the truth that there can be no such thing as complete objectivity in constitutional law, a field where there are no absolutes, every constitutional question involving a balancing of competing values. It may also serve, hopefully, to illustrate that orthodoxy in juridical thought is not per se antithetical to the professed aims of an innovative legal order. It gives me an opportunity likewise to acknowledge the neat and logical pattern to the decision that strengthens its plausibility. The principles of law announced flow from the basic premise of the stern necessities of martial law. What bothers me is that from the standpoint of tried and tested concepts in constitutional law, there would seem to be a need for further refinement as to the scope of such doctrines and for clarifying differentiation. That, for me at least, would have been desirable. The apprehension is entertained that as worded in a rather all-encompassing manner, they may yield the impression of a total surrender to the pressure of events and the demands of the times. Candor though compels the admission that in the final analysis juridical theories cannot afford to be insensible to political and social realities. Now for the grounds of my concurrence and my dissent.

1. In the belief that petitioner's motion to withdraw should be granted, I am compelled to dissent. This is with due recognition of the principle that the Court is vested with discretion to grant or refuse such a plea. This notwithstanding, I am fully persuaded that the more appropriate response is one of acceding to petitioner's prayer that all cases filed on his behalf in this Court be terminated. The assumption must be that before he did arrive at such a conclusion, he had weighed with care and circumspection all the relevant aspects of the situation. It could very well be that he was prompted to take such a move to avoid further anxiety and worry on his part, considering that the ultimate outcome could belie expectations and frustrate hopes. At any rate, with his mind thus made up and without any compelling reason, in my mind, for the Court to keep the case in the docket, the discretion should be exercised in his favor. Nor does the fact that he used rather harsh language in the reasons given by him for his motion of withdrawal militate against his plea. There must be more understanding shown for the state of his physical and mental health after this long period of confinement, and of late of his depriving himself of the daily sustenance. What is more, the cutting edge of his sharp and pointed words may be blunted by the performance of this Court, which in the ultimate analysis is the ultimate criterion as to whether or not it has adequately discharged its responsibilities or lived up to the trust reposed in it. The judgment is for the entire constituency of informed and concerned citizens, not of petitioner alone. As for any individual Justice, I would assume that what matters

most is the verdict of his conscience.

2. Now as to the nature of my concurrence which has to be further qualified. Right at the outset, may I make clear that I join my brethren only to the extent that the conclusion arrived at by them conforms to what I had previously expressed in my separate opinions in *Aquino vs. Ponce Enrile*[1] and *Aquino vs. Commission on Elections*. [2] It follows that where the opinion of the Court reflects the stand I took, I am in agreement. More specifically, on the question of the scope of the competence of a military commission, I would predicate my vote on the constitutional provision that affixes to General Orders Nos. 8, 12, and 39 the status of being "part of the law of the land." [3] With due recognition of the vigor with which counsel for petitioner had pressed the point that such a character cannot be impressed on the aforesaid general orders if found in conflict with the present Constitution, I still find difficulty in according complete acceptance to such a view. To do so in my opinion would mean closing one's eyes to what was intended by the 1971 Constitutional Convention insofar as it did provide for the continued existence of a military commission with such powers as were then exercised. This is not to imply though that in no case may a Presidential proclamation, order, decree, or instruction be challenged in appropriate suits for lack of conformity to a specific provision found in the present Constitution.

3. It is to be stressed further that were it not for the above mandate of the Transitory Provisions, the submission of petitioner as to a military commission being devoid of jurisdiction over civilians elicits approval. The controlling principle, to my mind, is that supplied in the opinion of the United States Supreme Court in *Duncan vs. Kahanamoku*, [4] a decision impressed with the greatest relevance inasmuch as it interpreted the specific section found in the Hawaiian Organic Act, [5] which was also a feature of the Philippine Autonomy Act, [6] the source of the martial law provision in the 1935 Constitution. [7] As set forth in the *Duncan* opinion penned by Justice Black: "Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war. We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function. For Hawaii since annexation has been held by and loyal to the United States. Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war. And finally, there was no specialized effort of the military, here, to enforce orders which related only to military functions, such as, for illustration, curfew rules or blackouts." [8] I see nothing in *Moyer vs. Peabody* [9] that in any way runs counter to the above summary of the scope of the power of military tribunals. That was an action, as pointed out by Justice Holmes, "brought by the plaintiff in error against the former governor of the state of Colorado, the former adjutant general of the national guard of the same state, and a captain of a company of the national guard, for an imprisonment of the plaintiff by them while in office." [10] Then came this portion of the opinion: "The complaint alleges that the imprisonment was continued from the morning of March 30, 1904, to the afternoon of June 15, and that the defendants justified under the Constitution of Colorado, making the governor commander in chief of the state forces, and giving him power to call them out to execute laws, suppress insurrection, and repel invasion. It alleges that his imprisonment was without probable cause, that no complaint was filed against the plaintiff, and that (in that sense) he was prevented from having access to the courts of the state, although they were open during the whole time; but it sets out proceedings on habeas corpus, instituted by him before the supreme court of the state, in which that court refused to admit him to bail and ultimately discharged the writ. 35 Colo. 154, 91 Pac. 738, and 35 Colo. 159, 12 L.R.A. (N.S.) 979, 117 Am. St. Rep. 189, 85 Pac. 190. In those proceedings it appeared that the governor had declared a county to be in a state of insurrection, had called out troops to put down the trouble, and had ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with

safety, and that then he should be delivered to the civil authorities, to be dealt_ with according to law." [11] Plaintiff in error would hold the Governor liable for his order of detention in the course of suppressing an insurrection. As the case was dismissed on demurrer by the Circuit Court, it was elevated to the United States Supreme Court. In affirming the judgment, Justice Holmes categorically stated: "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. 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." [12] It does appear to me then, and this I say with due respect, that it is a rather forced interpretation to extract from the above explicit declaration of Justice Holmes the meaning that military tribunals are vested with jurisdiction over civilians. What was involved was a detention, not a trial. Under the view I entertain that *Duncan vs. Kahanamoku* supplies the applicable principle under the 1935 Constitution, the citations from *Winthrop* and *Fairman* found in the opinion of the Court are, for me, less than persuasive. [13] What compels concurrence on my part, to repeat, is "the law of the land" section found in the Transitory Provisions. Absent that provision, I would be unable to yield to the conclusion reached by my brethren on the question of jurisdiction.

4. The recognition implicit in the above constitutional precept as to the competence of a military commission to conduct criminal trials of certain specified offenses, to my mind, carries with it the duty to respect all the constitutional rights of an accused. It is from that perspective that a discussion of the due process guarantee gains significance. It has a connotation both substantive and procedural. As to the latter aspect, it is true that it has at its core, to follow the classic formulation of Webster, the requirement of a hearing before condemnation and a process of rational inquiry, but it has a much wider radiation extending to all the legal safeguards enjoyed by a person indicted for an offense. So it has come to be in the United States, where it is deemed to include the right to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; [14] the right to be free of compelled self-incrimination, [15] the right to counsel, [16] the right to a speedy [17] and public [18] trial, to confrontation of opposing witnesses, [19] to compulsory process for obtaining witnesses, [20] the right to a jury trial, [21] and the right against double jeopardy. [22] Such an approach is not uncongenial in our jurisdiction. [23] A related matter is the question of due process and preliminary investigation. I have my reservations as to the tone of certitude in the opinion of the court concerning the latter's being bereft of any constitutional significance. It was the ruling in *People vs. Sierra* [24] that "the principle uninterruptedly adhered to [is] that only where an accused is held to answer a criminal offense in an arbitrary or oppressive manner is there a disregard thereof. The requirement of the proceeding not being unjust or unreasonable must be met. This is not to rule out cases where such infirmity could be predicated on a showing that the disregard of this procedural safeguard did infect the prosecution with unfairness. In that sense, what was held in *People vs. Monton* as to such a failing nullifying the proceeding because of the due process protection could still be conceivably relied upon." [25]

5. Thus we come to what for me is the crucial issue posed, labeled "the principal question" in the memorandum of petitioner. He would invoke the highly-prized ideal in adjudication announced in *Gutierrez*, likewise a due process requirement, that a party to a trial "is entitled to nothing less than the cold neutrality of an impartial judge." [26] His fears, not devoid of plausibility, proceed from respondent Commission having been "created by the President's Order and subject to his control and direction" being unable to ignore his characterization that the evidence against petitioner was "not only strong [but] overwhelming." [27] It is to that implacable tenet of objectivity and neutrality, one of constitutional dimension, that appeal is made. For *Gutierrez* has been followed subsequently in an unbroken line of decisions with an impressive concord of opinion. [28] That for petitioner is to

buttress a stand that mirrors the realities, to reinforce the solidity of his position. For was it not Stoessinger who pointed out that there may be at times a tendency difficult to resist in subordinate military agencies to view matters in the light supplied by previous pronouncements of those higher up in the ranks and to respond to situations less on the basis of empirical evidence but more on that of conformity to a position officially taken. I do not have to go that far. There is acceptance on my part that, as the opinion of the Court states, respondent military commission may be trusted to be fair and that at any rate there are still various appeals in the offing. Thus there are built-in defenses against any erroneous or unfair judgment. There is, however, this other point to consider. For the Gutierrez ruling as now interpreted does not only guard against the reality but likewise the appearance of partiality. That would argue strongly for the transfer of the trial of the criminal charges against petitioner to civil courts. Nor would he be the only one thereby benefited. Respondent Commission would be spared from a proceeding with a case where from the start, in view of the peculiar circumstances, its bona fides had been open to question, although admittedly lacking factual foundation. The President likewise would be absolved from any adverse, if unfounded criticism. The greatest gain of course would be for the administration of justice. There is relevance to this excerpt from *Palang vs. Zosa*[29] "This voluntary inhibition by respondent judge is to be commended. He has lived up to what is expected of occupants of the bench. The public faith in the impartial administration of justice is thus reinforced. It is not enough that they decide cases without bias and favoritism. It does not suffice that they in fact rid themselves of prepossessions. Their actuation must inspire that belief. This is an instance where appearance is just as important as the reality. Like Caesar's wife, a judge must not only be pure but beyond suspicion. At least, that is an ideal worth striving for. What is more, there is deference to the due process mandate." [30] Necessarily then, there is complete acceptance on my part of the thought expressed in the opinion of the Court that the President is not precluded from pursuing further a notion previously expressed by him concerning the possible transfer of the proceedings against petitioner to the civil courts.

6. A few words more. It is to be admitted that in coping with the urgencies of the times, in accordance with what is ordained by the fundamental law and thus have its promise fulfilled, this Court is compelled to enter a domain much less clearly mapped out than before. It has to find its way as best it can with the light supplied by applicable precedents and the promptings of reason at times rendered obscure by the clouds of the emergency conditions. Moreover, there must be an awareness that the complexities of an era may not yield to the simplicities of a constitutional fundamentalism as well as of the pitfalls of merely doctrinaire interpretations. It cannot apply precepts with inflexible rigidity to fast-changing situations. The notion of law in flux carries it far indeed from a fixed mooring in certainty. There must be, it cannot be denied, greater sensitivity to the shifts in approach called for by the troubled present. Nonetheless, to paraphrase Cardozo, care is to be taken lest time-tested doctrines may shrivel in the effulgence of the overpowering rays of martial rule. There must be an effort to remain consistent with the old although relevant to the new. It is my view that thereby there is fidelity to the concept of the Constitution not only as a broad charter of powers to resolve conflicting issues and social problems, a means of ordering the life of the nation in times of normalcy as well as of crisis, but also as an assurance of the primacy of civil liberties.

[1] L-35546, September 17, 1974.

[2] L-40004, January 31, 1975.

[3] According to Article XVII, Section 3, par. 2 of the 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, or other acts of the

incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly."

[4] 327 US 304 (1946).

[5] Section 67, *ibid*, 308.

[6] The Philippine Autonomy Act (1916).

[7] 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."

[8] 327 US 304, 313-314.

[9] 212 US 78 (1909).

[10] *Ibid*, 82.

[11] *Ibid*, 82-83.

[12] *Ibid*, 85.

[13] Two American cases were cited in support of the view that due process is not necessarily judicial process, *Simon vs. Craft*, 182 US 427 (1901) and *Ballard vs. Hunter*, 204 US 241 (1907). The relevance is not immediately apparent, especially so as the former dealt with the proceedings taken in connection with the person of unsound mind, and the latter with the administrative process followed for the sale of property for nonpayment of levy taxes. Nor is the reference to a secondary authority, 16 Am. Jur., 2nd, of any particular worth.

[14] See *Mapp vs. Ohio*, 367 US 643 (1961).

[15] *Malloy vs. Hogan*, 387 US 1 (1964).

[16] *Gideon vs. Wainwright*, 372 US 335 (1963).

[17] *Klopfer vs. North Carolina*, 386 US 213 (1967).

[18] *In re Oliver*, 333 US 257 (1948).

[19] *Pointer vs. Texas*, 380 US 400 (1965).

[20] *Washington vs. Texas*, 388 US 14 (1967).

[21] *Duncan vs. Louisiana*, 391 US 145 (1968).

[22] *North Carolina vs. Pearce*, 23 L. ed. 2d 656 (1969).

[23] Cf. *Abriol vs. Homeres*, 84 Phil. 575 (1949) and *People vs. Holgado*, 85 Phil. 752 (1950).

[24] L-27611, August 30, 1972, 46 SCRA 717.

[25] *Ibid*, 726-727. *People vs. Monton* is reported in 23 SCRA 1024.

[26] *Gutierrez vs. Santos*, L-15824, May 30, 1961, 2 SCRA 249.

[27] Petitioner's memorandum, 35.

[28] Cf. *del Castillo vs. Javellana*, L-16742, Sept. 29, 1962, 6 SCRA 146; *People vs. Gomez*, L-22345, May 29, 1967, 20 SCRA 293; *Austria vs. Masaquel*, L-22536, Aug. 31, 1967, 20 SCRA 1247; *Pimentel vs. Salanga*, L-27934, Sept. 18, 1967, 21 SCRA 160; *Zaldivar vs. Estenzo*, L-26065, May 3, 1968, 23 SCRA 533; *Luque vs. Kayanan*, L-26826, Aug. 29, 1969, 29 SCRA 165; *Paredes vs. Gopengco*, L-23710, Sept. 30, 1969, 29 SCRA 688; *Geotina vs. Gonzalez*, L-26310, Sept. 10, 1971, 41 SCRA 66; *Tobias vs. Ericta*, Adm. Case No. 242-J, July 29, 1972, 46 SCRA 83; *Mateo Jr. vs. Villaluz*, L-34756, March 31, 1973, 50 SCRA 19; *Umali vs. Villaluz*, L-33508, May 25, 1973, 51 SCRA 84; *Palang vs. Zosa*, L-38229, Aug. 30, 1974, 58 SCRA 776.

[29] L-38229, Aug. 30, 1974, 58 SCRA 776.

[30] *Ibid*, 778.

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DISSENTING OPINION

MUÑOZ PALMA, J.:

I concur with the dissenting Opinion of Justice Claudio, Teehankee with additional explanation for my vote.

1. On the Motion to withdraw Petition —

From a letter of Benigno Aquino, Jr. of April 14, 1975, addressed to his wife, children, relatives, and friends submitted to the Court and now part of the record of the case (see page 65 of Justice Teehankee's dissenting opinion), I am convinced that petitioner no longer desires to seek redress or relief from this Court. He would, rather make of his plight (his continued detention from September 23, 1972, in a military camp and his trial before a Military Commission for crimes allegedly committed before the proclamation of Martial Law) a matter of conscience between himself and the President of the Republic, and offer his life for what he believes is a rightful cause. Who am I to stand on the way of this man who offers himself in supreme sacrifice, and is ready to consign his fate to his Maker, for his country and his people?

2. On the merits of the Case —

I vote to grant the Petition for Prohibition because, brushing aside the personalities of the parties involved, that is, the fact that Benigno Aquino, Jr. was a member of the Senate and a known leader of the Opposition at the time martial law was proclaimed and that President Ferdinand E. Marcos believes in the Rule of Law notwithstanding martial rule, I am called upon at this moment to lay down a principle of law which will decide the fate, not only of the present generation but also that of Filipinos still to be born. For the main question now at stake — whether or not military tribunals can try and render a verdict on civilians for offenses allegedly committed before or even during martial rule, notwithstanding the fact that civil authority is supreme and civil courts are existing and functioning under the Constitution — raises before my eyes the gruesome spectre of one, a hundred, a thousand civilian Filipinos being dragged by the mighty arm of the military before its own created and manned tribunals, commissions, etc., for offenses, real or imaginary, and tried and sentenced without the constitutional safeguards attendant to a trial by civil courts (see page 70-74 of Justice Teehankee's Opinion for these safeguards). True it is, that the picture I conjure before me may not take place at all under the present dispensation because President

Ferdinand E. Marcos, as Commander-in-Chief of the Armed Forces, is committed to uphold the Constitution and, as quoted by Justice Teehankee, believes in the protection of the Bill of Rights (see page 101 of Justice Teehankee's Opinion). But what about tomorrow, and the day after tomorrow, when we shall all be gone and the political atmosphere different? Legal precepts which are to protect the basic fundamental rights and liberties of an individual must be laid down not only for the present but for all times and for all conditions. The Bill of Rights must remain firm, indestructible, and unyielding to all forms of pressure, for like Mount Sinai of Moses it can be the only refuge of a people in any crucible they may suffer in the course of their destiny.

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DISSENTING OPINION

TEEHANKEE, J.:

This opinion for the granting of petitioner's withdrawal motion and in view of its denial, for the granting of the writ of prohibition against respondent military commission as prayed for in the petition, is issued pursuant to the Court's Resolution of April 25, 1975, which ruled as follows:

"... The Court, by a vote of seven to three, Resolved to DENY petitioner's motion for withdrawal of the petition and of all motions and incidents related thereto. Castro, Barredo, Antonio, Esguerra, Aquino, Concepcion, Jr. and Martin, J.J., voted to deny the motion: Fernando, Teehankee and Muñoz Palma, J.J., voted to grant the motion.

"There being no sufficient votes to declare that the respondent Military Commission is without jurisdiction over the pending criminal cases filed against the petitioner and that it acted with grave abuse of discretion in conducting the perpetuation of testimony proceedings, the Court Resolved to lift, effective immediately, the restraining order issued on April 8, 1975. Teehankee and Muñoz Palma, JJ., voted to maintain the restraining order.

"On the question of waiver of the presence of the petitioner in the perpetuation of testimony proceedings, Fernando; Teehankee, Barredo, Antonio, Muñoz Palma and Aquino, JJ., voted in favor of upholding the petitioner's right of total waiver of his presence; Castro, Esguerra, Concepcion, Jr. and Martin, JJ., voted in favor of qualified waiver, that is, that the accused could waive his presence except in the instances where such presence is needed for his identification by the prosecution witnesses.

"The extended reasoned resolution or decision and the separate extended reasoned concurring and/or dissenting opinions will be released next week.

"Makalintal, C.J., did not take part for being a party respondent; Makasiar, J., is on official leave."

I. I vote for the granting of petitioner's motion to withdraw his petition and all other pending motions and matters.

To paraphrase and cite the Chief Justice's reasons in casting a vote for granting a similar motion for withdrawal of petition filed by former Senator Jose W. Diokno in the Habeas Corpus cases^[1] (which was also defeated for lack of necessary votes), such withdrawal would not emasculate the "issues of paramount public interest" that need to be resolved (as invoked by the majority) for they may be duly resolved in the other cases which remain pending, such as the earlier and urgent lead case of Gumaua vs. Espino and Military Commission No.2^[2] which raises the

same fundamental question of whether military tribunals have jurisdiction to try civilians (wherein petitioner was sentenced on March 16, 1973 to death by firing squad, which sentence was affirmed on September 29, 1973 by the President and which has long been pending decision); and since it is petitioner Aquino's life and liberty that are at stake, his choice to renounce his own petition questioning the jurisdiction of respondent military commission to try the cases filed against him and the subsequent incidents and to remove the case from this Court's cognizance should be respected "regardless of the fact that (one) disagreed with many of his reasons for so doing" since one "could not escape a sense of irony in this Court's turning down the plea to withdraw. . . and then ruling adversely to him on the merits of his petition." It may be added that since the majority who voted to deny the withdrawal motion numbers only seven out of ten Justices taking part in the deliberations as of the date of issuance of the Court's Resolution of April 25, 1975 which denied the motion^[3] the majority opinion would fall short of the required number of eight Justices to render a decision on the merits.^[4]

The Solicitor General's grounds for opposing withdrawal are not persuasive. In his first opposition of April 14, 1975 where he notes that petitioner "has chosen to dramatize his protest by staging a hunger strike. Petitioner's motion is thus silently eloquent in its avoidance of the reasons for (withdrawal), "his prayer that "if the petitioner's motion is granted, it should be with prejudice," is inconsistent with his posture that the petition is premature and with the fact that the charges against petitioner are still, pending reinvestigation as ordered by the President. In his second opposition of April 16, 1975, he avers that the Government "seeks only to present the evidence supporting the charges of murder, illegal possession of firearms and subversion against the petitioner," and if this be so, petitioner's withdrawal of his petition at bar precisely clears the way of all judicial obstacles for the prosecution to do so.

Petitioner's withdrawal should be properly granted in pursuance of the established principle that the judicial power is exercised only when necessary for the resolution of an actual case and controversy, particularly in view of the respondents' stand in their answer that the petition has been prematurely filed.

Judicial abstention would provide the Court with time and opportunity to ponder and deliberate on the basic constitutional questions involved and their ramifications which concern inter alia the supremacy of civilian authority over the military, the right of civilians to judicial process as against the executive process of military tribunals, the upholding of Judicial Power as vested by the Constitution in the Supreme Court and in such inferior courts as may be established by law and the recognition of the individual's liberties as guaranteed by the Bill of Rights even in a state of martial law.

II. Since the majority has nevertheless resolved to go into the merits of the case and the transcendental constitutional issues, a brief statement of the factual background is required for the proper consideration of the issues on the merits.

Petitioner (after having been served on August 11 and 18, 1973 at his detention quarters with copies of the six criminal charges filed against him with respondent military commission) filed on August 23, 1973 his original petition at bar for prohibition questioning the jurisdiction of military tribunals in the absence of a state of war or belligerency over civilians like him particularly, for civil offenses allegedly committed before the proclamation of martial law and complaining of violation of his constitutional rights in that he was deprived of due process and the vested right to preliminary investigation as provided by law and the assistance of counsel with right to cross-examine the witnesses against him.

Petitioner further alleged that the military tribunals are mere instruments and subject to the control of the President as created by him under the General Orders issued by him as Commander-in-Chief of the Armed Forces of the Philippines,^[5] and that he had already been publicly indicted and adjudged guilty by the President of the

charges in a nationwide press conference held on August 24, 1971, following the Plaza Miranda bombing of August 21, 1971 and the suspension of the privilege of the writ of habeas corpus under Proclamation No. 889 on August 23, 1971.

The Court set an urgent preliminary hearing on August 26, 1973 (a Sunday) on the question of whether with its membership then of only nine (9) Justices, it had the required quorum to take cognizance of the petition. No further action was taken by the Court for following petitioner's refusal to participate in the arraignment and trial set on August 27, 1973, the President issued on August 28, 1973 Administrative Order No. 355, creating a special five-member committee to "reinvestigate the charges against Benigno S. Aquino, Jr. and others," composed of a retired Supreme Court Justice to be designated by the Chief Justice as chairman and four members to be designated respectively, by the accused-petitioner himself, the president of the Integrated Bar of the Philippines, the Secretary of Justice and the Secretary of National Defense, with the proviso that "should the accused decline to designate a representative to the committee, the Chief Justice shall designate someone in his stead" and expressly stating the following premises and objectives:

"WHEREAS, Benigno S. Aquino, Jr. and his counsel have repeatedly complained, orally and in writing that the accused has been denied his constitutional right to due process and have openly questioned the regularity and fairness of the application to him of the established procedure sanctioned by law and practice;

"WHEREAS, although the Prosecution Staff is assumed to have conducted a fair and impartial initial investigation, it is desirable to reassure the accused that he continues to enjoy his constitutional right to due process and to remove any doubt whatsoever in the mind of anybody that only after finding a prima facie case against him were charges filed;

"WHEREAS, it is necessary for the above purpose that a Committee be created to conduct a re-investigation of said charges to demonstrate that everything is being done to insure utmost fairness, impartiality and objectivity is the prosecution of the charges against the accused and to determine whether really there is reasonable ground to believe that the offenses charged were in fact committed and the accused is probably guilty thereof.

"* * * * *

"The Committee shall convene immediately, conduct the preliminary investigation in the most expeditious manner and submit its findings to the Secretary of Justice.

"To prevent a failure or delay of justice, any testimonial evidence presented before the Committee may be used in any proceeding or action before any court or tribunal, civil or military, without need of presenting the witness or witnesses who testified in case such witness or witnesses have died or left the country or become unable to testify."[6]

The charges against petitioner and his co-accused were thus brought back to the stage of preliminary investigation. On August 30, 1973, respondent military commission met and ordered that the hearing of the cases be postponed indefinitely to await the outcome of the reinvestigation ordered under the said Administrative Order.

The Secretaries of Justice and of National Defense designated their representatives. The Chief Justice asked retired Justice J.B.L. Reyes, but the latter on August 31, 1973 declined the designation and also declined as IBP president to designate a representative to the special committee, on grounds of illegality of the order. Petitioner likewise declined to designate his representative.

Petitioner filed on September 5, 1973 his first supplemental petition to include these developments and to insist that he be granted his right to preliminary investigation as prescribed by statutory law, to be conducted by the court of first instance as far as the four charges of subversion under R. A. 1700 are concerned. (On October 31, 1973, Presidential Decree No. 328 amending P.D. No. 39 prescribing the rules of procedure for military tribunals

under martial law was issued, providing for the perpetuation of testimony in cases pending before military tribunals.)

No action was taken by the Court on this supplemental petition until July 11, 1974 when it issued a resolution requiring an answer thereto which was filed by the Solicitor General on August 21, 1974. On October 31, 1974, petitioner filed a second supplemental petition citing the President's statements to the world press on April 15, 1974 and August 19, 1974 on the "actual removal" of martial law and that "technically and legally, martial law was lifted with the ratification of the Constitution last year (1973)." The Solicitor General filed his answer thereto on December 11, 1974.

Memoranda were filed by petitioner's counsel and by the Solicitor General on March 21, 1975 and March 11, 1975, respectively.

Meanwhile, on March 10, 1975, respondent military commission issued ex parte its order granting the prosecution's motion of March 7, 1975 "to examine and take the deposition of its witnesses" on March 31, and April 1-4, 1975 until terminated for perpetuation purposes on the bare allegation that "(T)he petitions of the accused Benigno S. Aquino, Jr. pending in the Supreme Court will take time to resolve resulting in the delay of the perpetuation of the testimonies of the prosecution witnesses . . ."

Petitioner's counsel filed on March 24, 1975 an urgent motion to restrain respondent military commission from holding the perpetuation proceedings on the grounds among others that the very issue of its jurisdiction to take cognizance of civil offenses allegedly committed before martial law by civilians like petitioner was pending with this Court and that such proceedings would "short-circuit" the Special Reinvestigating Committee created under Administrative Order No. 355 even before such committee has commenced its duty to determine the existence of "reasonable ground to believe that the offenses charged were in fact committed and the accused is probably guilty thereof" and "whether or not petitioner should be held for trial." [7]

On April 1, 1975, this Court, then composed of ten members issued its resolution that it lacked the "necessary quorum" to act on petitioner's said urgent motion.

On April 7, 1975, petitioner's counsel filed an urgent manifestation averring that this Court without a qualified quorum could issue the temporary restraining order prayed for so as not to render the case moot and apprising this Court that after respondent military commission had on April 1, 1975 held, consistently with *Elago vs. Peoples* [8] that the perpetuation proceedings are not a part of the trial and granted petitioner's request to be returned to his detention quarters, ruling that he could refuse to be present at the proceedings since he had expressly waived his presence, as allowed in P.D. No. 328, it reversed itself at the military prosecutor's instance on April 4, 1975 and now ruled that the perpetuation proceedings are part of the trial and that petitioner must be present at the proceedings (which would take two to three months according to the military prosecutor's manifestation) and that petitioner must be physically present throughout the proceedings even against his will.

Petitioner's counsel further manifested that petitioner's request to respondent military commission to suspend the proceedings for seven days to allow his counsel time and opportunity to seek appropriate relief from this Court was summarily denied and petitioner then delivered his statement that if denied this "last basic right of a human being . . . to be let alone" he would have no alternative "but to go on a hunger strike, as a form of silent protest against a procedure that is intended to humiliate and dehumanize me."

The perpetuation of testimony proceedings thus commenced on April 4, 1975 and continued on succeeding days with the military prosecutor presenting as the first state witness Benjamin M. Bie, Jr. alias Huk Commander Melody, and with petitioner being compelled to be present throughout the proceedings. This witness, Bie together

with another listed witness Benjamin Sanguyo alias Huk Commander Pusa were originally co-accused with petitioner in four subversion charges but the charges against them were withdrawn under a "nolle prosequi" order issued by the Secretary of National Defense dated March 15, 1975.

On April 8, 1975, the Court ordered the issuance of a temporary restraining order enjoining respondent military commission from further proceeding with the perpetuation proceedings until the matter is heard and further orders and set petitioner's urgent motion and related incidents for hearing on April 14, 1975. It was at this hearing that petitioner's counsel presented the simple motion to withdraw the petition and all other pending motions in compliance with the petitioner's express wish.

In compliance with the Court's instruction at the hearing to inquire into petitioner's reasons for his withdrawal motion, his counsel on the next day, April 5, 1975, filed their manifestation submitting therewith petitioner's 6-page letter of April 14, 1975 addressed to his wife, mother, relatives and friends stating his reasons therefor and for continuing the hunger strike " (he)began ten days ago," inter alia, that "(he) felt that the case (he) had filed since 1973 in the Supreme Court had become meaningless; that he had decided to "place (his) fate and (his) life squarely in the hands of . . . Mr. Marcos;" that "The meaning and thrust of (his) struggle and sacrifice transcend the limited question of (his) absence or presence in the proceedings before the military tribunal" and he has solemnly vowed to continue his hunger strike as a protest against : "1. the trial of civilians before military tribunals . . . ; 2. the lack of judicial independence . . . for as long as our judges remain 'casuals'. . . ; 3. the absence of a genuine free press . . . ; and) 4. the further continuance of martial law and its evils and repressions . . ."

III. The transcendental character of the constitutional issues raised, dealing as they do with the individual's fundamental liberties as guaranteed by the Bill of Rights even in a state of martial law, which concededly is "not a military takeover of civil government functions"[9] and recognized under the 1973 Constitution to which all have pledged loyalty and wherein we are now called upon to discharge the judiciary's great burden of defining its constitutional boundaries, compels my vote on the merits which I cast for the granting of the writ of prohibition prayed for against respondent military commission for the reasons and considerations which are hereinbelow respectfully submitted.

1. Civilians like petitioner placed on trial for civil offenses under general law are entitled to trial by judicial process, not by executive or military process.

Judicial power is vested by the Constitution exclusively in the Supreme Court and in such inferior courts as are duly established by law.[10] Judicial power exists only in the courts, which have "exclusive power to hear and determine those matters which affect the life or liberty or property of a citizen." [11]

Military commission tribunals are admittedly not courts and do not form part of the judicial system. As further admitted by the Solicitor General in his answer,[12] "military commissions are authorized to exercise jurisdiction over two classes of offenses, whether committed by civilians or by military personnel either (a) in the enemy's country during its occupation by an army and while it remains under military government or (b) in the locality, not within the enemy's country, in which martial law has been established by competent authority. The classes of offenses are (a) violation of the laws and customs of war and (b) civil crimes, which because the civil courts are closed or their functions suspended or limited, cannot be taken cognizance of by the ordinary tribunals."

Since we are not enemy-occupied territory nor are we under a military government and even on the premise that martial law continues in force, the military tribunals cannot try and exercise jurisdiction over civilians for civil offenses committed by them which are properly cognizable by the civil courts that have remained open and have been regularly functioning.[13] In the leading case of *Duncan vs. Kahanamoku*, [14] the U.S. Supreme Court held in setting aside the prison sentences imposed on two civilians by military tribunals that the placing of Hawaii

under martial law (after the Japanese Pearl Harbor attack on December 7, 1941) under the Hawaiian Organic Act[15] did not include the power on the part of the military governor to supplant civilian laws by military orders and to supplant civil courts by military tribunals, where conditions were not such as to prevent the enforcement of the laws by the courts.

The late Justice Frank Murphy in his concurring opinion therein repudiated the government's appeal to abandon the "open courts" rule on the alleged ground of its unsuitability to "modern warfare conditions where all the territories of a warring nation may be in combat zones or imminently threatened with long range attack even while civil courts are operating" as seeking "to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights," and observing that "Constitutional rights are rooted deeper than the wishes and desires of the military."

And in *Toth vs. Quarles*[16] the U.S. Supreme Court further stressed that "the assertion of military authority over civilians cannot rest on the President's power as Commander-in-Chief or on any theory of martial law."

Thus, the President has filled up vacancies in the judiciary and "allayed effectively the fears expressed during the initial days of martial law that the rule of the military would prevail because other countries under martial law had dispensed with civilian courts of justice" and stressed the supremacy of the Constitution at the 38th anniversary rites of the AFP when he told the Armed Forces that "The military is the force that enforces the law, but the civil government is the ruling power in our country," and that "we have stuck to the Constitution. We have pledged loyalty to that Constitution." [17]

2. Even assuming that military tribunals could validly exercise jurisdiction over offenses allegedly committed by civilians notwithstanding the absence of a state of war or belligerency and the unimpaired functioning of the regular courts of justice, such jurisdiction could not encompass civil offenses (defined by the general civil law as per the Revised Penal Code and Republic Act 1700 known as the Anti-Subversion Act) alleged to have been committed by civilians like petitioner in 1965, 1967, 1969, 1970 and 1971, long before the declaration of martial law as of September 21, 1972.

The U.S. Supreme Court aptly pointed out, in *Toth vs. Quarles*, supra, in ruling that discharged army veterans (estimated to number more than 22.5 million) could not be rendered "helpless before some latter-day revival of old military charges"[18] and subjected to military trials for offenses committed while they were in the military service prior to their discharge, that "the presiding officer at a court martial is not a judge whose objectivity and independence are protected by tenure and undiminished salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from these differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."

The late Justice Black speaking for that Court added that "(A) Court-Martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the over-all mechanism by which military discipline is preserved," and that ex-servicemen should be given "the benefits of a civilian court trial when they are actually civilians. . . . Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."

More so then should military trials be not sanctioned for civil offenses allegedly committed by civilians like petitioner long before the declaration of martial law and for which they could have been charged then as well as now before the civil courts which have always remained open and their process and functions unobstructed.

The Solicitor General's contention that military tribunals have "competence to try civil crimes relating to the causes justifying the proclamation of martial law"[19] in a veiled reference to the subversion" charges against petitioner does not meet the essential requirement of the existence of overpowering necessity or emergency to justify the trial of petitioner, a civilian, for the said civil offenses by respondent military commission.

On the contrary, the President's issuance of Administrative Order No. 355 on August 28, 1973 for the reinvestigation of the charges against petitioner by a non-military special committee establishes per se that no serious grounds of overpowering necessity or considerations of national security or emergency stand in the way of recognizing petitioner's right to a civilian trial should the results of the civilian reinvestigation prove adverse to him.

As stated by the present Judge Advocate General in his treatise on martial law, "Necessity limits both the extent of powers that may be exercised under martial law, and the duration of its exercise. No life may be taken, no individual arrested or confined, or held for trial no property destroyed, or appropriated, no rights of the individual may be curtailed or suspended except where necessity justifies such interference with the person or the property. Any action on the part of the military that is not founded on the reasonable demands of necessity is a gross usurpation of power, illegal unjustified, and improper. The broad mantle of martial law cannot cover acts illegal because not justified by necessity, nor proper under the circumstances. This principle is based not only upon the fundamental precepts of constitutionalism, but rests on sound reason — that where the action of the matter is not necessary for the public ends of the state they are illegal and the mere fact that martial law exists will not be a ground for their justification." [20]

3. Petitioner may not be deprived of his constitutional right to due process by means of the proceedings instituted against him before respondent military commission, viz:

(a) The summary ex parte investigation by the chief prosecution staff of the JAGO of the charges filed against him deprived him of his right to be informed of the charges against him and of his right to counsel as expressly recognized now by section 20 of the Bill of Rights of the 1973 Constitution.[21]

(b) he would be deprived of his vested statutory right to a preliminary investigation of the subversion charges against him before the proper court of first instance as required under section 5 of the Anti-Subversion Act, Republic Act 1700[22] and of the other charges against him before the proper civilian officials and to confront and cross-examine the witnesses against him under Republic Act 5180; (at the least, the special reinvestigating committee created under Administrative Order No. 355 should be activated in order to discharge its assigned task of conducting the preliminary investigation and determining whether or not the petitioner should be held for trial);

(c) he would be deprived of the right to be tried by judicial process, by the regular, independent court of justice, with all the specific constitutional, statutory and procedural safeguards embodied in the judicial process and presided over not by military officers ("trained and oriented along strict rules of discipline and rigid countenance (although) they are human beings with human hearts"[23] who are not lawyers (except the law member), but by judges of at least ten years experience in the practice of law whose objectivity and independence are protected by tenure guaranteed by the Constitution and are nurtured by the judicial tradition; and

(d) he would be deprived of the right to appeal to the regular appellate courts and to judicial review by this Court, in the event of conviction and imposition of a sentence of death or life imprisonment which the charges carry.[24] Article X, section 1 of the 1973 Constitution expressly provides that the National Assembly (which is vested with the power to define, prescribe and allocate the jurisdiction of the various courts) may not deprive this Court of its jurisdiction over such serious cases, among others. This Court in the exercise of such jurisdiction has consistently exacted the cardinal rule that the prosecution must prove the guilt of the accused beyond a reasonable doubt and

required a qualified majority of ten (10) votes for affirmance of the death penalty (which requirement is of course not found in the Commander-in-Chiefs review of the decisions of military tribunals).

For the military tribunal to try petitioner under these circumstances is to deny petitioner due process of law as guaranteed -under section 1 of the Bill of Rights as well as under section 17 which further specifically ordains that "No person shall be held to answer for a criminal offense without due process of law." The elimination by subsequent decrees of his right to preliminary investigation (with right of counsel and of cross-examination) of the subversion charges before the proper court of first instance under Republic Act 1700 and of other rights vested in him at the time of the alleged commission of the offense which were all meant to provide the accused with ample lawful protection in the enforcement of said Act, such as the basic right to be tried by judicial process and the right of judicial review by this Court would further offend the Constitutional injunction against the enactment of ex post facto laws which would render it easier to convict an accused than before the enactment of such law.[25]

With all such constitutional safeguards, the Court through Mr. Justice Castro in its decision in *People vs. Ferrer*[26] rendered after the proclamation of martial law, nevertheless enjoined that "even as we uphold the validity of the Anti-Subversion Act, we cannot overemphasize the need for prudence and circumspection in its enforcement, operating as it does in the sensitive area of freedom of expression and belief," and set specific basic guidelines to be observed in any prosecution under the Act. Hence, the prohibition against ex post facto laws has been aptly described as "a warning against legislative oppression or tyranny" and a provision that "would minimize if not eradicate the possibility of the legislature itself discrediting the state with its palpable disregard of a basic objective, that justice be dispensed with an even hand through the duly established organs with a special fitness for the task." [27]

Petitioner has thus cited the President's announcement on December 11, 1974 that the persons charged with assassination attempts against him will be tried before the civil courts although the charges were filed with the military tribunals[28] and the President's recent issuance on March 6, 1975 of Letter of Instruction No. 225 creating a special five-member panel to conduct an investigation to re-evaluate the evidence against the therein accused and to determine whether an offense has been committed and whether they are probably guilty thereof and if probable cause is found, to file the appropriate charges.[29]

4. Petitioner's plea that his trial by a military tribunal created by the President and composed of the President's own military subordinates without tenure and of non-lawyers (except the law member) and of whose decision the President is the final reviewing authority as Commander-in-Chief of the Armed Forces deprives him of a basic constitutional right to be heard by a fair and impartial tribunal, considering that the President has publicly declared the evidence against petitioner "not only strong (but) overwhelming" and in petitioner's view thereby prejudged and predetermined his guilt merits consideration.

In petitioner's view, he has been publicly indicted and his guilt prejudged by the President when in a nationwide press conference on August 24, 1971 following the Plaza Miranda bombing three days earlier of the Liberal Party proclamation meeting, the President charged him and disclosed evidence in the possession of the government linking petitioner to some illegal and subversive activities, in 1965-1971, which are virtually the same charges now filed against him before respondent military commission, and declared the evidence against petitioner "not only strong (but) overwhelming." The President explained on the same occasion that in not acting against petitioner, he had "erred on the side of generosity as well as of liberality hoping that good sense may someday catch up with him" since petitioner was "the only opposition senator left in the Senate" after the bombing, but that he did not know "what will happen later on, because, of course, the military insist that we must not make any exceptions to the general rule." [30]

While one may agree that the President as Commander-in-Chief would discharge his duty as the final reviewing authority with fealty to his oath "to do justice to every man", particularly because of his renowned legal sagacity and experience, still under the environmental facts where the military appears to have been impressed by the President's appraisal of the evidence and without casting any reflection on the integrity of the members of respondent military Commission which petitioner himself acknowledges, the doctrine consistently held by the Court that "elementary due process requires a hearing before an impartial and disinterested tribunal"[31] and that "All suitors . . . are entitled to nothing short of the cold neutrality of an independent, wholly free, disinterested and impartial tribunal"[32] calls for application in the present case.

This Court in all its jurisprudence on disqualification and inhibition of judges has invariably cited as "a salutary norm . . . that he (the judge) reflect on the probability that a losing party might nurture at the back of his mind the thought that the judge had unmeritoriously tilted the scales of justice against him" and applied the yardstick that when the basis has been laid for "the possibility of a trial being tainted by partiality, this Court can step in to assure respect for the demands of due process" which it has extended primarily for the peace of mind and protection of the accused.[33]

Respondents' citing of *Yamashita vs. Styer*[34] as justifying the prosecution and trial of civilians by military commissions is in error as that case involved the "trial and punishment of war criminals (which) is an aspect of waging war." Neither is the creation of the People's Court after the last war to try those charged with treason in point, for said court as well as similar courts like the Circuit Criminal Courts which were created by Congress pursuant to its authority under the Constitution and vested with special jurisdiction over certain crimes, were created as judicial courts and part of the judicial system whose decisions were and are subject to review by the appellate courts, unlike military commissions.

5. Prescinding from the issue of respondent military commission's lack of jurisdiction over the charges against the petitioner, the examination of the prosecution witnesses and the perpetuation of their testimony should properly be held before the Special Reinvestigating Committee created under Administrative Order No. 355 for the simple reason that all proceedings before respondent military commission were deemed suspended by virtue of the reinvestigation ordered by the President to determine whether there "really is reasonable ground" to hold petitioner for trial and the perpetuation of testimony given before the said Committee is expressly provided for in the Administrative Order.

It was precisely "to reassure the (petitioner) that he continues to enjoy his constitutional right to due process " and "to insure utmost fairness, impartiality and objectivity" and "to determine whether really there is reasonable ground to believe that the offenses charged were in fact committed and the (petitioner) is probably guilty thereof" that the President created under Adm. Order No. 355 on August 28, 1973 a special five-member committee "to conduct the preliminary investigation" of the charges against petitioner.

It may be seen from the above-stated premises and objectives that the administrative order was issued by the President pursuant to his "orientation towards the protection of the Bill of Rights (and) the judicial process." As the President himself declared in the same nationwide press conference of August 24, 1971:

"I am a lawyer, my training is oriented towards the protection of the Bill of Rights, because if you will remember, I have repeatedly said, that if it were not for the Bill of Rights I would not be here now. If it were not for the judicial process, I would not be President of the Republic of the Philippines. . . ."[35]

In petitioner's urgent motion of March 24, 1975 for a restraining order against the holding of perpetuation of testimony proceedings before respondent military commission, he precisely complained that such proceedings would preempt and render moot the prejudicial question raised by him in the case at bar challenging the

commission's jurisdiction to take cognizance of the charges against him and would "short-circuit" the reinvestigation ordered by the President under Adm. Order No. 355 "even before the said committee has performed its duty to determine whether or not petitioner should be held for trial" and notwithstanding that "there is no indication coming from the President of the Philippines that it has outlived its usefulness — *functus officio* — or that it is not fit to administer justice to the petitioner." [36]

While petitioner insisted on his right to a preliminary investigation of the subversion charges by the court of first instance as prescribed by Republic Act 1700, he nevertheless propounded in his March 21, 1975 memorandum that retired Justice J. B. L. Reyes' having declined to act as chairman of the committee and to designate a representative of the Integrated Bar did not mean that the committee "cannot be made to function (since) in the absence of judicial writ or process, there is nothing to prevent the designation of another retired justice of the Supreme Court as chairman, and nothing to prevent the incoming president of the Integrated Bar to designate a representative to the committee." [37] As to petitioner's having declined to designate his representative, it has already been pointed out, *supra*, [38] that the said order expressly provides that in such event "the Chief Justice shall designate someone in his stead."

It is evident then that under the said order, the Chief Justice was called upon to fill at least the two vacancies by making the substitute designations as therein provided, which would have enabled the committee to discharge its function with a composition of four members (while awaiting the designation of the fifth member by the IBP president) but that he refrained from doing so as the matter was sub judice because of the pendency of the supplemental petition at bar questioning the validity of the order on the ground that it deprived petitioner of his right to investigation by the court of first instance on the principal charges of subversion.

With the Court's dismissal of the petitions (and petitioner's withdrawal thereof) nothing stands in the way now of activating the said Special Reinvestigating Committee and its discharging its assigned task of "conducting the preliminary investigation" and determining whether petitioner should be held for trial in implementation of the order's express objectives of reassuring petitioner of "his constitutional right to due process" and "insuring utmost fairness, impartiality and objectivity in the prosecution of the charges against (petitioner)."

Such preliminary investigation by the Special Reinvestigating Committee with its diverse membership and emphasis that those designated must meet the qualifications of being "learned in the law, reputed for probity, integrity, impartiality, incorruptibility and fairness and must have had no previous connection in this matter either as counsel or investigator" is certainly far more desirable than the present situation where such grave charges were summarily filed with the military commission against petitioner without his having been previously informed of the charges against him nor given the benefit of any preliminary investigation.

Going by the very standards of "utmost fairness, impartiality and objectivity" set by the President in the Administrative Order, and prescinding from the unsettled question of whether petitioner would have through counsel the right of cross-examination of the witnesses presented against him, it will be readily appreciated that in such preliminary investigation by a non-military special committee wholly composed of civilians, petitioner may then fairly and properly be represented by experienced counsel who can competently handle his defense and at least present timely objections to the admission of incompetent or inadmissible evidence, not to mention that the five men "learned in the law" composing the committee would most likely *motu proprio* rule out any such inadmissible evidence. This would be in contrast to the perpetuation proceedings in the military tribunal where petitioner has discharged all his counsels, civilian and military, because of the lack of jurisdiction, in his view, (as well as per this opinion) of the military commission over civilians like him for alleged pre-martial law civil offenses and the nullity of the proceedings therein, and thus has been deprived, although by his own act, of indispensable legal representation and assistance in the proceedings where his very life, liberty and honor are at

stake.

The objective of the perpetuation proceedings may properly be achieved by the Special Reinvestigating Committee before whom the testimonial evidence sought to be perpetuated should be presented in the discharge of its assigned task to conduct a preliminary investigation to determine whether or not the charges against petitioner should stand and petitioner made to face trial. Holding the perpetuation proceedings before the committee would dispose of the legal requirements under P.D. No. 328 itself that the proceedings be had before a military tribunal with jurisdiction and "before which a case is pending." Even though technically, as contended by respondents, the cases are still pending with the military tribunal, it seems obvious from the very terms of Administrative Order No. 355 that the charges are in fact deemed withdrawn from the military tribunal and the latter cannot hold any proceedings for as long as the committee has not completed its preliminary investigation and determined thereafter the existence of a prima facie case sufficient to let the charges remain and to require petitioner to face trial. The Administrative Order thus expressly provides for the perpetuation of "any testimonial evidence presented before the Committee" and for its use in any proceeding" before any court or tribunal, civil or military, without need of presenting the witness-or-witnesses who testified in case such witness or witnesses have died or left the country or become unable to testify."^{38-a}

6. Assuming nevertheless that the perpetuation of testimony proceedings could be properly conducted before respondent military commission, petitioner's physical presence at the proceedings could not be compelled by virtue of his express waiver thereof as explicitly allowed by the Constitution and by P.D. No. 328 itself.

On April 1, 1975, respondent military commission had recognized petitioner's right to waive his presence at the proceedings and granted his request to be returned to his detention quarters. But on April 4, 1975, it reversed itself at the military prosecutor's instance and ruled instead that petitioner's presence at every stage of the proceeding is indispensable on the ground, as stated by the Solicitor General, that "the charges against petitioner involve capital offenses and petitioner is in custody and petitioner had claimed in this case that proceedings for the perpetuation of testimony were actually a part of trial"[³⁹]

Petitioner's submittal that he cannot be compelled to be present at the proceedings even against his will by virtue of his express waiver is meritorious. Whereas previously such right of waiver of the accused's presence in criminal proceedings was generally recognized[⁴⁰] save in capital cases[⁴¹] (leading to the suspension of trial whenever the accused was at large) or where the accused was in custody although for a non-capital offense, the 1973 Constitution now unqualifiedly permits trial in absentia even of capital cases, and provides that "after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustified,"[⁴²] thus recognizing the right of an accused to waive his presence. P.D. No. 328 under which the perpetuation proceedings are being conducted in military commissions (as the counterpart rule for similar proceedings before the regular civil courts, as provided in Rule 119, section 7 of the Rules of Court) explicitly provides that after reasonable notice to an accused to attend the perpetuation proceedings, the deposition by question and answer of the witness may proceed in the accused's absence and "the failure or refusal to attend the examination or the taking of the deposition shall be considered a waiver."[⁴³] Thus, an accused's right of total waiver of his presence either expressly or impliedly by unjustified failure or refusal to attend the proceedings is now explicitly recognized and he cannot be compelled to be present as against his express waiver.

Even as among the members of the Court who voted as per the April 25, 1975 resolution in favor of qualified waiver, i.e. that the accused's presence could be required in the instances where his presence is needed for his identification by the prosecution witness, the view was expressed that such presence could be dispensed with if his waiver expressly included an admission of his identification by name by the witnesses-deponents. It should be

noted that such an additional requirement would be superfluous because of the total waiver as well as because of the disputable presumption[44] established by the rule of evidence of "identity of person from identity of name"[45] aside from the many prominent public positions occupied by petitioner through which his identification is made by the prosecution witnesses as noted from their affidavits as submitted by the Solicitor-General.

7. Petitioner's objection to the perpetuation proceedings, particularly if they were to be considered part of the trial, since the very question at issue in the case at bar on military commissions' lack of jurisdiction over pre-martial law civil offenses allegedly committed by civilians like petitioner would be preempted and rendered moot by the proceedings should have been given due consideration by said commission, instead of being used by it to require his presence against his will.

It should be noted that the Solicitor General's second ground for justifying respondent commission's reversal order requiring petitioner's presence was that "petitioner had claimed in this case that proceedings for the perpetuation of testimony were actually a part of trial", without however stating respondent's own stand.

The prevailing doctrine, as enunciated by the Court in *People vs. Elago*[46] appears quite clear that "It is not a trial where the defendant has to introduce his evidence. It is only taking down the statements of the witnesses for the prosecution with opportunity on the part of the defendant to cross-examine them." [47] The Court, citing Rule 111 (e) of the 1940 Rules of Court (now reproduced in Rule 115 (f) of the Revised Rules of Court)[48] and the great weight of judicial authorities against the admission of a deposition or previous testimony of a witness who is present in court or is available at the actual trial set aside the appellate court's decision affirming conviction therein and ruled that the trial court and the appellate court "committed reversible error" in admitting the perpetuated testimonies or depositions of the two American prosecution witnesses when they were actually present in court at the time of trial.

The Court thus held that:

"It is clear from the rule ... that the testimony or deposition of a witness may be read or submitted in evidence only when the deponent is dead or incapacitated to testify or cannot be found in the Philippines. If he was present in court, there is no need for introducing his deposition in evidence because his testimony is the best evidence, especially in a case like the present where the deponent in giving his deposition had not been cross-examined by the defendant, although of course, said failure to cross examine may not be laid at the door of the prosecution." [49]

The most that can be said then is that the perpetuation proceedings may be conditionally considered part of the trial only when the deponent witness— is at the time of trial dead or incapacitated to testify or cannot with due diligence be found in the Philippines. Absent any of these conditions, it is not a part of the trial and the witness(es) must give their testimony anew (not their previous or perpetuated deposition) as the best evidence subject to the crucible of cross-examination.

Hence, petitioner had cause to complain against the military prosecutor's ambivalent posture that "In the first day he argued we must proceed (notwithstanding the pendency before this Court of the petition questioning the commission's lack of jurisdiction) because this is not part of the trial. Now, the ruling adversely was handed down (allowing petitioner's waiver of his presence), but this is a part of trial, he says." [50]

8. Withal, these questions presented serious, if not difficult, questions of law, and particularly, the petitioner's right to totally waive his presence at the proceedings presented an important new question that required an authoritative ruling from this Court because of the new provisions of the 1973 Constitution involved.

The granting of petitioner's urgent pleas on April 4, 1975 to be given a period of at most seven days to file a written motion for reconsideration of the commission's reversal order of the same date requiring his presence at every stage of the proceedings (estimated to last from two to three months, according to the military prosecutor[51] and to seek relief from this Court, instead of yielding to the stubborn insistence of the military prosecutor that the perpetuation be "done immediately" on the gratuitous assertion that "precisely because if the ground is delay, the witnesses whose testimonies are sought to be presented would have been long dead if perpetuation is held up"[52] and summarily denying petitioner's "repeated appeals... as fast as they were presented" as graphically reported by the press[53] would have averted triggering off the hunger strike commenced on the same date by petitioner who felt that he was unjustly denied his right of waiver and the "last basic right of a human being . . . to be left alone."

Such an urgent serious plea to be given a reasonable time and opportunity to seek recourse from this Court would have been readily acceded to by a regular court in line with established judicial usage and procedure. The Solicitor General's reply of April 11, 1975 after this Court's issuance of the restraining order of April 8, 1975 suspending further proceedings by the commission — in contrast to the military prosecutor's unyielding stand incongruously branding the filing with this Court of the petition at bar and of the supplemental petitions as "delaying tactics" and "dilatory moves"[54] — expressly "welcome(d) any ruling by this Court whether under Presidential Decree No. 328 the presence of the accused is necessary or indispensable." The decision of this Court upholding petitioner's right of waiver vindicates petitioner's assertion before respondent military commission of his right "to keep silent . . . to stay alone. . .not to participate. . ."[55] — a right which is his to exercise or not.

9. Respondents have utterly failed to show the existence of "public danger (that) warrants the substitution of executive process for the judicial process" and the setting aside of the constitutional mandate that lodges judicial power in the regular courts of law and not in military tribunals and guarantees civilians the benefits of a civilian court trial. To subject civilians to military trial just like military personnel and troops and enemy belligerents rather than to civilian trial by the regular civil courts is to negate the cardinal principle and state policy of supremacy at all times of civilian authority over the military.^{55-a}

In seeking to justify the substitution of the executive or military process by military commissions for the judicial process of preliminary investigation and trial by the regular civil courts with right of appeal to the Supreme Court invoked by petitioner as his constitutional right, the Solicitor General in his memorandum has made a number of bare assertions without even any factual averments or allegations in support thereof, as follows:

"Indeed, civil courts may be open and undisturbed in the execution of their functions and yet may be wholly incompetent to avert a threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators. In times of rebellion it may often happen that the judges are in active sympathy with the rebels, and courts their most efficient allies. (Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281, 299 [Chase, C.J., concurring].)

There may be other reasons justifying the creation of military tribunals. Judges may be unwilling to try the rebels out of fear or other motives."

* * * * *

"In our case, study shows that Communist subversion and propaganda aim at the paralyzation of the will and the terrorism of the population and the government functionary. In many parts of the country the rebels succeeded in intimidating and silencing not only the offended parties and their witnesses but even the judges."

* * * * *

"Still another reason for trial by military tribunals is the possibility that the accused may exploit procedural

advantages available in the civil courts and render military operations against the rebellion difficult." (Citing a West Virginia case (1912) where the court therein reasoned that "Participants (in an insurrection) arrested and committed to the civil authorities, could easily find means of delaying trial, and liberated on bail return to the insurrectionary camp and continue to render aid . . . (and) the civil tribunals . . . are wholly inadequate to the exigencies of a state of war, incident to an invasion or insurrection.")^[56]

These reflections on the competence of the civil courts find no justification in the facts of public notice and knowledge, to wit:

A number of judges of courts of first instance have been removed with the acceptance of their resignations but there is not a single recorded case where the "judges (were) in active sympathy with the rebels, and courts their most efficient allies";

There is not a single known case since the martial law proclamation of "judges (being) unwilling to try the rebels out of fear or other motives" or of the judges, complainants and witnesses having been intimidated and silenced by rebels;

Neither is there a single known instance of an accused rebel having "exploited procedural advantages available in the civil courts and rendering military operations against the rebellion difficult", since those suspected of participation or conspiracy in the communist rebellion have been arrested without right to bail;

General Order No. 49 issued by the President on October 4, 1974 restored to the civil courts a large number of criminal cases that were transferred to military tribunals upon the proclamation of martial law on the express premises that "positive steps have been taken to revitalize the administration of justice and the new Constitution authorizes the reorganization of the courts" and "although there still exist areas of active rebellion in the country, on the whole there has been such an improvement in the general conditions obtaining in the country and in the administration of justice as to warrant the return of some of the criminal cases to the jurisdiction of civil courts"; and

These premises of G.O. No. 49 are borne out by the data and published reports. The twenty (20) military commissions (14 ambulatory and 6 regional commissions)^[57] hearing cases from time to time in marathon hearings as the pressures of the military service allow the military commissions to convene could not conceivably match the work and cases disposition of around three hundred and twenty (320) courts of first instance and circuit criminal courts all over the country working — continuously and regularly throughout the year.

The argument of procedural delays in the civil courts and need of prompt and certain punishment has been long cut down by the late Justice Frank Murphy in his concurring opinion in *Duncan*^[58] when he stressed that "civil liberties and military expediency are often irreconcilable" and that "the swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws. We would be false to our trust if we allowed the time it takes to give effect to constitutional rights to be used as the very reason for taking away those constitutional rights," as follows:

"Delays in the civil courts and slowness in their procedure are also cited as an excuse for shearing away their criminal jurisdiction, although lack of knowledge of any undue delays in the Hawaiian courts is admitted. It is said that the military 'cannot brook a delay and that 'the punishment must be swift; there is an element of time in it, and we cannot afford to let the trial linger and protracted.' This military attitude toward constitutional processes is not novel. Civil liberties and military expediency are often irreconcilable. It does take time to secure a grand jury indictment, to allow the accused to procure and confer with counsel, to permit the preparation of a defense, to form a petit jury, to respect the elementary rules of procedure and evidence and to judge guilt or innocence according to accepted rules of law. But experience has demonstrated that such time is well spent. It is the only method we have of insuring the protection of constitutional rights and of guarding

against oppression. The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws. We would be false to our trust if we allowed the time it takes to give effect to constitutional rights to be used as the very reason for talking away those rights. It is our duty, as well as that of the military, to make sure that such rights are respected whenever possible, even though time may be consumed."

As already indicated above, it should be noted that no actual case of undue delays in the prosecution of criminal cases in the regular civil courts has been claimed by respondents, nor has it been shown that military necessity or public danger require that petitioner be deprived of his rights to due process and to the cold neutrality of an impartial tribunal under the judicial process, should the reinvestigation ordered by the President bind him over for trial.

10. The Solicitor-General's submittal that "the decrees and orders relating to military commissions are now part of the law of the land and are beyond question" and that "as the trial and punishment of civilians by military tribunals under the circumstances . . . are valid and constitutional, objections based on differences between civil and military courts are immaterial" is constitutionally infirm and untenable.

The Solicitor-General's premise is that "with the ratification of the new Constitution martial law as proclaimed by the President became part of the law of the land and now derives its validity from the new Constitution"[59] and that by virtue of section 3 (2) of the transitory Provisions[60] the decrees and orders on the military commissions are now also part of the law of the land and beyond question states a rather prolix and sweeping concept that cannot be precipitately sanctioned.

Martial law has not become part of the law of the land and beyond question by virtue of the coming into force of the 1973 Constitution. In fact, the said Constitution has precisely reproduced the 1935 Constitution's commander-in-chief clause with power to declare martial law limited to exactly the same causes of invasion, insurrection or rebellion or imminent danger and with exactly the same requirement that the public safety require it.[61] Going by the doctrine enunciated in *Lansang vs. Garcia*[62] by a unanimous Court, the existence of factual bases for the proclamation and continuation of martial law may under the said provision be judicially inquired into in order to determine the constitutional sufficiency thereof as well as to circumscribe the constraints thereof, in particular cases where they clash with an individual's constitutional rights, within the bounds of necessity for the public ends and the public safety, as indeed this Court did pass on such questions in the Habeas Corpus cases.[63] And as the President expressly stated at his world-wide satellite press conference of September 30, 1974, the duration of martial law is "only as long as necessary" as per the following pertinent excerpt of his statement thereon:

"Of course the problem here is, if you say that martial law leads to democracy, how long are you going to maintain martial law? I say again that only as long as necessary. As the constitutionalists put it, necessity gave life to martial law and martial law cannot continue unless necessity allows it to live."[64]

The cited Transitory Provision, known as the validating provision puts the imprimatur of a law upon the President's acts and decrees under martial law which were not within or beyond his allocated constitutional powers. As aptly stated by Justice Munoz Palma in her separate opinion in the Habeas Corpus cases, the people could not by the 1973 Constitution have thrown away "all their precious liberties, the sacred institutions enshrined in their Constitution, for that would be the result if we say that the people have stamped their approval on all the acts of the President executed after the proclamation of martial law irrespective of any taint of injustice, arbitrariness, oppression, or culpable violation of the Constitution that may characterize such acts. Surely, the people acting through their constitutional delegates could not have written a fundamental law which guarantees their rights to life, liberty and property, and at the same time in the same instrument provide for a weapon that could spell death to these rights."

The contention that the decrees and orders on military commissions as "part of the law of the land are beyond question" really begs the question, for as was stressed by Justice Munoz Palma, it would be "incongruous" that while the acts of the regular National Assembly as the "permanent repository of the legislative power" are subject to judicial review, "the acts of its temporary substitute, that is, the incumbent President" such as the decrees and orders in question would be claimed to be "beyond question."

Indeed, the majority resolution recognizes that "Of course, from the fact that the President has this range of discretion, it does not necessarily follow that every action he may take, no matter how unjustified by the exigency, would bear the imprimatur of validity."

While the decrees and orders on military tribunals were made part of the law of the land by the cited Transitory Provision (assuming that they had been properly submitted for the purpose) still this general and transitory provision can in no way supersede or nullify the specific allocation of jurisdiction and judicial power of the Supreme Court and the regular courts of justice as established by law under Article X section 1 of the Constitution nor their proper exercise of jurisdiction to the exclusion of non-judicial agencies, under section 8 of Article XVII which provides that:

"SEC. 8. All courts existing at the time of the ratification of this Constitution shall continue and exercise their jurisdiction, until otherwise provided by law in accordance with this Constitution, and all cases pending in said courts shall be heard, tried, and determined under the laws then in force. The provisions of the existing Rules of Court not inconsistent with this Constitution shall remain operative unless amended, modified, or repealed by the Supreme Court or the National Assembly." (Art. XVII)

Insofar as the questioned decrees and orders encroached upon the jurisdiction of the regular courts over the trial of civilians, they must be deemed abrogated by the cited provisions of the Constitution itself, in accordance with the established rule that statutes as well as executive orders and regulations that are inconsistent with and transgress the provisions of a new Constitution must be deemed repealed thereby.

As noted in the writer's previous opinions,[65] the specific legislative powers granted the incumbent President in section 3 (2) of the article on Transitory Provisions are limited to "modifying, revoking or superseding" the incumbent President's validated acts and decrees done or issued prior to the proclaimed ratification on January 17, 1973 of the 1973 Constitution. No post-ratification legislative powers are therein granted the incumbent President and such legislative power or more accurately military power under martial rule that has been exercised by him thereafter (in the absence of a parliament) must rest on the law of necessity of preservation of the State and the decreeing of such necessary measures as will safeguard the Republic and suppress the rebellion (or invasion). On the other hand, Section 7 of the same Article expressly reserves to the National Assembly the power to amend, modify or repeal "all existing laws not inconsistent with this Constitution (which) shall remain operative." Among such existing laws whose "amendment, modification or repeal" are reserved to the National Assembly are the laws herein involved, viz, the Anti-Subversion Act, Republic Act No. 1700 and the existing Rules of Court[66] with their safeguards for the rights of an accused defendant. At any rate, any such presidential decrees and orders cannot prejudice the vested rights of a defendant-accused as to pre-martial law offenses allegedly committed by him nor be given an adverse ex post facto effect against him.

11. Respondent's assumption of the validity of military trials of civilians and conclusion that objections based on differences between civil and military courts are immaterial must necessarily fail.

It has been shown that respondents have failed to show the existence of some overpowering factor that makes a recognition of petitioner's and other civilians' constitutional rights to due process incompatible with the public safety as to warrant the temporary casting aside or suspension of such rights. On the contrary, the issuance of the

reinvestigation order under Administrative Order No. 355 for the non-military Special Reinvestigating Committee created thereunder to conduct a preliminary investigation of the charges against petitioner shows that no element of public safety is herein involved.

The vested rights invoked by petitioner as essential elements of his basic right to due process, which are not granted him under the decrees and orders for his trial by respondent military commission, are substantial and vital, viz, his right to a preliminary investigation as apparently recognized by Administrative Order No. 355 (as to the non-subversion charges) with right to counsel and of cross-examination of the witnesses against him, and the right under the Anti-Subversion Act to a preliminary investigation by the proper court of first instance; his right as a civilian to be tried by judicial process, by the regular independent civilian courts presided by permanent judges with tenure and with all the specific safeguards embodied in the judicial process; and his right to appeal in capital cases to this Court wherein a qualified majority of ten (10) affirmative votes for affirmance of the death penalty is required.

The ordinary layman as well as practitioner are totally unfamiliar with the summary rules and procedures of military commissions as compared to the established procedures under the Rules of Court before the civilian courts, which per se places the civilian on trial before a military commission in a disadvantageous position. A cursory review of the transcripts furnished the Court shows these peculiarities that normally would not occur in civilian trials, as follows:

The swearing-in at the commencement of the perpetuation proceedings on March 31, 1975 of two newly-appointed members:[67]

The withdrawal on March 15, 1975 of the charges against Huk Commanders Melody and Pusa who were originally named as co-accused principals in the four subversion charges and their utilization as state witnesses, which according to the commission's law member "automatically takes effect. The military commission cannot pass upon such withdrawal"[68] in contrast to the procedure in the civilian courts where the discharge of accused persons to be state witnesses must meet certain requirements in the interest of truth and justice, e.g. that the "defendant (to be discharged) does not appear to be the most guilty" and "has not at any time been convicted of any offense involving moral turpitude" as determined in the judgment of the court[69]; and

The military prosecutor (designated as trial counsel) acts in his own description as "a 'Glorified Chimoy' of the Military Commission. He acts not only as Prosecutor of Military Commission No. 2 but he acts as a general FACTOTUM or a MAN FRIDAY of this Military Commission . . . (and) he prepares the record of the trial." [70]

As far as is generally known, the military commission at the conclusion of the trial takes a secret written ballot with at least two-thirds of the members present to arrive at its summary findings of Guilty or Not Guilty, without entering a written decision which "shall clearly and distinctly state the facts and the law on which it is based" as is mandatorily required by the Constitution of every decision of a civil court of record.^{70-a}

12. The transcendental constitutional issues involved in the case at bar which the majority has resolved to decide on the merits despite petitioner's withdrawal motion call for adjudication on the basis of enshrined principles of constitutionalism and the rule of law, as unequivocally espoused by the President himself.

The case at bar asserts the right of civilians to the judicial process of civilian trials by the regular civil courts (particularly for pre-martial law offenses) as against the executive process of trial by military tribunals and hinges on this Court's upholding the principle that the individual in the absence of overpowering necessity or public danger, must be accorded his constitutional rights as guaranteed by the Bill of Rights even a state of martial law. A corollary principle would be that the continuation of martial law for institutionalization of reforms is not

incompatible with recognizing the fundamental liberties granted in the Bill of Rights.

The Bill of Rights of the Constitution specifies the powers that have been withheld from the government and are reserved to the people.[71] But the freedoms guaranteed by it against the overwhelming power of the State would be meaningless and of no use unless citizens could vindicate and enforce them against the government officials and agencies by proper procedures in the courts.

As held by the Court in *Garcia vs. Macaraig*, "In a system like ours, every exercise of governmental competence, whether coming from the President or from the lowest official, may be challenged in court in an appropriate legal proceeding." [72]

As was stressed by the late Chief Justice Stone in *Duncan*, *supra*, "executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency. In the substitution of martial law controls for the ordinary civil processes, what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling vs. Constantin*, *supra* (287 US 401, 77 L ed 387, 53 S Ct 190)."

The Court's judgment at bar is therefore of the utmost importance since under Article 8, Civil Code, "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines." As defined by Konvitz, "the Constitution and the laws enacted by the legislatures and the judgments and orders of the courts constitute the Rule of Law."

The President has often 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, . . .". [73]

While stressing that "martial law . . . is a temporary constitutional expedient of safeguarding the Republic" [74] and "a temporary phase in the development of our country" [75], the President has thus called for the Constitution to "remain firm and stable, "has rejected the "exercise (of) power that can be identified merely with a revolutionary government" that makes its own law [76] and has called on every citizen to "remain steadfast on the rule of law and the Constitution", as follows:

" . . . Whoever he may be and whatever position he may happen to have, whether, in government or outside government, it is absolutely necessary now that we look solemnly and perceptively into the Constitution and try to discover for ourselves what our role is in the successful implementation of that Constitution. With this thought, therefore, we can agree on one thing and that is: Let all of us age, let all of us then pass away as a pace in the development of our country, but let the Constitution remain firm and stable and let institutions grow in strength from day to day, from achievement to achievement, and so long as that Constitution stands, whoever may the man in power be, whatever may his purpose be, that Constitution will guide the people and no man, however powerful he may be, will dare to destroy and wreck the foundation of such a Constitution.

"These are the reasons why I personally, having proclaimed martial law, having been often induced to exercise power that can be identified merely with a revolutionary government, have remained steadfast on the rule of law and the Constitution. I would recommend that if the President can do this, if the President can restrain the exercise of his own powers, every citizen for his part should not find it a burden to participate in this act of self-denial and self-abnegation, as an earnest to the future of our race and our people. [77]

This is but to state that no one should be above or below the law and to reiterate the classic dictum that "The Constitution . . . is a law for rulers and 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." [78]

In the relatively recent case of *Phil. Blooming Mills Employees' Organization vs. Phil. Blooming Mills*,^[79] Mr. Justice Makasiar restated for the Court certain "basic concepts and principles" of constitutionalism, which bear reproducing as they concern the issues at bar, as follows:

"(1) In a democracy, the preservation and enhancement of the dignity and worth of the human personality is the central core as well as the cardinal article of faith of our civilization. The inviolable character of a man as an individual must be 'protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person'.^[80]

"(2) The Bill of Rights is designed to preserve the ideals of liberty, equality and security 'against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, and the scorn and derision of those who have no patience with general principles.'^[81]

"In the pithy language of Mr. Justice Robert Jackson, the purpose of the Bill of Rights is to withdraw 'certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's rights to life, liberty and property, to free speech, or free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.'^[82] Laski proclaimed that 'the happiness of the individual, not the well-being of the State, was the criterion by which its behaviour was to be judged. His interests, not its power, set the limits to the authority it was entitled to exercise.'^[83]

* * * * *

Mr. Justice Douglas articulated this pointed reminder:

"The challenge to our liberties comes frequently not from those who consciously seek to destroy our system of government, but from men of goodwill — good men who allow their proper concerns to blind them to the fact that what they propose to accomplish involves an impairment of liberty.

. . The motives of these men are often commendable. What we must remember, however, is that preservation of liberties does not depend on motives. A suppression of liberty has the same effect whether the suppressor be a reformer or an outlaw. The only protection against misguided zeal is constant alertness of the infractions of the guarantees of liberty contained in our Constitution. Each surrender of liberty to the demands of the moment makes easier another, larger surrender. The battle over the Bill of Rights is a never ending one.

'. . The liberties of any person are the liberties of all of us.

'. . . In short the liberties of none are safe unless the liberties of all are protected.

'. . But even if we should sense no danger to our own liberties, even if we feel secure because we belong to a group that is important and respected, we must recognize that our Bill of Rights is a code of fair play for the less fortunate that we in all honor and good conscience must observe.' "^[84]

If as stressed above uniformly by the President and the cited legal authorities, *supra*, the freedoms guaranteed by the Bill of Rights are "removed from the vicissitudes of political controversy (and) beyond the reach of majorities and officials" and are established "as legal principles to be applied by the courts" and "may not be submitted to a vote; they depend on the outcome of no elections," then it is respectfully submitted that the principles of fundamental public policy enshrined in the Bill of Rights that guarantee to every individual due process and fair play, regardless of who he is and of whoever may be in power, call for the granting of the petition and at the least for the reinvestigation of the charges against petitioner with "utmost fairness, impartiality and objectivity" as directed in Administrative Order No. 355 itself.

- [1] Aquino, Jr. vs. Enrile and related cases, 59 SCRA 183, 236 (Sent. 17, 1974).
- [2] L-36188, filed on January 29, 1973 and deemed submitted for resolution with the filing on May 8, 1973 of the last pleading, petitioner's surrejoinder, as required by the Court's resolution of April 26, 1973; see also related case for habeas corpus against execution of death sentence, L-37586, Gumaua vs. Zagala, et al., filed on Oct. 5, 1973 and submitted for decision on July 9, 1974.
- [3] As of release of the Resolution on April 25, 1975, the other two Justices of the present 12-member Court, namely, the Chief Justice disqualified, and Justice Makasiar abroad on leave, have not taken part. Justices Fernando and Palma and the writer voted to grant the withdrawal.
- [4] 'Article X, Section 2 (2), 1973 Constitution.
- [5] General Orders, 3, 3-A, 8 and 12.
- [6] Emphasis supplied.
- [7] Par. 8, Petitioner's urgent motion of March 24, 1975."
- [8] 84 Phil. 643.
- [9] President's statement on announcing his proclamation of Martial Law, Sept. 23, 1972.
- [10] Article X, section 1, 19 73 Constitution.
- [11] Words and Phrases, Perm. Ed. Vol. 23, p. 317-318. See Lopez vs. Roxas, 17 SCRA 756 (1966); Scott's Dept. Store vs. Micaller, 99 Phil. 762 (1956).
- [12] At pages 14-16, Answer to Supplemental Petition; emphasis supplied.
- [13] Ex parte Milligan, 4 Wallace (U.S.) 127, 18 L. ed. 297.

[14] 327 U.S. 304 (1946).

- [15] Its Organic Act prior to Hawaii's incorporation as a state of the American Union contained a provision similar to that in our Constitution for the declaration of martial law in case of invasion, insurrection or rebellion or imminent danger thereof, when the public safety requires it.

[16] 350 U.S. 5, 14 (1955).

- [17] Philippine Daily Express, Jan. 3, 1974, page 4.
- [18] Chief Justice Earl Warren: "The Bill of Rights and the Constitution," 37 N.Y.U. Law Review, 181.
- [19] Respondent's memorandum, pp. 12, 20.
- [20] Santos, Martial Law, 2nd ed., pp. 77-78, citing Winthrop, p. 820; Fairman, p. 48; Wiener, p. 14.
- [21] "SEC. 20. No person shall be compelled to be a witness against himself. Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. No force, violence, threat, intimidation or any other means which vitiates the free will shall be used against him. Any confession obtained in violation of this section shall be inadmissible in evidence. (Article IV)"
- [22] This sections expressly provided that "No prosecution under this Act shall made (without) a proper preliminary investigation thereof, with notice, ... to the party concerned, who shall have the right to be represented

by counsel, to have compulsory process for obtaining witnesses in his favor, and to cross-examine witnesses against him; . . .".

[23] Brig. Gen. G.S. Santos, AFP JAGO Chief, Phil. Daily Express, April 26, 1975, p. 10.

[24] Art. X, sec. 5(2) of the 1973 Constitution; Rule 115, sec. 1 (i).

[25] Art. IV, sec. 12, 1973 Constitution.

[26] 48 SCRA 382, 415 (Dec. 27, 1972); see also 56 SCRA 793 (Apr. 30, 1974).

[27] Fernando's Bill of Rights, 1970 ed., p.246; See In re: petition of Kay Villegas Kami, 35 SCRA 429 (1970).

[28] Phil. Daily Express, December 12, 1974.

[29] Idem. April 12, 1975.

[30] The pertinent text as reported in Manila Times Aug. 30, 1971, Annex A, petition, reads:

Q: — In the light of all this, Mr. Presidents do you contemplate any particular action on Mr. Aquino and some other officials, which you have also mentioned?

The President: — Well, I have been asked the question, then why did you not order the arrest of Senator Aquino? And my answer was he has always claimed that he is one of the leaders of the Opposition, and I have erred on the side of generosity as well as of liberality, hoping that good sense may someday catch up with him. That is why I have not acted. I do not know what will happen later on, because, of course the military insist that we must not make any exceptions to the general rule.

Q: — Mr. President, is the evidence against the senator strong enough to - for conviction?

The President: — I believe so, I have not included some of the evidence, but even with what we have, and the testimonies of some of those whom I have presented to you, as well as those who are in the custody of the government, I believe that the evidence is not only strong; it is overwhelming.

Q: — Then Mr. President, if this is the case under your suspension of the writ of Habeas corpus, are you empowered to call the Armed Forces to arrest the senator?

The President — Yes, I am — that I am empowered, yes, even before the suspension of the privilege of the writ of habeas corpus. But now he is the only senator, the opposition senator left in the Senate."

[31] Geotina vs. Gonzales, 41 SCRA 66, per Castro, J.

[32] Luque vs. Kayanan, 20 SCRA 165, per Sanchez, J.

[33] See Umale vs. Villaluz, 51 SCRA 84 (1973), per Makasiar, J.; Mateo, Jr. vs. Villaluz, 50 SCRA 18, (1973) per Fernando, J. and cases cited.

[34] 75 Phil. 563 (1971).

[35] Manila Aug. 30, 1971, Annex A, petition.

[36] Par. 8, Urgent Motion of March 24, 1975.

[37] Petitioner's memorandum of March 21, 1975, p. 48.

[38] At page 880 hereof.

38-a Supra, at page 880 hereof.

[39] Respondents' Reply to petitioner's Manifestation dated April 11, 1975.

[40] People vs. Francisco, 46 Phil. 403 (1924).

[41] People vs. Avanceña, 32 O.G. 713 (1933); see Diaz vs. U.S. 222 U.S. 442 (1912)

[42] Art. IIV, section 19, Bill of Rights.

[43] This quoted waiver proviso is identically provided for in Rule 119, sec 7.

[44] Rule 131, sec. 5 provides that such "presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence."

[45] Rule 131, sec. 5, par. (w).

[46] 84 Phil. 643 (1949).

[47] Idem. at p. 650.

[48] Section 1. Rights of defendant at the trial. — In all criminal prosecutions the defendant shall be entitled:

“ * * * * *

"(f) To be confronted at the trial by, and to cross-examine the witness against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answer in the presence of the defendant or his attorney, the defense having had an opportunity to cross-examine the witness, the testimony or deposition of the latter may be read, upon satisfactory proof to the court that he is dead or incapacitated to testify, or cannot with due diligence be found in the Philippines..."

[49] 84 Phil. at p. 651, emphasis supplied. The accused and counsel in this case had refused to take part in the perpetuation proceedings, claiming lack of reasonable notice and had abandoned the session hall.

[50] April 3, 1975, t.s.n. p. 53, notes in parenthesis supplied.

[51] April 4, 1975, t.s.n. p. 34.

[52] March 31, 1975 p. 88.

[53] Bulletin Today, April 5, 1975.

[54] "Phil. Daily Express, April 6, 1973.

[55] April 3, 1975 t.s.n., p. 29.

55-a Art. 11, sec. 8, 1973 Constitution.

[56] Solicitor-General's memorandum, pp. 29-31.

[57] Brig. Gen. Guillermo S. Santos, AFP JAGO Chief, Phil. Daily Express, April 26, 1975, p. 10.

[58] Supra, tn. 14.

[59] Solicitor-General's memorandum, at p. 17.

[60] "(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 Presidents or unless expressly and explicitly modified or repealed by the regular National Assembly." (Art. XVII, sec. 1)

[61] The commander-in-chief 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)

[62] 42 SCRA 448, citing *Sterling vs. Constantin* 287 U.S. 375, 385.

[63] *Aquino, Jr. vs. Enrile, etc.* 59 SCRA 183, 647-648.

[64] *Phil. Daily Express*, Sept. 23, 1974.

[65] See writer's separate opinions in *Aquino, Jr. vs. Comelec*, L-40004, Jan. 31, 1975 and in *Gonzalez vs. Comelec*, L-40017, Feb. 22, 1975.

[66] Sec. 8 of the Transitory Provisions above-quoted recognizes the power of the Supreme Court or the National Assembly to amend, modify or repeal the Rules of Court.

[67] Col. Stefani C. Domingo, appointed 25 March 75; and Capt. Benjamin E. Facto, appointed 20 March 75; March 31, 1975, t.s.n., pp. 5-9.

[68] March 31, 1975, t.s.n., p. 18.

[69] Rule 119, sec. 9 imposing five requirements.

[70] March 31, 1975, t.s.n. pp. 90-91; emphasis supplied.

70-a Art. X, sec. 9, 1973 Constitution.

[71] Thomas Jefferson contended in urging that the new U.S. Constitution should include a bill of rights: "I have a right to nothing which another has a right to take away . . . Let me add that a bill of rights is what the people are entitled to against every government on earth ... and what no just government should refuse."

[72] 39 SCRA 106, 116 (1971), per Barredo, J.

[73] President Marcos: "Democracy: a living ideology" delivered May 25, 1973 before the U.P. Alumni Ass'n.; *Times Journal* issue of May 28, 1973.

[74] Pres. Marcos: Foreword, *Notes on the New Society*, p. vi.

[75] Pres. Marcos: Sept. 20, 1974 satellite world press Conference; *Phil. Daily Express* issue of Sept. 23, 1974.

[76] Pres. Marcos at satellite world press conference of Sept. 20, 1974: "(I) insisted that not only individuals but also we ourselves in government and the military be guided by a Constitution and that Constitution be respected. This was one of the agreements with those with whom I met before we agreed to proclaim martial law, and that is, that we would follow the Constitution and not establish a revolutionary form of government and start fighting all over the country-side again." (*Phil. Daily Express* issue of September 23, 1974.)

[77] Pres. Marcos' address on observance of the first anniversary of the 1973 Constitution on Jan. 17, 1974; *Phil. Labor Relations Journal*, Vol. VII, Jan. 1974, p. 6; emphasis supplied.

[78] *Ex parte Milligan* 4 Wall. (U.S.) 120.

[79] 51 SCRA 189, 201-202, 220-221; italics copied.

[80] *American Com. vs. Douds*, 339 U.S. 382, 421.

[81] Justice Cardoso, *Nature of Judicial Process*, 90-3; Tañada and Fernando, *Constitution of the Philippines*, 1952 ed., 71.

[82] *West Virginia State Board of Education vs. Barnette*, 319 U.S. 624, 638.

[83] Laski, *The State in Theory and Practice*, 35-36.

[84] *A Living Bill of Rights* (1961), pp. 61, 62, 64; 4 SCR A, 690-692; italics copied.

In the latest case of *Magtoto vs. Manguera etc.*, L--37201-02, March 3, 1975, Mr. Justice Castro in his dissenting opinion paraphrased Justice Douglas' admonition thus: "the rights of none are sale unless the rights of a II are protected; even if we should sense no danger to our owl rights because we belong to a group that is informed, important and respected, we must always recognize that any code of fair play is also a code for the less fortunate."

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